BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McKAY CREEK VALLEY ASSOCIATION, ALLEN NEURINGER, MARTHA NEURINGER, GEORGE NORWOOD, TINA NORWOOD, LEO NASLANKA, KAREN CALIENDO, GREG MECHLEM, DIANA YATES, HARLEY ANDERS, DEXTER D. DANIELSON, NANCY DANIELSON, R.G. DANIELSON, NELS GABBERT, ROBERT GROTT, BILL HOUDEK and CHRIS MICHEL, Petitioners, vs. WASHINGTON COUNTY, Respondent.	LUBA Nos. 89-027 and 89-028 FINAL OPINION AND ORDER

Appeal from Washington County.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Mitchell, Lang and Smith.

Cheyenne Chapman and John M. Junkin, Hillsboro, filed the response brief, and Cheyenne Chapman argued on behalf of respondent.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee.

REMANDED 09/18/89

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

Opinion by Sherton.

NATURE OF THE DECISIONS

Petitioners appeal two Washington County decisions approving farm related dwellings on two parcels in the Exclusive Forest and Conservation (EFC) zone.[1]

MOTION TO DELETE PETITIONERS

Petitioners move to delete Jay and Sharlene Beavers as petitioners. There is no opposition to the motion, and it is allowed.

FACTS

The subject parcels are part of the undeveloped 32-lot Overlook Acres subdivision, which was recorded in 1916.[2] Parcel A is 7.2 acres, comprised of 4.7 wooded acres and 3.2 acres planted with strawberries. The proposed dwelling would be sited in the wooded portion of Parcel A. Parcel B is 5.2 acres, comprised of 2.9 acres planted with strawberries and 3.3 acres in an old orchard and a small pasture. The proposed dwelling would be sited in the orchard portion of Parcel B. Both parcels are designated "Wildlife Habitat" by the county's Rural/Natural

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[1]The EFC zone is intended "to provide for forest uses" and "to meet Oregon Statutory Requirements for forest lands." Washington County Community Development Code (CDC) 342-1. The EFC zone is not an exclusive farm use zone.

[2]The parcels which are the subject of the appeals in LUBA Nos. 89-027 and 89-028 shall be referred to as "Parcel A" and "Parcel B," respectively. In addition, three record documents have been filed in this consolidated proceeding. We cite the record filed in LUBA No. 89-027 as "Record A," the record filed in LUBA No. 89-028 as "Record B" and the supplemental record filed in the consolidated proceeding as "Record C."

Resource Plan (plan).[3]

On November 14, 1988, two applications for farm related dwellings on Parcels A and B were filed. They were processed by the county as applications for dwellings in conjunction with farm use in the EFC zone under CDC 342-2.5. Under CDC 342-2, such dwellings are uses permitted in the EFC zone through a "Type I" procedure. The Type I procedure provides for decisions by the county planning director (director), without public notice or hearing. CDC 202-1.3. Type I decisions may be appealed to the hearings officer or planning commission by the applicant only. Id. The director issued decisions approving farm related dwellings on Parcels A and B on January 27 and February 1, 1989, respectively. These appeals followed.

JURISDICTION

The county contends that we lack jurisdiction to review the appealed decisions because they are not "land use decisions," as defined by ORS 197.015(10).[4] ORS 197.015(10)(b) provides that "land use decision":

> "Does not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government under ORS 215.402 to 215.438 * * *."

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[3]The Rural/Natural Resource Plan is part of the Washington County Comprehensive Plan.

[4]LUBA has exclusive jurisdiction to review "land use decisions" of local governments. ORS 197.825(1).

The county makes three arguments in support of its contention that the challenged decisions are within the above-quoted exception for "ministerial" decisions. We address each argument separately.

A. Legislative Determination By County

The county points out that the acknowledged CDC identifies approval of farm related dwellings in the EFC zone as a Type I development action. CDC 242-2. The county argues that CDC 202-1.1 defines Type I actions as governed by non-discretionary, clear and objective review criteria.[5] According to the county, this definition is a legislative determination, made by the county and acknowledged by the Land Conservation and Development Commission (LCDC), that such Type I decisions are ministerial, and do not involve the exercise of significant factual or legal judgment.

Whether a local government decision is a "ministerial decision * * * made under clear and objective standards," as described in ORS 197.015(10)(b), is a question of state law. LUBA owes no deference to a local government's interpretation of state law. Hammack & Associates, Inc. v. Washington County, 89

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[5]CDC 202-1.1 states:

> "Type I development actions involve permitted uses or development governed by clear and objective review criteria. Type I actions do not encompass discretionary land use decisions. Impacts have been recognized by the development standards. The intent and purpose of the district is not a consideration of approval in Type I uses."

Or App 40, 45, 747 P2d 373 (1987); Williams v. Wasco County, ___ Or LUBA ___ (LUBA No. 89-057, September 11, 1989), slip op 7. Furthermore, acknowledgment of a county's comprehensive plan and land use regulations by LCDC certifies only that the plan and regulations comply with the Statewide Planning Goals. ORS 197.015(1). It does not establish that the plan and regulations comply with state statutes, or that all statements made in the plan and regulations are legally correct.

In order to determine whether the challenged decisions are ministerial decisions made under clear and objective standards, we must determine whether, under the applicable standards of the county's plan and land use regulations, the challenged decisions can be made without the exercise of significant factual or legal judgment. Flowers v. Klamath County, ___ Or App ___, ___ P2d ___ (September 13, 1989); Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev den 303 Or 74 (1987).

B. CDC Standards

CDC 342-2.5 provides that the following use is permitted in the EFC zone "subject to the applicable standards as set forth in Article IV:"

> "Dwelling Unit (including a mobile home) in conjunction with farm use as defined in ORS 215 - Section 430-37A(1)(a) and (b)" (Emphasis added.)

CDC Section 430 establishes "special use standards" for specific uses. CDC 430-37.2A provides in relevant part:

> "Dwelling Unit (including a mobile home) customarily provided in conjunction with farm use as defined in ORS Chapter 215 for the owner, tenant or for a farm

employee of the owner or the tenant farmer.

"A dwelling in the * * * EFC District may be approved upon a finding that the proposed dwelling is customarily required to conduct the proposed farm use. The applicant shall provide, in affidavit form, information which shall meet the following:

"(1) A dwelling in conjunction with farm use or the propagation or harvesting of a forest product on a lot or parcel * * * managed as part of a farm operation or wood lot which:

"* * * * *

"(b) * * * is planted in perenials [sic] capable of producing, upon harvest, an average of at least $10,000 in gross annual income * * *

"* * * * *

"(2) In addition, in the EFC District, the applicant must show whether or not the proposed dwelling will seriously interfere with the preservation of fish and wildlife areas and habitats identified in the Washington County Comprehensive Plan, or how the interference can be mitigated."

According to the county, ORS 215.288(2) requires counties which designate marginal lands pursuant to ORS 197.247, as Washington County has, to adopt the standards of ORS 215.213(1) to (3). The county argues it accordingly based the above-quoted CDC standards on the stricter, objective standards of ORS 215.213(1) to (3), rather than on the subjective, discretionary standards of ORS 215.283. The county further argues "[t]he clear intent of the [CDC] and state law for counties with marginal land provisions is to reduce, if not eliminate entirely, any discretion in granting permits for farm related dwellings." Respondent's Brief 4.

The above-quoted provisions of CDC 430-37.2A bear some resemblance to those of ORS 215.213(2)(b). ORS 215.213(2)(b) provides in relevant part:

> "The following uses may be established in any area zoned for exclusive farm use if the use meets reasonable standards adopted by the governing body:
>
> "* * * * *
>
> "(b) A dwelling <u>in conjunction with farm use</u> or the propagation or harvesting of a forest product on a lot or parcel that is managed as part of a farm operation or woodlot * * * if the lot or parcel:
>
> "(A) * * * is planted in perennials capable of producing upon harvest an average of at least $10,000 in annual gross farm income * * *
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> "* * * * *" (Emphasis added.)

Nevertheless, there are significant differences between the relevant provisions of CDC 430-37.2A and ORS 215.213(2)(b). A comparison of the emphasized portions of the above quoted CDC and statutory language shows that the statute requires the dwelling be "in conjunction with" farm use, whereas the CDC provision requires the dwelling also be "customarily provided in conjunction with farm use" and "customarily required to conduct the proposed farm use." In addition, CDC 430-37.2A(2) contains the additional standard that the dwelling not seriously interfere with identified fish and wildlife habitat areas.

Furthermore, ORS 215.288(2) requires counties which designate marginal lands to "apply ORS 215.213(1) to (3) <u>to land zoned for exclusive farm use</u> * * *." (Emphasis added.) As we

explained in n 1, the EFC zone is not an exclusive farm use zone and, therefore, the county is not required by statute to adopt approval standards for uses in the EFC zone which are consistent with ORS 215.213(1) to (3).[6] In view of these distinctions, we conclude that the intent of the state marginal lands legislation and the provisions of ORS 215.213(2)(b) do not control our interpretation of CDC 430-37.2A.

A determination of the compliance of a proposed dwelling with the relevant provisions of CDC 430-37.2A requires the exercise of significant factual or legal discretion in several respects. First, the determination of whether the proposed dwelling "will seriously interfere with the preservation of fish and wildlife areas and habitats" depends upon the specific facts of the situation and a legal judgment of what constitutes serious interference. Second, the determination of whether the perennials planted are capable of producing an average of $10,000 gross annual income upon harvest depends upon specific facts concerning site and market conditions, and judgment as to appropriateness of the proposed farming techniques. Finally, determinations of whether a dwelling is "customarily required to conduct the proposed farm use" and "customarily provided in conjunction with [the] farm use" also clearly require the

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[6]However, if the county does choose to adopt statutory language in its code standards, it must interpret those code standards consistently with interpretation of the corresponding statutory provisions by the courts and this Board. See discussion under the seventh assignment of error, infra.

exercise of factual and legal judgment. Doughton v. Douglas County, supra.

C. Resolution and Order 88-69

The county argues that even if the relevant provisions of CDC 430-37.2A are themselves discretionary, that discretion is eliminated by application of the nondiscretionary standards of Resolution and Order 88-69 (resolution). According to the county decisions challenged in this case, the resolution establishes that 2.6 acres of strawberries are capable of producing at least $10,000 in gross annual farm income and, therefore, that the proposed farm uses are "sufficient to qualify the parcel for a dwelling in conjunction with farm use." Record A10; Record B10.

The resolution incorporates several exhibits and states that the standards described in these exhibits are "adopted as the reasonable standards to review request [sic] pursuant to [CDC] 430-37.2A(1) * * *." Record C29. Exhibit B to the resolution is entitled "Criteria for Processing and Reviewing Dwelling Requests Pursuant to [CDC] 430-37.2A(1)(b) and (c)." Record C32. Exhibit B requires applicants for a farm dwelling to submit a farm management plan which complies with Exhibits D, E and F to the resolution. Id. Exhibit E to the resolution sets out a "list of Washington County Perennials listing the minimum acreage of various perennials which are capable of producing an average of at least $10,000 in annual gross farm

income."[7] Record C35.

We conclude that Exhibits B and E to the resolution purport to establish objective standards for determining whether the standard of CDC 430-37.2A(1)(b), requiring that the subject property be "planted in perenials [sic] capable of producing, upon harvest, an average of at least $10,000 in gross annual income," is satisfied by the proposed farm use.[8] However, the resolution does not purport to address whether a dwelling is (1) "customarily required to conduct [that] farm use," or (2) "customarily provided in conjunction with [that] farm use," both of which are discretionary determinations required by CDC 430-37.2A. Furthermore, the resolution does not address whether a dwelling "will seriously interfere with fish and wildlife areas and habitats," a discretionary determination required, in this case, by CDC 430-37.2A(2). Thus, application of the resolution cannot have the effect of eliminating the significant factual and legal judgment required in application of CDC 430-37.2A.

Based on the foregoing, we conclude that the challenged

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[7]Exhibit E has a list of various types of fruit and nut trees, with corresponding figures for "minimum trees/acre" and "acreage required." It also lists various small fruit and berry plants, with corresponding figures for "minimum plants/acre," "spacing of rows," "spacing of plants" and "acreage required." For strawberries, Exhibit E requires a minimum of 11,000 plants/acre, row spacing of 42 feet [sic], plant spacing of 12-14 inches and a minimum of 2.6 acres. Record C35.

[8]Whether the county's adoption of the resolution does, in fact, replace the discretionary gross annual income capability standard of CDC 430-37.2A(1) with objective criteria is discussed under the assignments of error which follow.

county decisions approving farm related dwellings in the EFC zone are discretionary decisions, not ministerial decisions made under clear and objective standards. Thus, they are land use decisions for which LUBA has review jurisdiction.

STANDING

Standing is an issue in this case. The county argues that petitioners do not have standing because they were not entitled to notice of the appealed decisions and were not aggrieved by the decisions. The county contends that under the Type I procedure required by the CDC, only the applicants had opportunity for notice and hearing and standing to appeal.

We understand the county to argue that petitioners do not satisfy ORS 197.830(3)(c). ORS 197.830(3)(c) provides that a person may petition the Board for review if the person:

> "Meets one of the following criteria:
>
> "(A) Was entitled as of right to notice and hearing prior to the decision to be reviewed; or
>
> "(B) Is aggrieved or has interests adversely affected by the decision." (Emphasis added.)

However, although the county does contend petitioners were not entitled as of right to notice and hearing prior to the challenged decisions, and were not aggrieved by the decisions, the county does not contend that petitioners do not have interests adversely affected by the decisions.

The petition for review contains allegations that each of the individual petitioners are adversely affected by the county's decisions. Furthermore, attached to the petition is an

affidavit from each individual petitioner which states he or she owns property within sight and sound of the subject parcels and would be adversely affected by increased traffic, noise, loss of wildlife habitat and, in some instances, interference with forestry operations. The petition for review also alleges that the individual petitioners are members of petitioner McKay Creek Valley Association (MCVA), which "has among its organizational objectives the protection of rural resource lands through the implementation and enforcement of Oregon's land use planning program," and asserts, therefore, that petitioner MCVA has representaional standing. Petition for Review 1, 11.

The county does not contest the allegations described above, or explain why they are inadequate to satisfy the "has interests adversely affected by the decision" criterion of ORS 197.830(3)(c)(B). Furthermore, the county does not contest petitioner MCVA's claim of representational standing, other than by contesting the individual standing of MCVA's members.

Petitioners' allegations are adequate to satisfy ORS 197.830(3)(c).[9] We reject the county's challenge to petitioners' standing.

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[9]However, even if petitioners' allegations were not adequate to satisfy the "adversely affected" criterion of ORS 197.830(3)(c), we note that under the Court of Appeals' recent decision in Flowers v. Klamath County, supra, slip op at 6-7, petitioners' contentions that no hearings were held and no notice given by the county are sufficient to satisfy the "appearance" criterion of ORS 197.830(3)(b), and the "aggrieved" criterion of ORS 197.830(3)(c), if such hearings and notice were required by statute. We address petitioners' claim that hearing and notice are statutorily required under the first assignment of error.

FIRST ASSIGNMENT OF ERROR

> "Respondent exceeded its jurisdiction, misconstrued the applicable law, and failed to follow the procedures applicable to the matter before it to the prejudice of Petitioners' substantial rights in approving the subject applications in violation of ORS 215.402 to 215.428 and CDC section 202."

Petitioners argue that because the appealed decisions involve the exercise of significant legal and factual judgment, they are discretionary and, therefore, they are decisions approving "permits," as defined by ORS 215.402(4). Petitioners argue the county acted contrary to ORS 215.416(3) by approving these permits without holding a public hearing on the applications. According to petitioners, the only exception to this requirement for a public hearing on permit applications is found in ORS 215.416(11), which allows counties to approve permit applications without a prior hearing if they give notice of their decisions and provide an opportunity to appeal. Petitioners contend the county did not satisfy the requirements of ORS 215.416(11) in this case, because it did not give notice of its decision to those affected, including petitioners, and did not provide petitioners with a means to appeal the decisions.[10]

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[10]Petitioners also argue that the county violated provisions of CDC 202 by classifying the subject applications as Type I applications. According to petitioners, pursuant to CDC 202.5-1, the director should have classified the applications as Type II or III, because those procedures would have provided petitioners with either a hearing by right or a hearing upon appeal.

The EFC zone lists dwellings in conjunction with farm use, pursuant to CDC 430-37.2A, as uses "permitted through a Type I procedure."

The county argues that the appealed decisions are not discretionary. The county's arguments are summarized under our discussion of jurisdiction, supra.

ORS 215.402(4) defines "permit" as:

> "* * * discretionary approval of a proposed development of land under ORS 215.010 to 215.438 or county legislation or regulation adopted pursuant thereto."

In deciding that we have jurisdiction over the subject appeals, supra, we determined the challenged decisions are discretionary. Accordingly, we conclude the county's decisions approved "permits," as defined by ORS 214.402(4).

ORS 215.416(3) and (5) provide:

> "(3) Except as provided is subsection (11) of this section, the hearings officer shall hold at least one public hearing on the [permit] application."
>
> "(5) Hearings under this section shall be held only after notice to the applicant and also notice to other persons as otherwise provided by law and shall otherwise be conducted in conformance with ORS 197.762."

The county failed to hold a public hearing on either of the appealed applications and, therefore, violated the notice and hearing requirements of ORS 215.416(3) and (5).[11]

CDC 342-2.5. The list of Type I actions in CDC 202-1.2 includes "those identified in this Code as Type I actions." CDC 202-1.2A. CDC 202-5.1 gives the director discretion to classify an application as Type I, II or III only when the CDC does not identify the application as a specific type. Cornell Park Associates v. Washington County, ___ Or LUBA ___ (LUBA No. 88-032, August 24, 1988), slip op 5. The county, therefore, did not violate the CDC by following a Type I procedure in acting on the subject applications.

[11]We agree with petitioners that because the county did not provide notice of its decisions or a means to appeal the decisions to anyone other

The first assignment of error is sustained.[12]

SECOND, THIRD AND SIXTH ASSIGNMENTS OF ERROR

> "In making its decision, Respondent, used criteria (Resolution and Order 88-69) not authorized pursuant [sic] its county charter and not acknowledged pursuant to ORS 197.251 or ORS 197.610 to 197.625. The challenged decisions thus improperly construed the applicable law and Respondent acted without having jurisdiction."
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> "Respondent misconstrued the applicable law and made a decision not supported by substantial evidence in the whole record when it determined that the subject applications complied with CDC sec. 430`37.2A and ORS 215.213(2)(b), and its purported implementing device, Washington County Commissioners Resolution and Order 88-69. Further, the lack of a sufficient factual justification and explanation of the decision and applicable standards violates ORS 215.416(9)."
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> "Respondent's conclusion that both challenged parcels are planted in perennials capable of producing upon harvest an average of at least $10,000 per year in annual gross farm income improperly construes applicable law and lacks substantial evidence in the whole record."

In these assignments of error, petitioners challenge the county's interpretation of CDC 430-37.2A and the resolution, the adequacy of the county's findings to address these provisions

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than the applicant, the county did not comply with the requirements of ORS 215.416(11) for approving a "permit" application without a hearing.

[12]Sustaining this assignment of error, in itself, requires that we remand the decisions to the county to hold the hearings and give the notice required by ORS 215.416(3) and (5). However, ORS 197.835(10)(a) generally requires us, when reversing or remanding a land use decision, to decide all issues presented to us. The purpose of this requirement is to provide any guidance needed to the local government, so that it may correct all deficiencies in its decision without the need for repeated appeals to this Board. Standard Insurance Co. v. City of Hillsboro, ___ Or LUBA ___ (LUBA No. 88-120, April 26, 1989), slip op 8, aff'd 97 Or App 625 (1989). Therefore, we will consider issues raised by petitioners in their remaining assignments of error if their resolution will provide useful guidance to the county on remand.

and the evidentiary support in the record for the county's determinations of compliance with these provisions. Because of our resolution of the first assignment of error, the appealed decisions must be remanded to the county for public hearing and, therefore, no purpose would be served by reviewing the adequacy of the county's findings and of the evidence in the record, to support the appealed decisions. However, we will consider petitioners' arguments concerning interpretation of the applicable standards, as those standards must be applied by the county on remand.

Petitioners argue that the county cannot interpret the resolution to make compliance with it equal compliance with CDC 430-37.2A(1). According to petitioners, the resolution cannot have such effect because (1) it was adopted in violation of the Washington County Charter (charter); and (2) it has not been acknowledged by LCDC pursuant to ORS 197.251 or 197.625.

We explained under subsection C of our above discussion concerning jurisdiction that we interpret the applicable provisions of the resolution as purporting to establish objective standards for determining compliance with the "planted in perennials capable of producing * * * $10,000 in gross annual income" standard of CDC 430-37.2A(1)(b). Thus, under the resolution, a finding that a certain number of acres have been planted, at a certain density, with a particular type of perennial equals compliance with the standard of

CDC 430-37.2A(1)(b).[13]

ORS 197.175(2)(d) requires cities and counties to "make land use decisions in compliance with the acknowledged [comprehensive] plan and land use regulations." In order for a county's comprehensive plan and land use regulations to be acknowledged by LCDC, they must be adopted through a citizen involvement process, as required by Statewide Planning Goal 1, and be subject to additional public and agency review in the acknowledgment process pursuant to ORS 197.251. Additionally, if an acknowledged plan or regulation is amended, or a new land use regulation is adopted after acknowledgment, it is required to comply with the Goal 1 citizen involvement process and the postacknowledgment notice and hearing requirements of ORS 197.610 and 197.615. This process provides for review by the public and the Department of Land Conservation and Development, before the adopted provisions are considered acknowledged pursuant to ORS 197.625.

The CDC is an acknowledged land use regulation. However, it is undisputed by the parties that the resolution was not part of the county plan and land use regulations initially acknowledged by LCDC, and was not adopted under the

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[13]In addition, Exhibit B to the resolution provides that applicants are not limited to the acreage/density standards of Exhibit E, "if the applicant can demonstrate that the proposed farm plan can meet the $10,000 requirement." Record C32. Additional standards for reviewing farm plans in such instances include "water rights, irrigation potential, compatibility with soils, slope, * * * time of planting [and whether the farm plan can be] implemented using good farm management practices." Id.

postacknowledgment amendment procedures of ORS 197.610 to 197.625.[14] Thus, the resolution is not an acknowledged land use regulation. To allow the provisions of the unacknowledged resolution to replace those of acknowledged CDC 430-37.2A(1)(b) as the applicable standard for certain land use decisions would, in effect, negate the procedures required by statute and goal to obtain acknowledgment of the CDC provision.[15] We, therefore, conclude that the county is required by statute to comply with the standard established by CDC 430-37.2A(1)(b), and that standard is not replaced or superseded by standards established in Resolution 88-69.[16]

The second, third and sixth assignments of error are sustained in part.

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[14]We do not determine whether the county's adoption of the resolution complied with its charter.

[15]The county supports its argument that compliance with the standards of the resolution conclusively determines compliance with CDC 430-37.2A(1) with citations to legislative history of the 1983 marginal lands legislation. However, as we previously explained, the marginal lands legislation requires particular statutory provisions to be applied in certain instances to land zoned for exclusive farm use. However, the land in question is not so zoned. Thus, we do not see the relevance of the legislative history of the marginal lands provisions to this case.

[16]On remand, the county must make a determination, supported by findings and substantial evidence in the record of the proceeding, on whether each of the proposed dwellings complies with CDC 430-37.2A(1)(b). In addition, we note we do not imply that the county could not, by following postacknowledgment amendment procedures, amend CDC 430-37.2A(1)(b) to replace the current standard with those of the resolution. However, such an amended code standard would be applicable only to applications filed after it was adopted. ORS 215.428(3).

SEVENTH ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and violated ORS 215.203(2)(a) and 215.416(9) [by not] determining whether the subject dwelling would be 'in conjunction with farm use' as defined by ORS 215.203(2)(a), or satisy[ing] the standards in OAR 660-05-030(4)."

Petitioners argue that CDC 342-2.5 permits dwellings in the EFC zone which are "in conjunction with farm use as defined in ORS [ch]215 * * *." Petitioners point out that CDC 430-37.2A refers to dwelling units "customarily provided in conjunction with farm use as defined in ORS Chapter 215 * * *." Petitioners argue that the county erred by failing to require that the proposed dwellings be in conjunction with farm uses which satisfy the statutory definition of "farm use" in ORS 215.203(2)(a). Petitioners also argue that the county failed to determine, as required by OAR 660-05-030(4), that "the day-to-day activities on the subject land are principally directed to the farm use of the land."[17]

A. ORS 215.203(2)

ORS 215.303(2) defines "farm use," in relevant part, as:

> "(a) * * * 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

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[17]Petitioners also argue that the county's decision lacks the findings necessary to demonstrate compliance with ORS 215.203(2)(a) and OAR 660-05-030(4), and contend this omission is a violation of ORS 215.416(9). Petitioners further argue that the record lacks substantial evidence to support the required findings. However, as previously explained, we address only petitioners' arguments regarding improper construction of the applicable legal standards by the county in making the challenged decisions.

> the products of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or anu other agricultural or horticultural use or animal husbandry or any combination thereof. * * *
>
> "(b) 'Current employment' of land for farm use includes:
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> "* * * * *
>
> "(C) Land planted in orchards or other perennials * * * prior to maturity;
>
> "* * * * *"

As petitioners point out, CDC 342-2.5 and 430-37.2A require the proposed dwellings to be "in conjunction with farm use as defined in ORS [ch]215," and "customarily provided in conjunction with farm use as defined in ORS Chapter 215," respectively. (Emphasis added.) We agree with petitioners that these CDC provisions require the farm use with which the proposed dwellings are in conjunction to satisfy the statutory definition of "farm use" in ORS 215.203(2).[18]

B. OAR 660-05-030(4)

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

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

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[18]We note, however, that findings demonstrating that the farm use with which proposed dwellings are in conjunction satisfies the definition of "farm use" in ORS 215.203(2) need not be in any particular form. In many instances, the findings required to demonstrate compliance with the annual gross farm income standard of CDC 430-37.2A(1)(b) may also suffice to demonstrate that the farm use satisfies ORS 215.203(2).

The relevant provisions of ORS 215.213(1)(g) and 215.283(1)(f) are essentially the same. They authorize counties to permit in exclusive farm use zones "dwelling[s] customarily provided in conjunction with farm use."[19] The Oregon Court of Appeals has held that "OAR 660-05-030(4) states substantive policy as well as statutory interpretation." (Emphasis added.) Newcomer v. Clackamas County, 94 Or App 33, 39, 764 P2d 927 (1988).

We recognize that the EFC zone is not an exclusive farm use zone. However, CDC 430-37.2A incorporates the statutory "dwellings customarily provided in conjunction with farm use" language of ORS 215.213(1)(g) and 215.283(1)(f). At least in the absence of any county legislative history for CDC 430-37.2A indicating a different intent, this CDC provision is properly interpreted the same as the identical statutory provisions. See Joseph v. Lane County, ___ Or LUBA ___ (LUBA No. 89-048, September 11, 1989), slip op 13-14. In Newcomer v. Clackamas County, supra, the Court of Appeals determined that OAR 660-05-030(4) properly interprets these statutory provisions. We, therefore, conclude that the interpretation and application of CDC 430-37.2A must also be consistent with OAR 660-05-030(4).

The seventh assignment of error is sustained in part.

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[19]ORS 215.213(1)(g) adds the qualification that the proposed dwelling be "on a lot or parcel that is managed as part of a farm operation not smaller than the minimum lot size in a farm zone with a minimum lot size acknowledged under ORS 197.251." However, in this case, this distinction is not relevant.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

> "The County's decisions fail to address criteria relating to the potential for serious interference with preservation of fish and wildlife areas and habitats under CDC secs. 422 and 430."
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> "Respondent misconstrued the applicable law and made a decision not supported by substantial evidence in the whole record when it determined that the subject applications complied with CDC sec. 422. Further, the lack of a sufficient factual justification and explanation of the decision and applicable standards and criteria violates ORS 215.416(9)."

Under these assignments of error, petitioners argue that the county's decisions are not supported by findings or evidence adequate to demonstrate compliance with the fish and wildlife habitat preservation requirement of CDC 430-37.2A(2). Because we remand the county's decisions for the county to hold the public hearings on the subject applications required by statute, no purpose would be served by reviewing the adequacy of the present findings in support of the decisions, or of the evidence in the present record.

The county's decisions are remanded.