



# Oregon

Tina Kotek, Governor

Department of Land Conservation and Development

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June 12, 2025

TO: Land Conservation and Development Commission

FROM: Brenda Ortigoza Bateman, Ph.D., Director  
Gordon Howard, Community Services Manager  
Jon Jinings, Community Services Specialist  
Angie Brewer, Central Oregon Regional Representative



**SUBJECT: Agenda Item # 6, June 26-27, 2025 LCDC Meeting**

## Participation in Deschutes County Court of Appeals Case

Review of state agency brief on judicial review of the Land Use Board of Appeals (LUBA) decision to affirm a Deschutes County decision to rezone a 710-acre tract from Exclusive Farm Use to a rural residential use. (LUBA No. 2024-082, 083 and 085; County file 247-24-000395-A, a remand of 247-21-001043-PA and 247-21-001044-ZC).

### I. AGENDA ITEM SUMMARY

**Purpose.** The purpose of this item is for the Land Conservation and Development Commission (LCDC or commission) to consider whether to confirm interpretation of its administrative rules presented by the Department of Justice in an agency brief to the Oregon Court of Appeals regarding a recent Land Use Board of Appeals (LUBA) decision. The LUBA decision affirmed Deschutes County's approval of a comprehensive plan amendment and rezone from Exclusive Farm Use to Rural Residential on 710 acres in the northern part of the county. The Department of Land Conservation and Development (DLCD or department) is filing an agency brief to present the Court of Appeals its interpretation of the rules that are at issue on judicial review of the LUBA decision.

**Objective.** LCDC confirms the interpretation of the administrative rules presented in an agency brief to the Court of Appeals.

### II. BACKGROUND

This case involves a Deschutes County decision affecting a tract of 710 acres designated Exclusive Farm Use, a resource zone protected by state law for agricultural

uses. The subject property is located about four and a half miles northwest of the city of Redmond, and about five miles west of the unincorporated rural community of Terrebonne.

The applicant argues the subject property fails to satisfy the definition of “Agricultural Land” in Statewide Planning Goal 3 and OAR 660-033-0020(1).<sup>1</sup> On this basis, the applicant requested a Comprehensive Plan Amendment to re-designate the subject property from Agriculture to Rural Residential Exception Area and a Zoning Map Amendment to rezone the property from Exclusive Farm Use (EFU) to Rural Residential-10 Acre Minimum (RR-10).<sup>2</sup> The county has approved this specific request twice.

The applicant filed the original application to the county in 2021; the county approved the application late 2022. The department provided formal comments during the hearings process. On January 26, 2023, the commission approved DLCD participation in this matter. **The department participated in the 2023 LUBA appeal and judicial review.** LUBA remanded the case to the county and the Oregon Court of Appeals affirmed LUBA.

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<sup>1</sup> OAR 660-033-0020(1) provides:

(1)(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 and I-VI soils in Eastern 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;

(c) "Agricultural Land" does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4.

<sup>2</sup> Properties failing to satisfy the definition of Agricultural or Forest lands do not deserve protection under Goals 3 or 4 and are often referred to as “nonresource lands.” Notably, the applicant’s proposal and the county’s decision do not find that the property qualified for an “exception” to Statewide Planning Goal 3 protecting Agricultural Lands, but rather that the property does not meet the definition of “agricultural land” found in statute or rules and thus qualified for designation as nonresource land.



On remand, the applicant provided additional information for the county's consideration. DLCD provided formal comments, expressing continued concerns with the lack of sufficient information to justify the conclusions reached by the applicant that the land was not "agricultural land" under Statewide Planning Goal 3 and administrative rule definitions.

The county approved the amended proposal in 2024, and opponents again appealed the decision to LUBA. Until now, the department has not participated in this second challenge to the county's decision. On May 16, 2025, LUBA issued a Final Opinion and Order that affirmed the county's decision to approve the application. See Attachment A.

The department has significant concerns with LUBA's interpretation of the commission's administrative rules in this case. Because the department has concerns that the interpretation could result in statewide consequences for the long-term protection of farmland, the department will file an agency brief before the Oregon Court of Appeals on June 27, 2025. Under caselaw, an agency brief representing the interpretation of administrative rules from both the commission and the department will have greater weight with the Court of Appeals than an agency brief presenting the rule interpretation of the department alone.

## **V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION**

The director recommends, based on the information contained in this report, that the commission confirm the rule construction presented in the state agency brief as representative of its interpretation regarding the legal basis for a finding that land is "agricultural land" under state law and administrative rule.

***Proposed Motion:*** I move that the commission confirm the rule construction presented in the state agency brief as representing the commission's interpretation regarding the legal basis for a finding that land is "agricultural land" under Statewide Planning Goal 3 and state administrative rules.

***Alternative motion:*** I move the commission does not endorse the rule interpretation presented in the state agency brief.

## **VI. Attachments**

- a. Redside Restoration Project One, LLC v. Deschutes County, \_\_ Or LUBA \_\_  
(LUBA Nos. 2024-082, 2024-083, 2024-085, May 16, 2025)

LUBA  
MAY 16 2025 AM 09:02

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

REDSIDE RESTORATION PROJECT ONE, LLC,  
*Petitioner,*

and

LORI ANDERSON JOHNSON, RICHARD DEL JOHNSON,  
KELSEY NONELLA, PAMELA MAYO PHILLIPS, TIM W. PHILLIPS,  
WILLIAM BUCHANAN, ELIZABETH BUCHANAN,  
KEYSTONE CATTLE & PERFORMANCE HORSES, LLC, and  
PAUL LIPSCOMB,  
*Intervenors-Petitioners,*

vs.

DESCHUTES COUNTY,  
*Respondent,*

and

710 PROPERTIES, LLC, CHARLES THOMAS, and  
ROBERT TURNER,  
*Intervenors-Respondents.*

LUBA No. 2024-082

1000 FRIENDS OF OREGON,  
*Petitioner,*

and

WILLIAM BUCHANAN, ELIZABETH BUCHANAN, and  
KEYSTONE CATTLE & PERFORMANCE HORSES, LLC,  
*Intervenors-Petitioners,*

vs.

1  
2 DESCHUTES COUNTY,  
3 *Respondent,*

4  
5 and

6  
7 710 PROPERTIES, LLC, CHARLES THOMAS, and  
8 ROBERT TURNER,  
9 *Intervenors-Respondents.*

10  
11 LUBA No. 2024-083

12  
13 CENTRAL OREGON LANDWATCH,  
14 *Petitioner,*

15  
16 and

17  
18 WILLIAM BUCHANAN, ELIZABETH BUCHANAN, and  
19 KEYSTONE CATTLE & PERFORMANCE HORSES, LLC,  
20 *Intervenors-Petitioners,*

21  
22 vs.

23  
24 DESCHUTES COUNTY,  
25 *Respondent,*

26  
27 and

28  
29 710 PROPERTIES, LLC, CHARLES THOMAS, and  
30 ROBERT TURNER,  
31 *Intervenors-Respondents.*

32  
33 LUBA No. 2024-085

34  
35  
36 FINAL OPINION  
37 AND ORDER  
38

1 Appeal from Deschutes County.

2  
3 James D. Howsley filed a petition for review and reply brief and argued on  
4 behalf of petitioner Redside Restoration Project One, LLC. Also on the brief were  
5 Ezra L. Hammer and Jordan Ramis PC.

6  
7 F. Blair Batson filed a petition for review and reply brief and argued on  
8 behalf of petitioner 1000 Friends of Oregon.

9  
10 Carol E. Macbeth filed a petition for review and reply brief and argued on  
11 behalf of petitioner Central Oregon Landwatch.

12  
13 Jeffrey L. Kleinman filed the intervenor-petitioner's brief and reply brief  
14 and argued on behalf of intervenors-petitioners William Buchanan, Elizabeth  
15 Buchanan, and Keystone Cattle & Performance Horses, LLC.

16  
17 Intervenors-petitioners Lori Anderson Johnson, Richard Del Johnson,  
18 Kelsey Nonella, Pamela Mayo Phillips, Tim W. Phillips, and Paul J. Lipscomb,  
19 represented themselves.

20  
21 David Doyle filed the respondent's brief and argued on behalf of  
22 respondent.

23  
24 J. Kenneth Katzaroff filed the intervenors-respondents' briefs and argued  
25 on behalf of intervenors-respondents. Also on the briefs was Schwabe,  
26 Williamson & Wyatt, P.C.

27  
28 BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board  
29 Member, participated in the decision.

30  
31 AFFIRMED 05/16/2025

32  
33 You are entitled to judicial review of this Order. Judicial review is  
34 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county Board of Commissioners' decision redesignating a 710-acre tract from Agricultural to Rural Residential Exception Area, and rezoning it from exclusive farm use (EFU) to rural residential use.

**FACTS**

The challenged decision is on remand from LUBA. *Central Oregon Landwatch v. Deschutes County*, LUBA Nos 2023-006/009 (Jul 28, 2023) (*Landwatch I*), *aff'd*, 330 Or App 321, 543 P3d 736 (2024) (*Landwatch II*). As described in our decision in *Landwatch I*, the subject property is a 710-acre tract comprised of nine lots of record. The property is undeveloped except for one tax lot, which is developed with a nonfarm dwelling. Two other lots of record have valid nonfarm dwelling approvals. A portion of the property is within an area identified by the county as suitable for a destination resort.

Soils on the subject property are predominantly non-agricultural (Class 7 or 8) soils, under the U.S. Natural Resources Conservation Service (NRCS) classification scheme, although approximately 200 acres or 29 percent of the tract consists of agricultural Class 6 soils. The property is vegetated with typical high desert flora, including juniper trees, sage brush, rabbit brush, and bunch grasses. The property has no irrigation rights, and no history of agricultural use. Most of the property sits on a rocky plateau above nearby irrigated farms. The property's



1 only existing access is to the south from NW Coyner Avenue and NW 103rd  
2 Avenue.

3 The subject property is almost entirely bordered by EFU-zoned lands  
4 (depicted in grey tone on the map below). Irrigated hay and alfalfa farms are  
5 adjacent or nearby to the northwest and southeast. Non-irrigated lands adjoining  
6 or nearby are largely developed with nonfarm dwellings and other nonfarm uses.  
7 To the south and southwest are federal Bureau of Land Management (BLM) lands  
8 used for off-road vehicle recreation. To the northeast is an area zoned for rural  
9 residential uses, depicted in white tone on the map.





1 Residential, 10-acre minimum (RR-10). Under the proposed rezoning, the subject  
2 property could be subdivided into 71 10-acre parcels and developed with housing.

3 On December 14, 2022, the board of commissioners approved the  
4 application, by a vote of 2-1, with Commissioner DeBone in the majority. The  
5 Department of Land Conservation and Development (DLCD), among others,  
6 appealed the county's December 14, 2022 decision to LUBA.

7 On January 26, 2023, the Land Conservation and Development  
8 Commission (LCDC) held a hearing to approve DLCD's request to proceed with  
9 its appeal of the county decision to LUBA. Commissioner DeBone appeared at  
10 the LCDC hearing, and spoke in opposition to DLCD's request.

11 On July 28, 2023, LUBA remanded the county's decision, requiring  
12 adoption of new findings based on a correct understanding of the applicable law.  
13 After the Court of Appeals affirmed LUBA's decision, the matter returned to the  
14 county. On remand, the Board of Commissioners held a hearing on July 24, 2024,  
15 and re-opened the record to accept new evidence and argument on the remand  
16 issues. Subsequently, at a September 4, 2024 meeting, the Board deliberated and  
17 voted to again approve the application. These appeals followed.

## 18 INTRODUCTION

19 The key questions underlying the county's decision on remand, and all the  
20 remaining assignments of error in this appeal, are whether the county's  
21 determination that the subject property is not "agricultural land" under Statewide  
22 Planning Goal 3 (Agricultural Land) is supported by substantial evidence and



1 adequate findings, and consistent with the terms of LUBA's remand in  
2 *Landwatch I*.

3 In relevant part, OAR 660-033-0020(1)(a) defines agricultural land for  
4 purposes of Goal 3 to include (1) land with non-agricultural soils that nonetheless  
5 is "suitable for farm use" based on a number of listed considerations, and (2) land  
6 that is necessary to permit farm practices to be undertaken on adjacent or nearby  
7 agricultural lands.<sup>1</sup> OAR 660-033-0030(1)(a)(B) and (C).

8 OAR 660-033-0030(3) specifies additional considerations for identifying  
9 agricultural land under OAR 660-033-0030(1)(a)(B) and (C), providing:

10 "Goal 3 attaches no significance to the ownership of a lot or parcel  
11 when determining whether it is agricultural land. Nearby or adjacent  
12 land, regardless of ownership, shall be examined to the extent that a  
13 lot or parcel is either 'suitable for farm use' or 'necessary to permit

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<sup>1</sup> OAR 660-033-0020(1)(a) provides:

"'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 and I-VI soils in Eastern 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."

1 farm practices to be undertaken on adjacent or nearby lands’ outside  
2 the lot or parcel.”

3 Thus, both the “suitable for farm use” and “necessary to permit farm practices”  
4 elements of the agricultural lands definition require that the county evaluate the  
5 relationship between the subject property and adjacent and nearby agricultural  
6 lands.

7 On review of the county’s initial decision, we concluded that the county  
8 erred in certain respects in applying OAR 660-033-0030(1)(a)(B) and (C), mainly  
9 by focusing on whether the subject property in isolation qualifies as agricultural  
10 land, and failing to properly consider its relationship with adjacent and nearby  
11 farm lands. *Landwatch I*, LUBA Nos 2023-006/007 (slip op at 46-62).

12 With respect to the OAR 660-033-0020(1)(a)(B) “suitable for farm use”  
13 test, we held that the county erred in failing to consider whether the subject  
14 property was suitable for farm use under the listed considerations, assuming the  
15 property were used in conjunction with adjacent or nearby agricultural lands.  
16 ORS 215.203(2)(a) defines “farm use” to mean the “current employment of land  
17 for the primary purpose of obtaining a profit in money” by pursuing a number of  
18 listed activities.<sup>2</sup> In its initial decision, the county focused on evidence and

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<sup>2</sup> ORS 215. 203(2)(a) provides:

“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-

1 argument that the subject property, in isolation, could not be put to farm use with  
2 any reasonable expectation of obtaining a profit in money. However, we held that  
3 OAR 660-033-0020(1)(a)(B), read together with OAR 660-033-0030(3), requires  
4 any evaluation of “profitability” to include consideration of using the subject  
5 property in conjunction with adjacent and nearby farm lands. *Landwatch I*,  
6 LUBA Nos 2023-006/007 (slip op at 36, 47).

7 Similarly, we held that the county erred in failing to consider conjoined  
8 use of the subject property, with respect to seasonal grazing, a feedlot operation  
9 using feed from nearby irrigated farms, and construction or maintenance of  
10 equipment and facilities used to support farm operations on adjacent or nearby  
11 farm lands. *Id.* at (slip op at 37-46).

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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, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. ‘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, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. ‘Farm use’ includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. \* \* \*



1 With respect to OAR 660-033-0020(1)(a)(C), the “necessary to permit  
2 farm practices to be undertaken on adjacent or nearby lands” test, we held that  
3 the rule

4 “asks not only whether the land itself is necessary to permit farm  
5 practices on adjacent or nearby lands but, also, whether the land’s  
6 resource designation and zoning, and the presumed lack of impacts  
7 or conflicts with farming on adjacent or nearby lands, are necessary  
8 to permit farm practices on adjacent or nearby lands.” *Id.* at (slip op  
9 at 59).

10 As applied here, our ruling meant that on remand the county must evaluate  
11 whether retaining the subject property’s resource designation and zoning is  
12 necessary to allow farm practices to be undertaken on adjacent or nearby farm  
13 lands, considering the impacts of developing the subject property on those  
14 practices, specifically the impacts of increased residential traffic on cattle  
15 transport, impacts to irrigation wells, and nuisance and trespass impacts. The  
16 Court of Appeals agreed that OAR 660-033-0020(1)(a)(C) requires  
17 “consideration of whether the land’s resource designation and zoning is  
18 ‘necessary to permit farm practices to be undertaken on adjacent or nearby  
19 agricultural lands.’” *Landwatch II*, 330 Or App at 333.

20 On remand, the county adopted additional findings addressing OAR 660-  
21 033-0020(1)(a)(B) and (C). On appeal, petitioners challenge those findings  
22 across multiple overlapping assignments of error. However, we first address  
23 petitioner Redside Restoration Project One, LLC’s (Redside’s) first and second  
24 assignments of error, which allege that the county committed procedural errors

1 with respect to *ex parte* communications and bias. If we sustain those procedural  
2 assignments of error, we would remand for further proceedings and adoption of  
3 a new decision, and accordingly would not address the assignments of error that  
4 challenge the merits of the county's remand decision.

5 **FIRST ASSIGNMENT OF ERROR (Redside)**

6 Redside argues that the county's decision on remand is invalid due to  
7 Commissioner DeBone's failure to disclose the substance of *ex parte*  
8 communications, and the county's failure to comply with ORS 215.422(3):

9 "No decision or action of a planning commission or county  
10 governing body shall be invalid due to *ex parte* contact or bias  
11 resulting from *ex parte* contact with a member of the decision-  
12 making body, if the member of the decision-making body receiving  
13 the contact:

14 "(a) Places on the record the substance of any written or oral *ex*  
15 *parte* communications concerning the decision or action; and

16 "(b) Has a public announcement of the content of the  
17 communication and of the parties' right to rebut the substance  
18 of the communication made at the first hearing following the  
19 communication where action will be considered or taken on  
20 the subject to which the communication related."

21 *See also* Deschutes County Code (DCC) 22.24.100 (Disclosure of Ex Parte  
22 Contacts).<sup>3</sup>

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<sup>3</sup> DCC 22.24.100 provides:

"Prior to making a decision, the Hearings Body or any member thereof shall not communicate directly or indirectly with any party or his representative in connection with any issue involved in a

1       The terms “*ex parte* contact” and “*ex parte* communication” are not  
2 defined in ORS 215.422 or its companion statute applicable to cities at ORS  
3 227.180. We have explained that “[a]n *ex parte* communication is a  
4 communication between a party and a decision-maker, made outside the hearing  
5 process, concerning a decision or action before the decision-maker.” *Oregon*  
6 *Shores Conservation Coalition v. Coos County*, 81 Or LUBA 839, 846 (2020).  
7 The statutes requiring disclosure of *ex parte* communication are remedial and  
8 their purpose “is to protect the substantive rights of the parties to know the  
9 evidence that the deciding body may consider and to present and respond to  
10 evidence.” *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 253,  
11 834 P2d 523 (1992). The statutes “prohibit[] undisclosed *ex parte*  
12 communications, *whether or not those communications in fact influence the*  
13 *[local government’s] original decision.*” *Opp v. City of Portland*, 38 Or LUBA  
14 251, 264-65, *aff’d*, 171 Or App 417, 16 P3d 520 (2000), *rev den*, 332 Or 239

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pending hearing except upon notice and opportunity for all parties  
to participate. Should such communication - whether written or oral  
- occur, the Hearings Body member shall:

“A. Publicly announce for the record the substance of such  
communication; and

“B. Announce the parties’ right to rebut the substance of the *ex*  
*parte* communication during the hearing.”

“Communication between County staff and the Hearings Body shall  
not be considered to be an *ex parte* contact.”



1 (2001) (emphasis added). According to Redside, during Commissioner DeBone's  
2 appearance at the LCDC hearing, the Commissioner witnessed and participated  
3 in wide-ranging discussions with DLCD staff, intervenors-respondents' attorney,  
4 and the LCDC Commissioners regarding the merits of the application and the  
5 county's initial decision to approve redesignation of the subject property.<sup>4</sup>  
6 Redside argues that many of the issues discussed in detail at the LCDC hearing,  
7 including impacts on irrigation wells, remain live issues in this appeal of the  
8 county's decision on remand. Redside contends that Commissioner DeBone  
9 received multiple *ex parte* communications at the LCDC hearing, and was  
10 therefore obligated to disclose the substance of the communications to the parties  
11 at the next public county hearing on this matter, the July 24, 2024 hearing before  
12 the County Board of Commissioners. Instead, Redside argues, Commissioner  
13 DeBone failed to disclose that he had participated in the LCDC hearing, much  
14 less disclose the substance of any communications received at the LCDC hearing,  
15 and failed to offer the parties the opportunity to rebut the same. According to the  
16 petitioner, it was not until the September 4, 2024 meeting at which the board

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<sup>4</sup> The existence and content of most of the relevant communications at the LCDC hearing are not in dispute, as the hearing was videotaped and transcribed. In an order dated April 17, 2025, LUBA granted Redside's motion to take the videotape and transcript into evidence pursuant to OAR 661-010-0045, for purposes of resolving Redside's First and Second Assignments of Error. We also granted respondents' unopposed motion to take into evidence Commissioner DeBone's affidavit, which describes the Commissioner's recollection of a conversation with DLCD staff that was visible on the videotape, but not audible.

1 deliberated and voted to approve the application that Commissioner DeBone  
2 announced that he had participated in the January 26, 2023 LCDC hearing.  
3 However, the Commissioner did not indicate that he had received *ex parte*  
4 communications at the hearing, disclose the substance thereof, or offer the parties  
5 a rebuttal opportunity.

6 Respondents agree that at the September 4, 2024 meeting the  
7 Commissioner disclosed that he had participated at the LCDC meeting on  
8 January 26, 2023. Respondent's Brief 6; Turner's Response Brief 49. However,  
9 respondents dispute that any communications received at the LCDC hearing were  
10 *ex parte* communications that required disclosure under ORS 215.422(3) and  
11 DCC 22.24.100. According to respondents, the statute and code do not apply to  
12 communications received after the county commissioners have rendered the  
13 county's final decision, and that decision is on appeal. Respondents argue that, at  
14 time of the LCDC hearing, there was no land use hearing on the application  
15 pending before the county and Commissioner DeBone was no longer a decision-  
16 maker.

17 Respondents also argue that the issues discussed at the LCDC hearing were  
18 not the same issues that the county addressed in its decision on remand, which  
19 was limited to the bases for remand identified in LUBA's *Landwatch I* decision.  
20 As such, respondents argue, any communications received at the LCDC hearing  
21 did not "concern" the decision that the county would make on remand.



1 Finally, respondents argue that even assuming the Commissioner violated  
2 the statute and code, any error provides no basis for reversal or remand, because  
3 Redside had a full opportunity to object to the lack of disclosure or inadequate  
4 disclosure at the September 4, 2024 meeting, and in fact failed to raise any  
5 objection for more than two months following the September 4, 2024 meeting.<sup>5</sup>  
6 Respondents contend that Redside's untimely objection waives its right to assign  
7 error on appeal to any violation of ORS 215.422(3).

8 Turning to the waiver issue first, we disagree with respondents that  
9 Redside waived their right to assign error to the alleged failure to disclose by  
10 failing to raise an objection at the September 4, 2024 meeting at which the  
11 Commissioners deliberated. *Horizon Construction, Inc. v. City of Newberg*, 114  
12 Or App 249, 834 P2d 523 (1992) (no waiver due to failure to timely object to  
13 disclosure, where the disclosure occurred after the close of the evidentiary record,  
14 during deliberations when there was at most an ephemeral opportunity for public  
15 input). Assuming for the moment that Commissioner DeBone had an obligation  
16 under ORS 215.422(3) and DCC 22.24.100 to disclose communications received  
17 at the LCDC hearing, that obligation was to disclose at the next public hearing  
18 following receipt of the communications, in this case, the July 24, 2024 public  
19 hearing. At that hearing public testimony was accepted and the parties had a full

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<sup>5</sup> Redside first raised the issue of *ex parte* communications arising from the LCDC hearing in a letter to county counsel dated November 15, 2024.

1 opportunity to raise any procedural objections at the hearing or before the close  
2 of the evidentiary record.<sup>6</sup> The September 4, 2025 meeting, however, was not a  
3 public hearing, and the county offered no opportunity for public testimony of any  
4 kind. In addition, Commissioner DeBone's announcement that he had  
5 participated in the LCDC hearing is not reflected in the minutes of the September  
6 4, 2025 proceeding. Apparently, that announcement was not framed as a  
7 disclosure of *ex parte* communications or accompanied by the usual indicia of a  
8 disclosure, and no one, including staff taking the minutes, recognized that the  
9 announcement might be understood as a disclosure of *ex parte* communications.

10 Consequently, that Redside did not lodge an objection to the lack of  
11 disclosure or adequate disclosure until two months after the September 4, 2024  
12 meeting does not mean that Redside waived its right to assign error on appeal  
13 based on the alleged violations of ORS 215.422(3). *Horizon Construction, Inc.*,  
14 114 Or App at 253-54.

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<sup>6</sup> We understand respondents to argue that Redside should have known that Commissioner DeBone might appear at the LCDC hearing and might become exposed to *ex parte* communications, and thus should have raised an objection to the lack of any disclosure at the July 24, 2024 public hearing. Respondents contend that Redside's failure to raise objections at the July 24, 2024 hearing waives its right to assign error to that lack of disclosure. We disagree. Under ORS 197.090(2), the county and the applicant received notice of the LCDC hearing and were invited to testify. No other parties to the county proceedings were entitled to notice, and apparently no other parties besides DLCD attended the LCDC hearing. Respondents identify no basis to conclude that Redside had actual knowledge of the LCDC hearing or of the Commissioner's participation prior to the September 4, 2024 deliberations.

1 Respondents argue that *Horizon Construction* is inapposite because that  
2 case did not involve proceedings on remand. We understand respondents to argue  
3 that obligations under ORS 215.422(3) adhere only during those periods of time  
4 when the land use matter is actively pending before the county. Any *ex parte*  
5 communications received by decision-makers at other times, when for example  
6 the county decision is on appeal to LUBA, need not be disclosed even if the  
7 appealed decision subsequently returns to the decision-makers for additional  
8 proceedings.

9 Resolving the parties' dispute over the requirements of ORS 215.422(3)  
10 require that we interpret the statute. To interpret the statute, we examine the  
11 statutory text, context, and any legislative history with the goal of discerning the  
12 enacting legislature's intent. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042  
13 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d  
14 1143 (1993).

15 The text of ORS 215.422(3) does not specify any temporal limitations or  
16 exclusions on the receipt of *ex parte* communications. The statute imposes  
17 obligations that must be fulfilled at the "first hearing following the  
18 communication," which presupposes a process culminating in one or more  
19 hearings. But the text does not limit its obligations to a county's initial  
20 proceedings on a land use application, and we do not understand respondents to  
21 dispute that the statute and DCC 22.24.100 also apply to proceedings on remand



1 that involve a hearing.<sup>7</sup> We understand respondents to argue that the code and  
2 statute “switch on” only when the county is actively processing the initial  
3 application or subsequent remand, and “switch off” during periods when the  
4 decision is on appeal to LUBA or the appellate courts. Under this view, *ex parte*  
5 communications received at a time when the decision is on appeal need never be  
6 disclosed, even if those communications are intended to, and have the effect of,  
7 influencing the county’s decision on remand.<sup>8</sup> However, nothing in the text or  
8 context of ORS 215.422(3) cited to us supports that view.

9 No party cites us to any relevant context or legislative history for ORS  
10 215.422(3), or its cognate applicable to cities, ORS 227.180(3). Under *Gaines*, if

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<sup>7</sup> DCC 22.24.100 is worded somewhat differently than ORS 215.422(3), but we do not understand respondents to argue that it imposes lesser obligations than the statute. But to the extent DCC 22.24.100 can be read to impose a lesser obligation than the statute, the statute would control. *See* ORS 197.829(1)(d) (LUBA must affirm a local government’s interpretation of its land use regulations unless the interpretation is contrary to a statute that the regulation implements).

<sup>8</sup> A hypothetical horrible illustrates the potential problems with respondents’ view. Suppose that after a county decision is appealed to LUBA a decision-maker engages in communications with a party that convince the decision-maker that the original decision was erroneous and the county should withdraw the decision for reconsideration pursuant to ORS 197.830(13)(b), or seek voluntary remand from LUBA. Under respondents’ view, the decision-maker would be under no obligation to disclose those communications during the hearing on reconsideration or voluntary remand, or offer any opportunity for rebuttal, because the decision-maker received the communications during a time period when the original decision was on appeal. That would be the case even if those communications profoundly influenced the county’s decision on remand.

1 the statute remains ambiguous after evaluating text, context, and legislative  
2 history, we may consider general maxims of statutory construction. One such  
3 maxim is that a court should attempt to construe the statute consistent with its  
4 purposes. On this point, the respondents' restrictive view of the statute seems  
5 inconsistent with the evident purpose of ORS 215.422(3), to ensure that land use  
6 decisions subject to a hearings process are rendered based solely on arguments  
7 and evidence presented in that public hearing process. Interpreting ORS  
8 215.422(3) to switch on or off depending on what phase the case is in would  
9 undercut that purpose.

10 We note that, at least for some purposes, a county's initial proceedings on  
11 a land use application, appeals of the resulting decision, subsequent proceedings  
12 on remand, and any further proceedings on appeal, are all regarded as different  
13 phases of the same case. *See Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678  
14 (1992) (law of the case waiver applies to subsequent appeals to limit issues on  
15 review). Similarly, for purposes of obligations imposed under ORS 215.422(3) a  
16 county's initial decision, appeal of that decision, and any proceedings on remand,  
17 are different phases of the same case. Remand is always a foreseeable result of  
18 appellate review, and a decision-maker should be prepared to conduct hearings  
19 on remand consistent with ORS 215.422(3), including disclosure of *ex parte*  
20 communications received during the appellate phase of the case.

21 Accordingly, we reject respondents' restrictive view of the statute, and  
22 conclude that obligations imposed under ORS 215.422(3) continue after the

1 county issues a decision on a land use application. If *ex parte* communications  
2 occur while the county's decision or action is pending review in another forum,  
3 then the county decision maker who received the *ex parte* communication must  
4 make a timely disclosure "at the first hearing following the communication where  
5 action will be considered or taken on the subject to which the communication  
6 related." ORS 215.422(3)(b).

7 Finally, we turn to respondents' argument that none of the communications  
8 received at the LCDC hearing have any bearing on the narrow range of issues  
9 remaining after LUBA's remand in *Landwatch I*, and thus, those communications  
10 are not *ex parte* because they do not concern the county's action in the proceeding  
11 on remand. We generally agree with respondents' premise that, whether ORS  
12 215.422(3) obliges disclosure of an *ex parte* communication during a hearing on  
13 remand depends on its relationship to the issues within the scope of remand. *See*  
14 *Opp*, 171 Or App at 423 (the remedy for nondisclosure of an *ex parte*  
15 communication "should be tailored to rectify the evil at which it is directed, in  
16 the light of the particular circumstances of the case"). ORS 215.422(3) imposes  
17 obligations only at a hearing where "action will be considered or taken on the  
18 subject to which the communication related[.]" A remand hearing will not (or at  
19 least should not) take action with respect to resolved issues or issues outside the  
20 scope of remand. Accordingly, in such circumstances the statute would not



1 necessarily oblige a decision-maker to disclose a communication on remand that  
2 concerns a non-issue or a resolved issue, rather than a live issue.<sup>9</sup>

3 LUBA's decision in *Landwatch I* resolved a number of issues adversely to  
4 the petitioners, but sustained some assignments of error, and remanded for  
5 additional analysis and adoption of adequate findings on a specific range of  
6 issues. Specifically, we directed:

7 "[T]he board of commissioners must consider the ability to use the  
8 subject property for farm use in conjunction with other property,  
9 including the Keystone property, and may not limit its review to the  
10 profitability of farm use of the subject property as an isolated unit.  
11 The board of commissioners must consider the ability to import feed  
12 for animals and may not limit its consideration to the raising of  
13 animals where adequate food may be grown on the subject property.  
14 The board of commissioners must also consider whether the subject  
15 property is suitable for farm use as a site for construction and  
16 maintenance of farm equipment. Furthermore, the board of  
17 commissioners must consider the evidence and adopt findings  
18 addressing the impacts of redesignation of the property related to  
19 water, wastewater, and traffic and whether retaining the property's  
20 agricultural designation is necessary to permit farm practices on  
21 adjacent or nearby lands." *Landwatch I*, LUBA Nos 2023-006/009  
22 (slip op at 85).

23 Thus, the question on review is whether the substance of any communications  
24 Commissioner DeBone received at the LCDC hearing has a bearing on the  
25 remand issues. We turn to the parties' arguments on that question.

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<sup>9</sup> In practice, it may be difficult for a decision-maker at a remand hearing to determine whether or not a particular communication is related to a live issue on remand. In such cases, it would be prudent to err on the side of disclosure.

1 As noted, the LCDC hearing was initiated by DLCD's request for  
2 authorization to appeal the county's initial decision to LUBA. The focus of  
3 DLCD's request, and much of the discussion at the hearing, was on the criteria  
4 for such authorization at OAR 660-001-0230(3), specifically whether the case  
5 will require interpretation of a statewide planning statute, goal or rule, or clarify  
6 state law. The legal issues that animated DLCD's request to appeal were resolved  
7 largely in DLCD's favor in *Landwatch I*.

8 Redside first cites portions of the LCDC hearing transcript where DLCD  
9 staff and then applicant's attorney discuss those legal issues, and argues that that  
10 debate, conducted in Commissioner DeBone's presence, constituted an *ex parte*  
11 communication that should have been disclosed during the county remand  
12 proceedings. Redside Petition for Review 12. However, we agree with  
13 respondents that the legal issues debated in the cited portions of the transcript  
14 concerned only a resolved issue that, by the time of remand, was no longer a live  
15 issue. Accordingly, ORS 215.422(3) did not obligate disclosure of the legal  
16 debate that Commissioner DeBone witnessed.

17 Redside next cites to a portion of the transcript where Commissioner  
18 DeBone testified in opposition to the DLCD request. LCDC Commissioner Boyle  
19 asked him questions regarding impacts on adjoining farm practices, and whether



- 1 wells could be dug on the property, and Commissioner DeBone answered.<sup>10</sup>
- 2 Redside argues that their colloquy constitutes *ex parte* communication that

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<sup>10</sup> Redside cites to the following portion of the transcript, which we quote from page 13 of its petition for review (reformatted slightly):

“Boyle (4:36:22): Has there been a farm impact study done?

“DeBone: Uh, uh, terminology maybe because part of the record is the fact that they showed that they could put like three or six, depending — you put six cows out there for like three or four or five/six months and three cows for a year or whatever so yeah I think that was in the record of, of our —

“Boyer: So this is the surrounding areas? Um about the impacts of a development with the surrounding agricultural areas. Thank you.

“DeBone (4:36:55): Uh it’s different uses, as in this rocky outcropping. It’s not even — uh you know, it’s not - it doesn’t have a lot of AMUs (animal month units) or Ums, and a field is grown to cut and bail and remove to deliver, so they would be kind of just separate uses if it was grazing on this property and cut and bail on the other property.

“Boyer (4:37:13) Well, and you know to me farming is not just soils, there’s — there’s other parts of farming. Um you know, rangeland is important for grazing um so that’s why I was asking some of those questions. And then I know you can dig - you say the wells could be dug and this could be dug in this area?

“DeBone (4:37:32): Okay, yeah. Uh yeah, I mean there’s some depth to groundwater, yeah.

“Boyer: Okay.

1 touched on issues relevant to remand, including impacts on adjacent farm  
2 practices, and the feasibility and expense of digging wells in the area.

3 Also with respect to water, Redside argues that Commissioner DeBone  
4 stated:

5 “As Commissioners we are not in the domain of making decisions  
6 based on waters, this is not a decision point during this process. \* \* \*  
7 We take water seriously in the basin and it comes, when it comes to  
8 land use and it’s not a mechanism to deny.” Redside Reply Brief to  
9 Turner Response Brief 2.

10 Redside argues that LUBA ruled to the contrary that the county must consider  
11 impacts on irrigation wells, and therefore that issue was within the scope of  
12 remand. Consequently, Redside argues, Commissioner DeBone’s erroneous  
13 views regarding consideration of impacts on water supplies were an *ex parte*  
14 communication that should have been disclosed at the remand hearing.

15 However, ORS 215.422(3) requires disclosure only of certain  
16 communications “received” by the decision-maker. Accordingly, a decision-  
17 maker’s own statements are not generally considered *ex parte* communications.  
18 *See Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346,  
19 372 (2017), *aff’d*, 291 Or App 251, 416 P3d 1110, *rev den*, 363 Or 481 (2018) (a  
20 letter from a decision-maker to a federal agency is not an *ex parte*  
21 communication). Thus, Commissioner DeBone’s answers to Commissioner  
22 Boyles’ questions do not constitute *ex parte* communications in themselves.

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“DeBone: They may be expensive[.]”

1 Commissioner Boyles' questions also would not qualify as *ex parte*  
2 communications for purposes of ORS 215.422(3) because they are not assertions  
3 of fact or argument, but instead questions posed to DeBone. Embedded in  
4 Commissioner Boyles' line of questions are a few background or framing  
5 statements, *e.g.*, "rangeland is important for grazing \* \* \* so that's why I was  
6 asking some of those questions." However, in this context such a framing  
7 statement cannot be reasonably understood as an attempt to impart facts or  
8 arguments to Commissioner DeBone that he might use to render a decision on  
9 the application, if remanded to the county.

10 Redside next cites to portions of the testimony of the applicant's attorney,  
11 answering the same question posed to DeBone regarding surrounding land uses:

12 "I'm going to try to answer one of the questions that was just asked  
13 around what was kind of the surrounding land uses. Um — and this  
14 property is actually — I don't want to use the word 'unique,' but it  
15 is unique. It is on a very steep elevated plateau and there is some  
16 irrigated agriculture uh to the northwest, but that is uh quite some  
17 distance off and an elevation change of something like 300 feet on  
18 pretty sheer cliff walls. \* \* \* And then on kind of the southeastern  
19 side, there are other properties that are in fact zoned EFU also. But  
20 almost every single one of them have received a non-farm dwelling  
21 approval and so they've actually been taken out of agricultural  
22 because the soils are so bad here." Redside Petition for Review 14.

23 Redside argues that in this quote the applicant's counsel asserts facts about the  
24 property and surrounding EFU-zoned properties, facts that are pertinent to



1 whether the subject property qualifies as agricultural land under OAR 660-033-  
2 0020(1)(a)(B) and (C).<sup>11</sup>

3 The above-quoted statement presents a closer question. In describing the  
4 subject property and surrounding lands the applicant's attorney makes several  
5 factual assertions, including that the subject property is on a steep elevated  
6 plateau, that there is irrigated agriculture at some distance to the northwest, some  
7 300 feet below the subject property by elevation, and that to the southeast there  
8 are an unspecified number of EFU-zoned properties almost all of which have  
9 non-farm dwelling approvals due to bad soils. The question before us is whether  
10 Commissioner DeBone, on remand from *Landwatch I*, was required to disclose  
11 having heard the foregoing statements and offer the parties an opportunity to  
12 rebut them.

13 Although it is a close question, we conclude that the answer is no. The  
14 above-quoted statements are consistent with various descriptions of the subject  
15 property and surrounding properties included in the county's original decision.  
16 The county's fact-finding on these points was not disturbed on appeal. Nothing  
17 in our remand required the county to reevaluate unchallenged fact-finding about  
18 the subject property's topographic relationship to irrigated lands to the northwest,

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<sup>11</sup> As noted, the issues on remand turn almost exclusively on OAR 660-033-0020(1)(a)(B) and (C), which define "Agricultural Land" to include land that is suitable for farm use, considering a set of listed factors, as well as land that is "necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

1 or the soil characteristics of lands to the southeast approved for non-farm  
2 dwellings. Redside does not dispute the cited facts, argue that they constitute new  
3 evidence, or explain what relevance the cited facts have to any remand issue.  
4 Petitioner cites OAR 660-033-0020(1)(a)(B) and (C), and it is true that our  
5 remand required that the county address discrete issues with respect to those  
6 standards. But Redside has not established that the above-quoted statements have  
7 a bearing on any of the discrete remand issues.

8 As explained, to constitute an *ex parte* communication under ORS  
9 215.422(3), the communication must “concern[] the decision or action” by the  
10 decision-makers, in this case, the decision on remand from LUBA. The scope of  
11 that remand was limited. Communications that do not concern matters within the  
12 scope of remand are therefore not subject to the obligations of ORS 215.422(3).

13 Under these circumstances, Redside must do more than merely establish  
14 that a decision-maker overheard a party make statements describing the subject  
15 property and some surrounding properties. Absent some showing that those  
16 statements have some bearing on the narrow scope of issues on remand,  
17 petitioner’s arguments do not provide a basis for remand under ORS 215.422(3).

18 Next, Redside quotes another statement by the applicant’s attorney, a legal  
19 argument regarding the role of profitability in determining whether land is  
20 agricultural land under the Goal 3 definition:

21 “So I want to talk really quickly about this issue of farm use and as  
22 far as we understand, if the agency uh took a little bit of issue on this

1 idea of primary purpose of profit. Uh and that in our opinion is  
2 something that is kind of black letter law.

3 “The *Wetherell* case - *Wetherell v. Douglas County* [342 Or 666,  
4 160 P3d 614 (2007)], which the Supreme Court decided in 2007  
5 \* \* \* uh pretty clearly tells you what you can do. And pretty clearly  
6 tells you that profitability is one of the main factors, and that indeed  
7 it is the land itself, the particular property that has to be able to  
8 support the agricultural use and that’s important because it’s  
9 different when you start to get into some issues about having a farm  
10 tract, which is not something that is at issue in this case. You do look  
11 at how you can put it into conjunction with other properties. That’s  
12 a completely different issue than what we have today[.]” Redside  
13 Petition for Review 15.

14 Redside argues that, in this quoted argument, the attorney insists that the subject  
15 property’s capability for farm use must be viewed in isolation, which is contrary  
16 to LUBA’s later ruling in *Landwatch I*, where we held in relevant part that the  
17 county erred in considering the profitability of farm use based solely on the  
18 subject property, without also considering farm use in combination with or in  
19 relation to farm activities on nearby or adjacent land. LUBA Nos 2023-006/009  
20 at (slip op at 36).

21 Redside is correct that the quoted argument, in suggesting that profitability  
22 should be evaluated based solely on farm use of the subject property, is contrary  
23 to our subsequent holding in *Landwatch I*. That argument therefore concerns a  
24 resolved legal issue that is outside the scope of remand. Our remand required the  
25 county to reevaluate the profitability factor based on more than farming the  
26 subject property, and we address below the parties’ challenges to the county’s  
27 remand findings on that point. However, for purposes of ORS 215.422(3), the



1 question is whether the statute obligates remand to require the Commissioner to  
2 “disclose” overhearing an erroneous statement of the law that is a resolved issue  
3 and hence outside the scope of remand. We conclude that the answer is no. A  
4 legal argument that is outside the scope of remand does not “concern” the  
5 county’s decision on remand, for purposes of ORS 215.422(3).

6 Finally, we understand Redside to argue that the unrecorded conversation  
7 between Commissioner DeBone and DLCD staff included *ex parte*  
8 communications. As noted, LUBA took as evidence outside the record  
9 Commissioner DeBone’s affidavit, which states his recollections of that  
10 conversation. The affidavit states in relevant part that DLCD staff

11 “stated that the agency had technical assistance dollars available to  
12 Deschutes County if the County wanted to study the issue in more  
13 detail. I understood this statement to convey the message that the  
14 agency believed it was correct, and that Deschutes County should  
15 use public dollars to ‘learn more’ so that the Board of  
16 Commissioners could get to an understanding that matched the  
17 position of the agency in that appeal.” Affidavit of Commissioner  
18 DeBone 2.

19 DLCD technical assistance dollars are typically used for comprehensive plan or  
20 land use code updates. It is not clear what “issue” DLCD staff was suggesting the  
21 county spend technical assistance dollars on, and no party sought to place before  
22 us an affidavit or statement of the DLCD staff member with his recollections of  
23 the conversation. Nonetheless, the information available to us does not suggest  
24 that DLCD staff imparted anything to Commissioner DeBone that concerned

1 issues within the scope of remand from *Landwatch I*. Accordingly, that  
2 conversation did not constitute an *ex parte* communication.

3 Redside's first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR (Redside)**

5 Redside argues that at the LCDC hearing and the county proceedings on  
6 remand Commissioner DeBone made statements demonstrating that, due to bias  
7 and prejudgment, he was incapable of rendering a decision on the application  
8 based on the evidence and arguments presented and the applicable legal  
9 standards.

10 Generally, participants to a quasi-judicial land use proceeding are entitled  
11 to an "impartial tribunal." *Fasano v. Washington Co. Comm.*, 264 Or 574, 588,  
12 507 P2d 23 (1973). However, at least with respect to elected officials acting as  
13 land use decision-makers, more recent cases recognize a high threshold for  
14 establishing bias and prejudgment. An elected official is expected to be intensely  
15 involved in community affairs, and a political predisposition on land use policy  
16 matters is not sufficient grounds for disqualification. *Columbia Riverkeeper v.*  
17 *Clatsop County*, 267 Or App 578, 341 P3d 790 (2014) (summarizing case law).  
18 Accordingly, the standard for disqualification is actual bias, not a mere  
19 appearance of bias. *Id.* at 602. That is, the party challenging the impartiality of  
20 the elected official must show that the decision maker "has so prejudged the  
21 particular matter as to be incapable of determining its merits on the basis of the  
22 evidence and arguments presented." *Id.* (citing *Beck v. City of Tillamook*, 113 Or



1 App 660, 662-63, 833 P2d 1327 (1992)). An additional restriction on bias claims  
2 is that the scope of the matter or question at issue is narrowly limited to the  
3 specific decision that is before the tribunal. *See Columbia Riverkeeper*, 267 Or  
4 App at 609 (statements made during election campaigns generally opposing  
5 liquified natural gas terminals are not germane to whether the official was biased  
6 in voting to reject a specific application for a terminal).

7 In the present case, Redside cites to selected statements in Commissioner  
8 DeBone's testimony at the LCDC hearing, which can be read to suggest that the  
9 Commissioner believes that an irrigation water supply is necessary to make a  
10 profit in farming, that water supply availability is not an issue in approving the  
11 application or a mechanism to deny the application, and that denial of this  
12 application would threaten the owner's property rights.<sup>12</sup> Redside contends that

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<sup>12</sup> Redside quotes the following from the transcript of the LCDC hearing:

"Lower Bridge is the area where farming for a profit is done in Deschutes County. The elevation is lower than Bend \* \* \* and the soils are better with flat ground and irrigation water. **If you have flat ground and irrigation water, profit in money can be created.**

"Now for the 710 Eden Crossing properties, 710 acres they are located on rocky outcropping above the Lower Bridge farming parcels. There may have been some historical grazing but the applicant has shown in the record that there is no opportunity for profit in money. \*\*\*\*\* One of these items was discussed and mentioned as a reason to deny this was water, uh 710 acres could be divided into 71, 10 acre parcels rural residential lots that would qualify for an exempt domestic well. **As Commissioners we are not**

1 these statements reflect views that were rejected by LUBA in *Landwatch I*.  
2 Further, Redside argues, the statements reflect considerations that are unrelated  
3 to the actual approval criteria, and a willingness to base the land use decision on  
4 those considerations rather than the approval criteria.

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**in the domain of making decisions based on waters, this is not a decision point during this process.**

“\*\*\*\*\* Either you have irrigation rights if you're going to use it for farming or you're allowed to put in a domestic well because we have no water limiting areas that the Oregon Water Resources would say yeah that's a[n] area of concern let's not allow new wells there. We don't have that, **we take water seriously in the basin and it comes, when it comes to land use and it's not a mechanism to deny.**” Redside Petition for Review 22 (bold added by Redside).

“If the intention is to have rural open space this is another topic, if the intention is to have open rural space then maybe there's a different zoning called open space with a lower tax burden.” *Id.* at 23-24.

“This is privately owned land that we're talking about. Private property owner—uh is zoned EFU should have the opportunity to farm for a profit.” *Id.* at 24.

“So if the intention of the state land use system is to say well, we want that private property to be you know, low density, no development, maybe one house per 180 acres or whatever, some scenario maybe that's a change in our land use system. So that's a big one. That's a—you know, big home run type thing we're talking about here, but it's private property and if the intention is to leave that person's private property that they pay taxes on, open space, you know, it puts us in this spot.” *Id.*

1 Redside also cites to comments made at the September 4, 2024 remand  
2 deliberations, when the Commissioner reflected on prior efforts to “work around”  
3 the one-size-fits-all nature of the statewide land use program.<sup>13</sup>

4 Redside contends that an impartial quasi-judicial decision-maker would  
5 not promote efforts to “work around” the statewide land use program in  
6 explaining why he is voting to approve a land use application. According to  
7 Redside, the quoted statements, taken together, demonstrate that Commissioner  
8 DeBone prejudged the application, and was unable to render a decision based on  
9 the evidence and arguments presented and the applicable land use standards.

10 Respondents argue, and we agree, that the statements Redside has cited fall  
11 short of demonstrating the “actual bias” that is required to disqualify an elected  
12 decision-maker. While some of Commissioner DeBone’s statements at the  
13 LCDC hearing were based on defenses of the county’s initial decision that did  
14 not fare well on appeal, the mere fact that the Commissioner expressed those

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<sup>13</sup> Redside quotes the following statement made at the September 4, 2024 proceedings:

“[W]e tried to do a non-prime farmland effort. We’ve talked about if it should be open space. Maybe that’s a new designation is it and this runs right into that same situation. A state land use system: one size fits all; the answer is this. We can’t vary and now people are scared to even open it up because there’s such high consequences and this puts us in this spot. Because we’ve tried to work around this but oh no, we’re not going to have that discussion[.]” Redside Petition for Review, 24-25.



1 positions prior to LUBA's decision does not mean that, on remand, the  
2 Commissioner was unable to decide the matter based on the evidence in the  
3 record and a correct application of the law.

4 Similarly, that the Commissioner expressed frustration at the relative  
5 inflexibility of the land use program does not mean that he was unable to make a  
6 decision based on the evidence and arguments presented, under a correct  
7 understanding of the law. As the last sentence of the quote suggests, the  
8 Commissioner seemed to recognize that a discussion of prior attempts at a "work  
9 around" is not relevant to the task before him. In any case, as an elected official,  
10 the Commissioner is expected to have opinions regarding policy. That the  
11 Commissioner described a different policy and a different legal framework that  
12 he would prefer is not sufficient to demonstrate that he was actually biased, or  
13 unable to reach a decision based on the evidence and a correct application of the  
14 law as it exists.

15 Redside's second assignment of error is denied.

#### 16 **FIRST ASSIGNMENT OF ERROR (1000 Friends)**

17 As noted, OAR 660-033-0020(1)(a)(C) defines "Agricultural Land" to  
18 include "[l]and that is necessary to permit farm practices to be undertaken on  
19 adjacent or nearby agricultural lands." We held in *Landwatch I* that the county  
20 misconstrued OAR 660-033-0020(1)(a)(C) to limit its inquiry to whether the  
21 subject property "contributes" to farm practices on adjacent and nearby lands, or  
22 whether such practices "depend on the use of" the subject property. We

1 concluded that the “necessary” test also requires inquiry into whether it is  
2 necessary to retain the land’s agricultural designation and zoning, in order to  
3 permit farm practices on adjacent or nearby lands to be undertaken. Accordingly,  
4 we remanded for the county to reconsider under a correct understanding of the  
5 law the evidence regarding the impacts of the proposed residential use on farm  
6 practices.

7 On remand, the county adopted additional findings, labeled “Remand Issue  
8 4: Is the Property’s existing designation ‘necessary’ to permit the continuance of  
9 farm practices on nearby and adjacent lands.” Record 57. The findings then  
10 identify existing farm practices on adjacent and nearby lands zoned EFU, and  
11 evaluate whether residential use of the subject property if rezoned to RR-10  
12 would prevent the continuation of those identified farm practices, considering  
13 impacts with respect to traffic and water, nuisance and trespassing. Record 57-  
14 83.

15 On appeal, petitioner 1000 Friends of Oregon (1000 Friends) argues that  
16 the county again misconstrued and misapplied OAR 660-033-0020(1)(a)(C).  
17 1000 Friends first argues that the county erred in again asking the wrong  
18 question: whether adjoining and nearby farms require the *use* of the subject  
19 property in order to conduct farm practices. According to 1000 Friends, the  
20 county failed to ask the question posed by the rule as interpreted by LUBA and  
21 the Court of Appeals: whether it is necessary to retain the protective resource

1 designation and zoning in order to permit farm practices to be undertaken on  
2 adjoining and nearby farm lands.

3 1000 Friends are correct that some of the county's findings on remand  
4 focus on whether adjoining or nearby farms require the use of the subject property  
5 in order to conduct farm practices. However, we did not hold in *Landwatch I* that  
6 that question was incorrect, only that it was insufficient. We held that OAR 660-  
7 033-0020(1)(a)(C) *also* requires consideration of whether the land's resource  
8 designation and zoning must be retained, in order to permit farm practices on  
9 adjacent and nearby lands.<sup>14</sup> The findings at Record 67-83 address the latter  
10 question at some length, considering four types of impacts—traffic, water,  
11 nuisance and trespass. Accordingly, that the remand findings address both  
12 questions posed by the rule is not a basis for reversal or remand.

13 1000 Friends next argues that on remand the county erred in focusing on  
14 whether removing the land's resource designation and zoning would prevent the  
15 *continuation* of existing farm practices. According to 1000 Friends, the relevant

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<sup>14</sup> We held in *Landwatch I*:

“[W]e agree with 1000 Friends that OAR 660-033-0020(1)(a)(C) asks not *only* whether the land itself is necessary to permit farm practices on adjacent or nearby lands but, *also*, whether the land's resource designation and zoning, and the presumed lack of impacts or conflicts with farming on adjacent or nearby lands, are necessary to permit farm practices on adjacent or nearby lands.” LUBA No 2023-006/009 at (slip op at 59) (emphases added).



1 question posed by the text of OAR 660-033-0020(1)(a)(C) is whether retaining  
2 the resource designation and zoning is necessary *to permit farm practices to be*  
3 *undertaken*. We understand 1000 Friends to argue that the phrase “to be  
4 undertaken” is forward-looking, and encompasses not only the continuation of  
5 existing farm practices but also the establishment of new farm practices that  
6 potentially *could be* undertaken on adjacent and nearby lands.

7 Intervenor-respondent Turner responds, initially, that the issue of whether  
8 OAR 660-033-0020(1)(a)(C) requires evaluation of impacts on hypothetical or  
9 potential farm practices was not raised during either of the proceedings below,  
10 and thus is waived pursuant to ORS 197.797(1) and ORS 197.835(3).<sup>15</sup> Further,  
11 Turner argues that that issue could have been, but was not, raised on appeal either  
12 before LUBA or the Court of Appeals, and failure to raise that issue on appeal  
13 means that the issue is barred in this second round of appeals by the doctrine of

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<sup>15</sup> ORS 197.797(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) provides, in relevant part:

“[LUBA] may only review issues raised by any participant before the local hearings body as provided by \* \* \* ORS 197.797 \* \* \*.”

1 law of the case. *See Devin Oil Co. v. Morrow County*, 252 Or App 101, 111-13,  
2 286 P3d 925 (2012) (*Beck* law of the case doctrine bars judicial review of issues  
3 that could have been, but were not, raised in previous appeals of the same case).

4 With respect to waiver under ORS 197.797(1), 1000 Friends replies that  
5 during the initial proceedings DLCD argued to the county that OAR 660-033-  
6 0020(1)(a)(C) requires an evaluation of “farming and ranching practices that are  
7 associated with *existing and potential* farm uses in the surrounding area.” LUBA  
8 No 2023-006/009 Record 464, 1432 (emphasis added). We agree with 1000  
9 Friends that, so far as ORS 197.797(1) is concerned, the DLCD letter adequately  
10 preserved the issue presented in 1000 Friends’ assignment of error for the first  
11 stage of appeal to LUBA.

12 However, it appears that that issue was not pressed thereafter at every stage  
13 of this appeal. On appeal to LUBA, 1000 Friends’ brief argued in relevant part  
14 only that the county must evaluate whether EFU zoning is necessary to permit  
15 farm practices to “continue.” 1000 Friends Petition for Review, LUBA No. 2023-  
16 006/009 18; Turner Response Brief App-1. 1000 Friends did argue, generally,  
17 that the initial findings are inadequate to address the “issues of compliance with  
18 OAR 660-033-0020(1)(a)(C) raised by” the DLCD letter, but 1000 Friends’ brief  
19 did not advance any argument that the county’s initial decision was defective for  
20 failure to address impacts on *potential* farm practices in the surrounding area.  
21 LUBA’s decision in *Landwatch I* quotes the pertinent portion of the DLCD letter,

1 (slip op at 52-53), but did not address the question of hypothetical or potential  
2 farm practices, because no party asked us to resolve that question.

3 An argument could be made that the issue of whether the county must  
4 evaluate both existing and potential farm practices was not yet ripe at that point,  
5 given the county's complete failure to consider impacts on any farm practices  
6 under the rule. However, even if so, the issue was certainly ripe when the matter  
7 was returned to the county on remand.

8 On remand, no party apparently argued to the county that OAR 660-033-  
9 0020(1)(a)(C) requires the county to consider the impacts of rezoning on both  
10 existing and potential farm practices. 1000 Friends cites us to only one place in  
11 the remand record where a party raised issues on this point, but even then the  
12 party argued only that the rezoning must "permit the *continuation* of customary  
13 farm practices on adjacent and nearby agricultural land." Record 957 (emphasis  
14 added).

15 Nonetheless, 1000 Friends argues that it could not reasonably anticipate  
16 that the county's remand findings would expressly adopt, for the first time, an  
17 interpretation that OAR 660-033-0020(1)(a)(C) is limited to considering the  
18 impacts of rezoning on *existing* farm practices. However, as Turner points out,  
19 the county's original decision compiled an inventory of farm uses and farm  
20 practices on surrounding lands, for purposes of OAR 660-033-0020(1)(a)(C), that  
21 inventoried only *existing* uses and practices. No party successfully challenged the  
22 adequacy of that inventory before LUBA or the Court of Appeals, or argued that



1 the inventory was inadequate for failure to include potential uses. The adequacy  
2 of that inventory was thus a resolved issue. On remand, it was entirely foreseeable  
3 that the county would use that inventory of existing uses and practices to address  
4 the remand issues under OAR 660-033-0020(1)(a)(C), *i.e.*, that the county would  
5 evaluate only impacts on *existing* farm practices. Even then, 1000 Friends failed  
6 to raise any issues at all on remand regarding impacts on potential farm practices.

7 *Currie v. Douglas County*, 308 Or App 235, 481 P3d 427 (2020),  
8 addressed a similar failure to press issues at all stages of an appeal. In the LUBA  
9 decision preceding *Currie*, we remanded to the county to identify “surrounding  
10 uses,” expressly noting our understanding that the petitioner limited their  
11 assignment of error to existing surrounding uses, not potential ones. *Currie v.*  
12 *Douglas County*, 79 Or. LUBA 585, 609 (2019). The petitioner did not appeal  
13 our decision to the court, but instead on remand attempted to raise the issue it had  
14 failed to press before LUBA, that the approval criterion required identifying and  
15 evaluating impacts on potential uses in the surrounding area. The Court of  
16 Appeals rejected that argument as waived under *Beck* and *Devon Oil*. The present  
17 case offers a similar failure to press issues at all stages of appeal.

18 Accordingly, we agree with Turner that the misconstruction of law  
19 argument raised in 1000 Friends assignment of error is waived, under the law of  
20 the case doctrine described in *Beck*, *Devon Oil*, and *Currie*.

21 1000 Friends’ first assignment of error is denied.

1 **FIRST ASSIGNMENT OF ERROR (Buchanans)**

2 **FIRST ASSIGNMENT OF ERROR (Landwatch)**

3       The Buchanans own a 37.51-acre parcel adjoining the subject property.  
4       They operate, among other businesses, Keystone Cattle & Performance Horses,  
5       LLC (Keystone), which involves grazing cattle on irrigated pastureland near  
6       Powell Butte, approximately 20 miles from the subject property, with winter  
7       grazing on their 37.51-acre irrigated parcel. During the initial county  
8       proceedings, the Buchanans submitted a business plan proposing use of the  
9       subject property for seasonal dryland grazing of their herd as an expansion of  
10      their existing Keystone operation. Specifically, the Buchanans proposed to graze  
11      an unspecified number of cows for several months in the spring and early  
12      summer, with the number of cows and the duration of grazing to be determined  
13      based on the forage available each year. The Buchanans stated that the proposed  
14      expansion of their existing cattle operation would benefit the operation and  
15      increase their profits. The Buchanans argued that their proposal to use the subject  
16      property for seasonal grazing in conjunction with their own property  
17      demonstrated that the subject property was “suitable for farm use” under OAR  
18      660-033-0020(1)(a)(B).

19       As noted, OAR 660-033-0020(1)(a)(B) defines “agricultural land” to  
20      include “[l]and in other soil classes that is suitable for farm use as defined in ORS  
21      215.203(2)(a), taking into consideration \* \* \* suitability for grazing[.]”  
22      Relatedly, OAR 660-033-0030(3) provides that “[n]earby or adjacent land,

1 regardless of ownership, shall be examined” to determine whether a lot or parcel  
2 is “suitable for farm use” under OAR 660-033-0020(1)(a)(B).

3 The county’s initial decision did not address the Buchanans’ testimony,  
4 under the mistaken view that OAR 660-033-0020(1)(a)(B) does not require the  
5 county to consider whether the property is suitable for farm use if used in  
6 conjunction with adjacent or nearby lands. As noted, in *Landwatch I*, we held in  
7 relevant part that the rule requires the county to consider conjoined use and  
8 remanded to the county to consider that question in the first instance, including  
9 with respect to the Buchanans’ proposal.<sup>16</sup>

10 We also held that the county erred in placing “undue weight on the  
11 profitability of farm use on the subject property,” and remanded for the county to  
12 address the “ability to use the subject property with a primary purpose of  
13 obtaining a profit in money in conjunction with other property.” *Landwatch I*,  
14 LUBA Nos 2023-006/009 (slip op at 35-36). As noted, the ORS 215.203(2)(a)  
15 definition of “farm use” lists a number of activities that constitute farm use when

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<sup>16</sup> We directed the county:

“On remand, the board of commissioners must consider the ability to use the subject property for farm use in conjunction with other property, including the Keystone property, and may not limit its review to the profitability of farm use of the subject property as an isolated unit. The board of commissioners must consider the ability to import feed for animals and may not limit its consideration to the raising of animals where adequate food may be grown on the subject property.” *Landwatch I*, LUBA Nos 2023-006/009 (slip op at 85).



1 engaged “for the primary purpose of obtaining a profit in money[.]”<sup>17</sup> Thus, even  
2 though “profitability” is not a listed factor in OAR 660-033-0020(1)(a)(B),  
3 because some notion of “profitability” is part of the statutory definition of “farm  
4 use,” and “farm use” is referenced in OAR 660-033-0020(1)(a)(B), profitability  
5 is one of the considerations in determining whether land is “suitable for farm use”  
6 under the rule. *See Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007)  
7 (invalidating an LCDC rule that prohibited consideration of profitability in  
8 determining whether land is agricultural land under OAR 660-033-0020(1)(a)).<sup>18</sup>

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<sup>17</sup> The phrase “primary purpose of obtaining a profit in money” is a term of art, with a specialized meaning in both tax law and land use law. We address below the parties’ arguments regarding the meaning of that phrase. In the meantime, for convenience we follow the parties in using shorthand terms such as “profitable” or “profitability,” cautioning only that those shorthand terms do not necessarily correspond to their ordinary usage.

<sup>18</sup> In *Wetherell*, the Supreme Court cautioned against assigning “profitability” an overly determinative role in the calculus under OAR 660-033-0020(1)(a)(B), at the expense of the considerations listed in the rule:

“Although profitability and gross farm income—both actual and potential—may be considered in determining whether land is suitable for farm use, we do not address the weight to be given to those considerations in any particular land use decision. In their arguments before LUBA, the Court of Appeals, and this court, the parties and *amici* appear to assume, at times, that, if particular land currently is ‘profitable’ or produces ‘gross farm income,’ then that land necessarily meets the ‘farm use’ test and is properly classified as agricultural land under Goal 3, whereas if the land is “unprofitable” for farming or produces no “gross farm income,” then it necessarily is not agricultural land under Goal 3. The case

1 On remand, the applicants submitted evidence in the form of testimony  
2 from several persons with ranching or agricultural experience around the state,  
3 opining that the subject property is not suitable for grazing, even in conjunction  
4 with the Buchanans' adjoining 37.51-acre parcel. Based on these opinions, the  
5 applicant argued that no rancher whose primary purpose is to obtain a profit in  
6 money would attempt to graze cattle seasonally on the subject property together  
7 with the adjoining 37.51-acre Buchanan parcel. The county chose to rely on the  
8 applicant's testimony, over the testimony of the Buchanans.

9 Over two sub-assignments of error, intervenors-petitioners William  
10 Buchanan, Elizabeth Buchanan, and Keystone (the Buchanans) challenge the  
11 county's findings that the subject property is not suitable for grazing in  
12 conjunction with their adjoining parcel. In its first assignment of error, petitioner  
13 Central Oregon Landwatch (Landwatch) also challenges those findings.

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before us, in its particular posture, does not present those issues. The determination that a particular parcel of land is 'agricultural land' turns instead on the local government's conclusion, subject to review by LUBA and the courts, that the land is '*suitable* for farm use,' taking into consideration the factors identified in Goal 3. The only issue that we decide today is whether 'profitability' or 'gross farm income' can be *considered* by the local government in making its land use decision, and our decision is limited to holding that the rule prohibiting the local government even from considering such evidence is invalid." 342 Or at 683 (emphases in original).

1           **A. First Sub-Assignment of Error (Buchanans)**

2           Under the first sub-assignment of error, the Buchanans argue that on  
3 remand the county again misconstrued the applicable law by overemphasizing  
4 “profitability,” while giving short shrift to the other considerations listed in OAR  
5 660-033-0020(1)(a)(B). The Buchanans note that, following the Supreme Court’s  
6 *Wetherell* decision, LUBA addressed the role of profitability in applying OAR  
7 660-033-0020(1)(a)(B), commenting that profitability is a “relatively minor  
8 consideration, and one that has a large potential for distracting the decisionmaker  
9 and the parties from the primary considerations listed in the rule definition.”  
10 *Wetherell v. Douglas County*, 58 Or LUBA 638, 657 (2009). In the present case,  
11 the Buchanans argue that the county again became distracted by profitability, and  
12 treated it as the lodestone of the inquiry under the rule, rather than a relatively  
13 minor consideration subordinate to more primary considerations.

14           Intervenor-respondent Thomas responds that the flaw in the county’s  
15 initial finding was not that it over-emphasized profitability vis-à-vis the other rule  
16 considerations, but that, as LUBA held, it placed “undue weight on the  
17 profitability of farm use *on the subject property*.” *Landwatch I*, LUBA Nos 2023-  
18 006/009 (slip op at 35) (emphasis added). Thomas argues that, on remand, the  
19 county appropriately adopted extensive findings addressing conjoined use with  
20 the Buchanan property, and those findings evaluate each of the considerations  
21 listed in OAR 660-033-0020(1)(a)(B), including the substantial volume of  
22 evidence submitted concerning the profitability of a conjoined grazing operation.



1       We agree with Thomas that our “undue weight” basis for remand was  
2   directed at the county’s exclusive focus on the subject property, rather than the  
3   appropriate weight given to consideration of profitability compared to the weight  
4   given other considerations. While the county’s findings on remand address  
5   profitability at length, and those findings are more extensive than those  
6   addressing other considerations, that differential presumably correlates to the  
7   relative volume of evidence submitted and issues raised regarding each  
8   consideration. Petitioners have not established that the county erred in giving  
9   short shrift to other considerations, or otherwise elevated considerations of  
10   profitability over considerations listed in the rule.

11       The Buchanans next argue that the “profitability” aspect of the farm use  
12   definition at ORS 215.203(2)(a) focuses on intent, *i.e.*, whether a farmer is  
13   motivated to employ land “for the primary purpose” of obtaining a profit in  
14   money by engaging in one or more of the listed activities. Because the definition  
15   turns on purpose or intent, petitioners argue that it is immaterial whether the end  
16   result is profitable or not. Petitioners concede that the farm operator’s intent must  
17   be reasonable, that the operator must identify a potentially plausible means of  
18   achieving a profit. But we understand petitioners to argue that it is unnecessary  
19   to support that intent with detailed financial explanations demonstrating that a  
20   proposed conjoined farm use would likely result in profit of some kind. We  
21   understand petitioners to contend that if an adjoining farm operator declares  
22   interest in conjoined use of the subject property, that expression of intent is

1 sufficient, without more, to demonstrate that the subject property is “suitable for  
2 farm use” under the rule. Petitioners argue that the Buchanans’ expressed intent  
3 to graze the subject property as part of their existing profitable beef business is a  
4 strong, if not compelling, basis to conclude that the property is suitable for farm  
5 use.

6 We disagree with petitioners that subjective intent is the hallmark of what  
7 constitutes a “farm use” for purposes of the definition of Agricultural Land at  
8 OAR 660-033-0020(1)(a)(B). That test is better understood as an objective test:  
9 whether a reasonable farmer would be motivated to put the land to agricultural  
10 use, for the primary purpose of obtaining a profit in money (*i.e.*, not as a hobby),  
11 given the considerations listed in the rule. *Central Oregon Landwatch v.*  
12 *Deschutes County*, LUBA No 2023-49 (Feb 15, 2024) (slip op at 7) (citing  
13 *Landwatch Lane County v. Lane County*, 77 Or LUBA 368, 371 (2018) and  
14 *Doherty v. Wheeler County*, 56 Or LUBA 465, 472 (2008)). We discuss below  
15 under the Buchanans’ second sub-assignment of error what kind of evidence is  
16 material under OAR 660-033-0020(1)(a)(B). However, for present purposes, we  
17 disagree with petitioners that their expressed intent to graze the subject property  
18 as part of their beef business is a conclusive basis, without more, to find that the  
19 subject property is suitable for farm use, as it regards profitability.

20 The Buchanans’ first sub-assignment of error is denied.

1           **B.     Second Sub-Assignment of Error (Buchanans); First**  
2           **Assignment of Error (Landwatch)**

3           The Buchanans and Landwatch both argue from different perspectives that  
4     the county's findings regarding profitability of conjoined use with the Buchanan  
5     parcel are not supported by adequate findings and substantial evidence. These  
6     arguments generally take two forms: (1) challenging the evidence the county  
7     relied upon, and (2) arguing that the county erred in rejecting the evidence the  
8     Buchanans submitted regarding their proposal for conjoined use.

9           Substantial evidence is evidence that a reasonable person would rely upon  
10    in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179 (1993). The  
11    applicant bears the ultimate burden of proof of providing evidence that the  
12    approval criterion is met. As applied in the present case, that requires essentially  
13    proving a negative: that the subject property is *not* suitable for farm use, including  
14    grazing in conjunction with adjacent or nearby lands, considering the factors  
15    listed in OAR 660-033-0020(1)(a)(B). If, as happened here, a nearby rancher  
16    testifies that they are interested in conjoined farm use, the applicant has the  
17    additional burden of addressing that testimony. *See Ploeg v. Tillamook County*,  
18    50 Or LUBA 608, 633 (2005) (county erred in rejecting adjoining farmers'  
19    proposals for conjoined use, where the applicant provided no contrary evidence).

20          To meet that added burden, on remand the applicants submitted in response  
21    to the Buchanans' original business plan letters from a number of ranchers and  
22    agricultural experts, generally averring that the subject property, even  
23    considering conjoined use with the Buchanan parcel, is not suitable for grazing.



1 The most detailed letter is from rancher and real estate development lawyer Rand  
2 Campbell, which critiques the Buchanan offer and provides an analysis of  
3 presumed income and expenses to demonstrate that the proposed conjoined use  
4 would not be profitable, *i.e.* that a reasonable rancher would not be motivated to  
5 employ the subject property with the Buchanan parcel with the primary purpose  
6 of obtaining a profit in money. Record 611-16. That analysis was based on a  
7 number of assumptions about how such a conjoined use would operate.

8 In response, on remand the Buchanans offered critiques of the Campbell  
9 letter, and offered some additional details about their Keystone operation. Record  
10 951-52. In its remand decision, the county chose to rely on the Campbell letter  
11 and the other letters applicants submitted with respect to the issue of conjoined  
12 use, and rejected the Buchanans' testimony.

13 On review, the Buchanans and Landwatch argue that the Campbell letter  
14 and other evidence the county relied upon do not constitute "substantial  
15 evidence," *i.e.* evidence a reasonable person would rely upon. Petitioners  
16 acknowledge that where the record includes substantial evidence supporting a  
17 finding of compliance with an approval criterion, as well as substantial evidence  
18 supporting a finding of noncompliance, the decision-maker is entitled to choose  
19 which evidence to believe. *Younger v. City of Portland*, 305 Or 346, 360, 752  
20 P2d 262 (1988). LUBA's role in that circumstance is not to reweigh the evidence,  
21 or substitute its judgment for the decision-maker, but rather only to determine  
22 whether the evidence relied upon constitutes substantial evidence in the whole

1 record. *Wilson Park Neighborhood Assoc. v. City of Portland*, 27 Or LUBA 106,  
2 113 (1994). However, petitioners contend that no reasonable person could  
3 conclude, as the county did, based on the whole record that the applicants met  
4 their burden of proving that the subject property is not suitable for grazing in  
5 conjunction with the Buchanan parcel.

6 Relatedly, in its first assignment of error Landwatch offers several  
7 critiques of the Campbell letter. First, Landwatch disputes a portion of the  
8 Campbell letter estimating that the carrying capacity of the Buchanan parcel is  
9 1.0 animal unit per month (AUM) per acre. The Campbell letter uses this estimate  
10 to evaluate the productive capacity of conjoined use in various ways. The  
11 estimate was based on information from the Oregon State University Extension  
12 Service: that irrigated land in central Oregon typically supports 1.0 AUM per acre  
13 depending on the condition of the pasture. Landwatch objects that this evidence  
14 of “typical” carrying capacity is not a basis to draw any conclusions about the  
15 actual carrying capacity of the Buchanan parcel. Landwatch argues that the  
16 record lacks any evidence of the parcel’s actual carrying capacity, and therefore  
17 the Campbell letter lacks any evidence supporting the critical estimate.

18 However, as intervenors argue, the only possible source of more accurate  
19 estimates of the carrying capacity of the Buchanan parcel would be the  
20 Buchanans, who chose not to provide any information regarding the actual  
21 carrying capacity of their land. In the absence of any site-specific information,

1 the county did not err in relying on the estimates of typical capacity provided by  
2 the OSU Extension Service.

3 Landwatch next argues that the Campbell letter and county findings  
4 conclude that conjoined use would be unprofitable based largely on the  
5 unfounded assumption that the Buchanans' entire herd would reside most of the  
6 year on the subject property, and thus would have to be fed imported feed for  
7 eight months or more at significant expense.<sup>19</sup> Landwatch notes that the  
8 Buchanans proposed to graze some of their herd on the subject property for only  
9 2-4 months, in spring and early summer when forage is most abundant, and that  
10 the Buchanans did not propose to leave the herd on the property the remainder of  
11 the year, or to conduct supplemental feeding on the subject property. Instead,  
12 Landwatch argues, it is clear under the Buchanan proposal that their herd would  
13 graze much of the year on their irrigated parcel near Powell Butte. However,  
14 Landwatch argues, the Campbell letter ignored this part of the proposal, and  
15 pretended that the herd would reside most of the year on the subject property, and  
16 either starve or require more than eight months of expensive supplemental  
17 feeding. By erroneously assuming that the proposal required supplemental

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<sup>19</sup> The Campbell letter estimated that supplemental feed for approximately eight months would cost between \$21,260 and \$43,204 per year, depending on the size of the herd and other variables, and that that supplemental feed cost alone would exceed the expected revenue from the grazing operation. Record 614-15.



1 feeding, Landwatch argues, the Campbell letter vastly over-estimated the costs  
2 of the proposed conjoined use.

3 Our remand in *Landwatch I* required the county to consider a scenario  
4 where the subject property is used essentially as a feedlot, with supplemental feed  
5 imported from elsewhere. Hence, it was not error for the county to consider the  
6 expense and feasibility of providing supplemental feed. However, we separately  
7 remanded for the county to evaluate the Buchanans' proposal for conjoined  
8 grazing use, which was limited to 2-4 months of grazing on the subject property  
9 and did not propose or require supplemental feed on the property. As we  
10 understand their proposal, for the remainder of the year their herd would be  
11 located on either their adjoining parcel or their Powell Butte irrigated pasture.

12 Intervenor 710 responds that because the Powell Butte pasture is located  
13 20 miles away from the subject property and is neither adjacent nor nearby, the  
14 Campbell letter and the county properly ignored the Powell Butte pasture for  
15 purposes of analyzing the profitability of conjoined use with the adjacent  
16 Buchanan parcel. It is true that our remand did not require the county to consider  
17 conjoined use between the subject property and the Powell Butte pasture itself.<sup>20</sup>

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<sup>20</sup> The Powell Butte pasture is not adjacent or nearby the subject property, and so would not require independent analysis of conjoined use for purposes of OAR 660-033-0020(1)(a)(B). But our understanding is that it is commonplace for cattle ranches in central Oregon to use noncontiguous parcels that are owned or leased, and to periodically transport cattle between the different units of the overall ranch operation. If an adjacent or nearby parcel is part of a larger

1 However, we did remand for the county to evaluate the Buchanan proposal for  
2 conjoined use of the subject property with the Buchanan parcel, and that proposal  
3 did not include leaving the Buchanan herd on the subject property for more than  
4 a few months, or for any period of time that would require supplemental feeding.

5 In essence, the Campbell letter evaluated the profitability of a significantly  
6 *different* proposal than the one proposed by the Buchanans. That erroneous focus  
7 on a different proposal significantly undermines the letter's conclusions  
8 regarding the profitability of conjoined use under the Buchanan proposal. The  
9 estimated cost of supplemental feed on the subject property is by far the largest  
10 single cost assumed by the Campbell letter. So large is that assumed cost for feed  
11 that, if it were subtracted, the Campbell letter could be read to indicate that the  
12 Buchanan proposal for conjoined use might be profitable, depending on what  
13 other variables and assumptions are employed.

14 Nonetheless, petitioners have not demonstrated that the county's choice to  
15 rely on the applicants' evidence regarding the profitability of conjoined use is not  
16 supported by substantial evidence, or that, as a matter of law, a reasonable  
17 decision-maker could only rely on the Buchanans' testimony. Despite some  
18 erroneous assumptions in the Campbell letter, the letter identifies a number of  
19 ongoing expenses that any conjoined grazing use of the subject property would

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noncontiguous ranch operation, an accurate evaluation of conjoined use with that  
adjacent or nearby parcel might well require some consideration of the role that  
parcel plays, and the subject property would play, in the larger ranch operation.

likely incur, and attempts to assign numbers to at least some of those expenses. For example, there is no dispute that the subject property lacks facilities for watering cattle. The Campbell letter notes the expense of digging new wells or hauling water to the subject property. Either method would require some means of distributing water to different sub-areas, and installing troughs of some kind. The Buchanans replied that digging a new well would be unnecessary, that a supply for 70 head of cattle—approximately 1,400 gallons—could be hauled to the subject property every two days. The Buchanans also suggested that the domestic well on the property could supply sufficient water, rather than hauling water from an offsite source. However, all water-hauling methods cited by the Buchanans would incur some unknown level of expense. Unlike the Campbell letter, the Buchanans made no effort to estimate any of the typical or likely expenses that their proposed conjoined grazing operation would incur.

In the face of the Campbell letter's attempt to estimate typical expenses and compare them to gross revenue, the Buchanans' generalized assertion that conjoined use could be profitable is not sufficient to compel the county to rely on the Buchanans' testimony. A more persuasive approach might have offered at least a pro forma budget for the proposed conjoined grazing operation, which



1 would identify the assumptions employed, attempt to quantify typical or likely  
2 expenses, and provide some estimate of revenue.<sup>21</sup>

3 The Campbell letter aside, the county's conclusions regarding conjoined  
4 use are also supported by several other letters from area ranchers and others with  
5 relevant experience. While those letters largely do not explain or quantify their  
6 conclusions that conjoined grazing use with the subject property would be  
7 unprofitable, in this respect they are no worse than the Buchanans' largely  
8 unexplained and certainly unquantified assertion that conjoined use with their  
9 adjoining parcel could increase their profits. As explained above, an adjoining  
10 rancher's mere *intent* or purpose to employ the subject property in an attempt to  
11 obtain a profit in money is not a sufficient basis on which to conclude that the  
12 subject property is suitable for grazing, in conjunction with adjacent or nearby  
13 ranch lands.

14 In this respect, the state of the evidentiary record resembles that in  
15 *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009) in which an adjoining  
16 rancher proposed a conjoined grazing operation. In response, the applicant

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<sup>21</sup> Respondents criticize the Buchanans for failure to submit tax or financial records of their Keystone operation. We disagree with respondents that submittal of such confidential information is necessary to support a proposal for conjoined use for purposes of OAR 660-033-0020(1)(a)(B). That said, there is no doubt that such a proposal would warrant more serious consideration if it were accompanied by a pro forma analysis of reasonably anticipated annual and amortized expenses and an estimate of anticipated revenue.

1 submitted an economic analysis of expenses and revenues that, like the Campbell  
2 letter, employed some questionable assumptions. Despite those flaws, we upheld  
3 the county's finding that the subject property was not suitable for grazing  
4 considering conjoined use, because the portions of the economic analysis  
5 untainted by questionable assumptions supported that finding, and no party  
6 provided comparable information regarding likely expenses or revenue. *See also*  
7 *Wetherell v. Douglas County*, 60 Or LUBA 131, 148 (2009), *aff'd* 235 Or App  
8 246, 230 P3d 976 (2010) (addressing a similar flawed economic analysis of  
9 conjoined use and absence of comparable evidence).

10 In sum, petitioners have not demonstrated that the county could not rely  
11 on the Campbell letter and other evidence in the whole record to conclude that a  
12 reasonable rancher would not undertake seasonal grazing of the subject property  
13 in conjunction with the Keystone operation with the primary purpose of obtaining  
14 a profit in money. The county found that the other OAR 660-033-0020(1)(a)(B)  
15 considerations also fail to support a conclusion that the subject property is  
16 suitable for farm use, and those findings are either unchallenged in this appeal or  
17 any challenges were resolved in *Landwatch I*. Accordingly, petitioners'  
18 arguments under these assignments of error do not provide a basis for reversal or  
19 remand.

20 The Buchanans' second sub-assignment of error is denied.

21 The Buchanans' and Landwatch's first assignments of error are denied.

1   **SECOND ASSIGNMENT OF ERROR (Landwatch)**

2           Landwatch argues that the county erred in failing to address conjoined use  
3   with adjacent or nearby properties other than the Buchanan parcel. Landwatch  
4   identifies two groups of properties that, it argues, the county failed to adequately  
5   evaluate for conjoined use with the subject property.

6           The first is the Johnson ranch, located approximately one mile from the  
7   subject property, outside the Study Area identified by the county. We understand  
8   petitioner to argue that the county should have evaluated the possibility of  
9   conjoined grazing use with the Johnson ranch. Intervenor 710 responds that any  
10   challenge to the adequacy of the Study Area identified by the county is foreclosed  
11   by petitioners' failure to challenge on appeal the Study Area adopted in the  
12   county's initial decision. In addition, 710 argues that a property located  
13   approximately one mile from the subject property is neither adjacent nor nearby,  
14   and thus need not be evaluated for conjoined use under OAR 660-033-  
15   0020(1)(a)(B).

16          We agree with 710 that all potential challenges to the Study Area or which  
17   lands should be studied for conjoined use were resolved or could have been  
18   resolved in *Landwatch I*, and that petitioner's arguments that the county should  
19   have evaluated conjoined use with the Johnson parcel outside the Study Area is  
20   waived, under the reasoning in *Beck*. In any case, we also agree with 710 that,  
21   while the geographic scope of "nearby" is somewhat elastic, petitioner has not  
22   established that property one mile away from the subject property is "nearby"



1 under the circumstances of this case, for purposes of OAR 660-033-  
2 0020(1)(a)(B). *See Wetherell*, 60 Or LUBA at 147 (parcel located two miles away  
3 is not “nearby”).

4 The second group of properties consists of adjacent and nearby irrigated  
5 farms within the Study Area, located to the northwest and the southeast, which  
6 grow crops such as alfalfa, orchard grass and timothy grass.<sup>22</sup> The county  
7 generally dismissed the notion of conjoined use with these irrigated properties,  
8 noting lack of interest by the owners, the steep topography separating the subject  
9 property from irrigated farms to the northwest, lack of irrigation on the subject  
10 property for cultivation of crops, and the other limitations discussed above with  
11 respect to the Buchanan proposal. However, Landwatch argues that the county  
12 failed to evaluate whether the irrigated farms could be used in conjunction with  
13 a grazing operation on the subject property. Landwatch disputes the county’s  
14 finding that it would be impracticable to move cattle back and forth between the  
15 subject property and irrigated parcels to the northwest, given the steep  
16 topography. Landwatch notes that the Buchanans proposed to walk cattle directly

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<sup>22</sup> Landwatch also cites to maps showing irrigated parcels that are beyond the Study Area identified by the county, located within about a 5-mile radius of the subject property. On this scale, Landwatch argues, the subject property seems almost surrounded by thousands of acres of irrigated parcels growing forage crops. However, as explained above, petitioner has not demonstrated that these parcels, most located miles away from the subject property, are “nearby” for purposes of OAR 660-033-0020(1)(a)(B).

1 to the subject property from their irrigated parcel to the southeast, where terrain  
2 is less steep. Landwatch also argues that parcels to the northwest could avoid  
3 steep slopes by trucking cattle along county roads to the southeast access point.

4 710 responds, and we agree, that petitioner has not demonstrated that the  
5 county erred in rejecting conjoined grazing use with irrigated parcels other than  
6 the Buchanan parcel. The same reasons discussed above that the county found  
7 militate against conjoined grazing use with the Buchanan parcel would  
8 presumably also apply to other adjacent irrigated parcels. In addition, such  
9 conjoined use would labor under the additional expense of trucking cattle back  
10 and forth, as well as the need to construct corrals and loading chutes on the  
11 subject property. Finally, we note that the scenario petitioner contemplates is that  
12 the irrigated parcels would convert their cropland to irrigated pasture, and convert  
13 their business model from growing crops for sale to a cattle grazing operation. It  
14 is doubtful that in considering conjoined use under OAR 660-033-0020(1)(a)(B)  
15 and OAR 660-033-0030(3), a county must consider scenarios requiring  
16 wholesale changes to farming practices on existing adjacent or nearby farm  
17 operations. OAR 660-033-0020(1)(a)(C) is concerned in part to *protect* existing  
18 farm practices. Reading OAR 660-033-0020(1)(a)(B) to require the county to  
19 consider scenarios where adjoining and nearby farm operations make  
20 fundamental changes in their farm practices and business models would put the  
21 two rules into conflict. Accordingly, we reject that argument.

22 Landwatch's second assignment of error is denied.

### 1   **THIRD ASSIGNMENT OF ERROR (Landwatch)**

2           The definition of “farm use” at ORS 215.203(2)(a) encompasses a wide  
3   array of activities, including “the feeding, breeding, management and sale of, or  
4   the produce of, livestock, poultry, \* \* \* [and] any other agricultural or  
5   horticultural use or animal husbandry or any combination thereof.” *See* n 2. In  
6   addition, ORS 215.203(2)(a) includes in the definition the profit-motivated  
7   “stabling or training [of] equines including but not limited to providing riding  
8   lessons, training clinics and schooling shows.”

9           Under the third assignment of error, Landwatch argues that the county  
10   erred in rejecting arguments that the subject property, in conjunction with  
11   adjacent or nearby parcels, could not be used to raise chickens, goats and pigs,  
12   produce eggs, grow plants in greenhouses, conduct feedlots, or operate a horse  
13   boarding or training facility, or a riding school.

14          The county rejected those arguments below, noting that all of the cited  
15   farm activities would require a water source, and citing the cost of purchasing  
16   water rights, drilling a well, installing a pump, irrigation system, etc. Addressing  
17   chicken-raising, the county further found that free-range chicken farms in Central  
18   Oregon require irrigated pasture. The county also found that all the cited activities  
19   would require establishing electrical service to the subject property, noting the  
20   need to cool animals and plants during summer months. The county found that  
21   establishing electrical service would be cost-prohibitive.



1 Landwatch challenges these findings, disputing that free-range chickens  
2 require irrigated pastures, and arguing that no new wells are needed, as the  
3 domestic well serving the non-farm dwelling on the property might provide all  
4 the water needed. Landwatch argues that a domestic or exempt well can be used  
5 for watering livestock, citing ORS 537.545.<sup>23</sup> With respect to electricity,  
6 petitioner argues that there is no evidence in the record that establishing electrical  
7 service would be cost-prohibitive, and in any case the operator could simply  
8 install solar panels and storage batteries.

9 710 responds by citing to expert testimony that chicken farms require  
10 irrigated pastures and significant water and electrical infrastructure. Record 980-  
11 83. We agree with 710 that the county's findings regarding chickens are  
12 supported by substantial evidence. Even if a single domestic well could legally  
13 and functionally supply all the water needed to support a chicken farm on the  
14 subject property, something petitioner does not attempt to establish, there is no  
15 doubt that installation of a water distribution system would represent significant  
16 expense.

17 With respect to electrical service, 710 cites to evidence that, due to various  
18 constraints upon the two electric utilities that serve the area, providing electricity  
19 to the property would cost \$365,000 from one utility and \$570,000 from the other,

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<sup>23</sup> ORS 537.545 provides in relevant part that certain uses of groundwater, including "stockwatering," are exempt from requirements to have a legally recognized water right.

1 and that extensions from both utilities would be needed to serve full development  
2 of the subject property. Record 891. Landwatch replies that these figures are  
3 based on estimates to extend power to supply a 71-lot subdivision, and argues  
4 that the record includes no estimate of cost to extend power to serve a chicken  
5 farm or similar farm facility. However, the cited evidence provides some support  
6 for the county's finding that providing electricity to service a chicken farm or  
7 other farm facility on the property would be a significant capital expense.  
8 Petitioner does not dispute that extending electrical service to farm uses would  
9 be relatively costly.

10 With respect to petitioner's suggestion that solar power could supply all  
11 electrical needs, 710 argues that this issue was not raised in any earlier phase of  
12 this appeal and is waived under *Beck*. We agree with 710. In any case, petitioner  
13 cites no basis to support its apparent presumption that installing solar panels and  
14 storage capacity necessary to serve chicken coops or similar farm facilities would  
15 cost less than extending power from the utilities.

16 For similar reasons, petitioner's arguments regarding goats, pigs, feedlots  
17 and greenhouses also provide no basis for reversal or remand. The county found  
18 that all such proposals would require installation of significant water and/or  
19 electrical infrastructure, at significant expense.

20 Finally, Landwatch argues that the findings concluding that the subject  
21 property is not suitable for horse boarding, riding and training facilities are not  
22 supported by substantial evidence. Landwatch cites the testimony of an equine

1 nutritionist stating that the subject property could be suitable for a boarding,  
2 riding and training facility, similar to four other horse facilities in the region,  
3 located near the cities of Bend and Redmond. The equine nutritionist also stated  
4 that many horses do not do well on irrigated pasture and require dry acreage. To  
5 counter, the applicants submitted statements from the operator of a horse  
6 boarding, training and riding facility, opining that such a facility requires a mix  
7 of dry and irrigated pasture, as well as level ground with a minimum of rocks,  
8 noting that all four of the facilities cited have those qualities, unlike the dry, steep,  
9 rocky terrain of the subject property. The operator also noted that all four  
10 facilities are located near urban areas, with good road access, and proximity to a  
11 large concentration of customers for horse facilities, unlike the subject property.  
12 The county chose to rely on the testimony of the facility operator over the equine  
13 nutritionist, adopting findings that the subject property lacks many of the qualities  
14 needed for a horse boarding, training and riding facility.

15 Landwatch argues that no reasonable decision-maker would rely on the  
16 testimony of a mere facility operator over a credentialed equine nutritionist, on  
17 the suitability of the subject property for a horse facility. However, we agree with  
18 710 that both sets of testimony constitute substantial evidence on that point.  
19 Accordingly, LUBA must defer to the county's choice of which substantial  
20 evidence to rely upon. *Younger*, 305 Or at 360.

21 Landwatch's third assignment of error is denied.



1 **FOURTH ASSIGNMENT OF ERROR (Landwatch)**

2 Landwatch argues that the county misconstrued the applicable law in  
3 rejecting arguments that the subject property could be profitably leased to  
4 adjoining property owners such as the Buchanans.

5 The county found that no reasonable rancher would lease the subject  
6 property for cattle grazing in conjunction with their own land, based on lack of  
7 forage and other reasons discussed elsewhere in this opinion.<sup>24</sup> However, the  
8 county also evaluated profitability with respect to the property owner acting as  
9 lessor, finding that lease revenue to the owner would not cover the cost of  
10 property taxes, even with farm tax deferral, or cover the cost of necessary  
11 improvements for grazing, such as the cost of installing perimeter fencing and  
12 water stations. Record 93, 113-14.

13 On appeal, Landwatch challenges those findings, arguing that the county  
14 misconstrued ORS 215.203(2)(a) by evaluating the profitability of a conjoined  
15 grazing use based on a lease from the lessor's perspective rather than the tenant's.  
16 According to Landwatch, the property owner in that circumstance is acting not

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<sup>24</sup> We note that the Campbell letter appears to include lease payments for the subject property as an expense to the farm operator, for purposes of evaluating profitability. Record 614. *But see Wetherell*, 60 Or LUBA at 156 (Ryan, Board Member, concurring, opining that lease payments should not be included as an expense in evaluating profitability under OAR 660-033-0020(1)(a)(B)). No party raises any issue on this point in this appeal, however, so we do not consider it further.

1 as a farmer but as a person engaged in a real estate business. Landwatch argues  
2 that the proper focus of any evaluation of profitability under ORS 215.203(2)(a)  
3 with respect to a proposal to lease the subject property as part of a conjoined  
4 grazing operation is on the tenant's grazing enterprise. Under that focus, we  
5 understand petitioner to argue, expenses incurred by the property owner as a  
6 property owner or land investor, for example property taxes and any capital  
7 improvements unrelated to a farm use, are not part of the profitability calculus.

8 710 responds that the county properly considered evidence that potential  
9 lease revenue from leasing the subject property for a conjoined grazing operation  
10 would not cover the expenses of land ownership, including property taxes and  
11 capital improvements that might be required to attract a tenant. 710 argues that it  
12 would be nonsensical to ignore evidence that fair market lease rates for grazing  
13 use would not cover the typical expenses of the property owner.

14 We generally agree with petitioner that the definition of "farm use" at ORS  
15 215.203(2)(a) is concerned with whether a reasonable farmer would be motivated  
16 to undertake farming activities listed in the rule, for the primary purpose of  
17 obtaining a profit in money from those activities, not whether a landowner would  
18 be motivated to lease the land for farming activities, with the primary purpose of  
19 obtaining a profit in rental income. In evaluating profitability as part of  
20 determining whether property is "suitable for farm use" considering conjoined  
21 use with adjacent or nearby farm parcels, the appropriate focus is on the potential  
22 revenues and expenses of the farm operator, not the property owner. The property

1 owner may well be holding the land based solely on investment-backed  
2 expectations, or as part of a tax strategy to generate a paper business loss, rather  
3 than because of its potential to generate income from farming activities.

4 That said, petitioner's argument on this point does not provide a basis for  
5 reversal or remand. As we understand the county's findings regarding landowner  
6 expenses in a lease scenario, such findings were alternatives to the county's  
7 primary analysis focused on whether a reasonable neighboring rancher would  
8 expand their grazing operation to include the subject property, with the primary  
9 purpose of obtaining a profit in money. The county answered that question in the  
10 negative, for a number of reasons discussed elsewhere in this opinion. We have  
11 affirmed the county's findings under that primary analysis. Accordingly, any  
12 error in the county's alternative findings regarding whether it would be profitable  
13 for the property owner to lease the subject property is not a basis for reversal or  
14 remand.

15 Landwatch's fourth assignment of error is denied.

### 16 **THIRD ASSIGNMENT OF ERROR (Redside)**

17 As noted, OAR 660-033-0020(1)(a)(C) requires the county to evaluate  
18 whether the subject property must remain designated and zoned for agriculture  
19 to permit farm practices to be undertaken on adjacent or nearby agricultural lands.  
20 Redside argued below that digging 71 exempt domestic wells would impact the  
21 groundwater aquifer that underlies all of the irrigation wells in the area, and  
22 potentially require that irrigation wells be deepened, at considerable expense.



1 Redside submitted testimony from a water expert that the cost of deepening an  
2 irrigation well could range from \$60,000 to over \$150,000. Record 1702. Redside  
3 argued that such expenses could negatively impact farm practices on adjoining  
4 and nearby irrigated farmlands.

5 The county rejected that argument, citing a study submitted by the  
6 applicants, that groundwater is declining generally in the area due to a multitude  
7 of causes, including climactic factors, and that the expected rate of withdrawal  
8 from the proposed 71 wells would be miniscule, a tiny fraction of the annual  
9 recharge rate for the aquifer.<sup>25</sup> Given the *de minimis* impact of the proposed  
10 domestic wells, the applicant's expert opined that there is no evidence that the  
11 wells would hasten the day when neighboring irrigation wells must be deepened,  
12 in any event, due to climactic and other factors that are occurring regardless of  
13 whether the domestic wells are dug. The findings also note that exempt wells to  
14 support farm use, or to support destination resort uses, could impact the aquifer  
15 to a similar or greater extent than the proposed domestic wells. Record 71.

16 On review, Redside first argues that the county excluded the adjoining  
17 Redside farm, with its four irrigation wells, from the Study Area, and thus failed  
18 to evaluate any impacts to the Redside wells at all. Thomas responds that the  
19 county's findings identify what petitioner refers to as the Redside property as the

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<sup>25</sup> According to the applicants' water expert, the 71 exempt wells would draw at most 51 acre feet of water per year, which is 0.0000182 percent of the annual recharge rate of the aquifer. Record 72.

1 Volwood Farms property, which is included in the Study Area, and which was  
2 evaluated along with all other adjoining or nearby irrigated farms for impacts on  
3 irrigation wells. As far as we can tell, Thomas is correct on this point.

4 Redside next argues that groundwater loss is a zero-sum game, and that  
5 any reduced water supply to irrigation wells, no matter how small or de minimis,  
6 or how overshadowed by groundwater loss caused by other factors, may impact  
7 farm practices on adjacent or nearby irrigated farmlands. Relatedly, Redside  
8 disputes that it is appropriate to compare the groundwater loss from the 71  
9 proposed wells with hypothetical groundwater loss that might occur from exempt  
10 wells for farm use of the property, or from wells supplying a hypothetical  
11 destination resort.

12 We tend to agree with Redside that a comparison with the groundwater  
13 loss that might occur assuming hypothetical development of the subject property  
14 with exempt farm uses or destination resort uses does not assist the county's  
15 evaluation of impacts under OAR 660-033-0020(1)(a)(C). Nothing in the rule  
16 suggests that impacts to farm practices from proposed development can be  
17 ignored if other types of land uses potentially allowed on the property could have  
18 similar impacts. However, that comparison with the impacts of other uses appears  
19 in the findings as an aside. Record 72 ("Putting comparison aside..."). The  
20 county's primary rationale for finding no impact on irrigation wells is its  
21 conclusion that the impact of 71 domestic wells on the aquifer would be so small  
22 compared to the annual recharge rate, that it would not "hasten the day" when

1 area farmers must deepen their wells in any event, due to general aquifer decline.  
2 If that conclusion is supported by the record, then any error in comparing impacts  
3 of hypothetical wells serving different potential uses is not a basis for remand.

4 We conclude that the water study submitted by applicants is substantial  
5 evidence supporting the county's primary conclusion on this point. For purposes  
6 of OAR 660-033-0020(1)(a)(C) the applicable test is not "no impact," but  
7 whether the impacts would not permit farm practices to be undertaken on  
8 adjoining and nearby agricultural land. A reasonable fact-finder could conclude  
9 from the record that the impact of 71 domestic wells on the aquifer would not  
10 significantly hasten the day when irrigation wells must be deepened in any event.  
11 In addition, to reduce any impact, the county imposed a condition limiting  
12 irrigation per domestic well to one-quarter acre, rather than the half-acre figure  
13 allowed under state law. This condition goes some way toward ensuring that any  
14 impact is not inconsistent with OAR 660-033-0020(1)(a)(C).

15 Finally, Redside argues that the county erred in minimizing the financial  
16 impact to farmers to deepen their irrigation wells, based on evidence that  
17 deepening a domestic well in the area costs only \$6,537. Record 75. As noted,  
18 Redside's expert testified that typical costs for deepening an irrigation well can  
19 range between \$60,000 and \$150,000. Redside contends that no reasonable fact-  
20 finder would rely on evidence regarding the costs of deepening a domestic well  
21 to draw any conclusions regarding the costs of deepening an irrigation well.



1        However, the county cited the cost of deepening a domestic well in the  
2 context of addressing an argument about impacts to *domestic* wells. Record 74-  
3 75. The passage cited by petitioner did not address impacts on irrigation wells,  
4 and as far as petitioner has established, the county did not draw any conclusions  
5 regarding the cost of deepening irrigation wells from the testimony regarding the  
6 cost of deepening a domestic well.

7        Redside's third assignment of error is denied.

8        **FOURTH ASSIGNMENT OF ERROR (Redside)**

9        As noted, the only access to the property is from the southeast, off NW  
10 Coyner Avenue. The challenged decision requires a second access road for  
11 emergency vehicle access, connecting to NW 93rd Street north of the property.  
12 The required emergency access would require an easement from the BLM.

13        Redside argues that there is no evidence in the record that BLM will grant  
14 the easement, or where secondary access would go if BLM declines to grant an  
15 easement. Redside notes that farms to the north of the property use county roads  
16 to transport cattle in a circulation route. Redside speculates that if an alternative  
17 emergency access point is approved, then it may not be limited to emergency  
18 access, and it is possible that traffic from the 71-lot subdivision would take access  
19 using the county roads to the north, thus interfering with cattle circulation.  
20 Redside argues that the county erred in assuming that all resident traffic would  
21 access the property via NW Coyner Avenue, and thus avoid conflicts with the  
22 cattle circulation route to the north.

1           Thomas responds that binding conditions of approval prohibit the creation  
2 of new points of access to the property for use by residential traffic. Record 138.  
3 We agree with Thomas that that condition ensures that the traffic impacts Redside  
4 speculates might occur will not occur.

5           Redside's fourth assignment of error is denied.

6           The county's decision is affirmed.