BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HAROLD REED,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 90-006
LANE COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
ROY DUNCAN,	)	
	)	
Intervenor-Respondent.	)	

Appeal from Lane County.

Harold Reed, Eugene, filed the petition for review and argued on his own behalf.

Stephen L. Vorhes, Eugene, filed a response brief and argued on behalf of respondent.

Joseph J. Leahy, Springfield, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Harms, Harold & Leahy.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 06/21/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the Lane County Hearings Official approving an application for a nonfarm dwelling.

MOTION TO INTERVENE

Roy Duncan moves to intervene on the side of the respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenor-respondent's (intervenor's) predecessor in interest applied for permission to place a nonfarm dwelling on an 11.34 acre parcel, zoned Exclusive Farm Use 40 (E-40). Approximately 8.84 acres of the subject property are covered by brush and trees and approximately 2.5 acres of the subject property are open. The property consists of Natroy Silty Clay Loam soils which have an Agricultural Class IV rating. The subject property is bisected by Spencer Creek. A portion of the subject parcel is specially assessed for farm use.

All of the parcels surrounding the subject property are zoned E-40. To the west of the subject property is a 29.4 acre parcel upon which pigs are raised. The property to the north is used for pasturing livestock and production of hay. The properties to the east and south are used, at least in part, for pasturing livestock. To the northwest there is a

vacant parcel approximately 6.7 acres in size.

The hearings official denied the nonfarm dwelling application on September 25, 1989. On October 6, 1989, the hearings official agreed to reconsider that decision, and stated in a letter to the Lane County Planning Department:

> "I have received an October 4, 1989 appeal of my September 25, 1989, decision denying the [application] for a special use permit for a dwelling not in conjunction with farm use within an E-40 district.
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> "After a review of this appeal I have concluded that the standard applied to Lane Code 16.212(4)(j)(iii) was too rigid and thus violated the Lane Code. Therefore, under the authority of Lane Code 14.535(2)(a), I will reconsider my decision. This reconsideration shall be based upon additional evidence presented at an evidentiary hearing limited to the following two issues:
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> "(1) The appropriate standard(s) to be applied through Lane Code 16.212(4)(j)(iii); and
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> "(2) The submission of additional evidence relevant to the above-determined standard(s).
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> "* * * * *" Record 141.

Thereafter, on October 27, 1989, the hearings official held an evidentiary hearing to reconsider the September 25, 1989 denial decision. On November 20, 1990, the hearings official issued an order approving the disputed application.[1] This appeal followed.

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[1]Petitioner appealed the hearings official's approval to the board of county commissioners. However, the board of county commissioners issued an order on December 20, 1990 determining it would not consider petitioner's

FIRST ASSIGNMENT OF ERROR

> "The Hearings Official erred in concluding that the applicant's request complies with Lane Code 16.212(4)(j)(iii) (Lack of Suitability for Farm Use)."

Lane County Code (LC) 16.212(4)(j)(iii) establishes the following requirement for approval of nonfarm dwellings in the E-40 zone:

> "The dwelling or mobile home is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of its size or location if it can reasonably be put to farm use in conjunction with other land."[2]

Petitioner argues that the hearings official's findings do not demonstrate this approval criterion is met and, even if they do, that those findings are not supported by substantial evidence in the whole record.

Petitioner contends the hearings official failed to consider the suitability of the entire 11.34 acre subject

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appeal. Petitioner filed his notice of intent to appeal with this Board on January 9, 1990.

[2]LC 16.212(4)(j)(iii) adopts requirements nearly identical to those provided in ORS 215.213(3)(b). Where an ordinance adopts language from a statute, we interpret the ordinance consistent with the statute, unless a contrary intent is clearly stated. Kellogg Lake Friends v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-061, December 22, 1988), slip op 10-11, aff'd 96 Or App 536, rev den 308 Or 197 (1989). There is nothing to suggest that LC 16.212(4)(j)(iii) is intended to have a meaning distinct from ORS 215.213(3)(b). Consequently, prior interpretations of ORS 215.213(3)(b), by the appellate courts and this Board, are relevant in ascertaining the meaning of LC 16.212(4)(j)(iii).

parcel for the production of farm crops and livestock, and instead erroneously considered only whether the 2.5 acre open area on the subject property is suitable for the production of farm crops and livestock. Petitioner specifically contends the hearings official did not address whether the entire subject parcel could be cleared and used for pasturing goats or other livestock.

Additionally, petitioner contends the hearings official erred in applying a "net income," and "reasonable farmer" standard to determine whether the 2.5 acre area of the subject parcel is generally unsuitable for the production of farm crops and livestock.[3] According to petitioner, the

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[3]The hearings official made the following findings regarding the net income standard:

> "The Hearings Official's September 25, 1989 decision * * * relied heavily on several Oregon cases that suggested that 'suitability' for the production of farm crops and livestock was to be measured through a 'gross income' and not a 'profit' test. However, the question then became: How much gross income must a parcel earn to be considered 'suitable?' The Legislature has set a gross income threshold for non-EFU-zoned parcels for farm tax assessment purposes but not for land currently zoned for exclusive farm use. Using the provisions of ORS 308.372(2)(a) as a guideline, the Hearings Official adopted a threshold of $100 per acre. For several reasons the Hearings Official believes that this standard is too severe.
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> "The provisions of ORS 308.372 are intended to screen out requests for tax deferrals which cannot be justified by prior agricultural management. That is, if a parcel is not zoned EFU then some empirical proof must be offered to show that notwithstanding its zoning, the parcel has a potential for agriculture. Nor does a gross income threshold necessarily reflect practical reality. For example, would a reasonable farmer invest $5,000 to earn $100 (or gross $5,100) if an investment of the same capital outlay at a nominal interest rate (6%) would earn three times that profit? The Hearings

hearings official erroneously determined the 2.5 acres could not be profitably farmed and a reasonable farmer would not farm it.

> Official is reluctant to apply a 'gross income' standard absent a legislatively derived threshold.
>
> "A net income standard has many of the shortcomings of a gross income standard. It too may not reflect practical business sense in regard to the alternative methods of investing capital. Also, it has been criticized as being very difficult to establish as expenses are often variable and subjectively justified (i.e., three strands of barbed wire instead of two, methods of depreciation of farm equipment, the choice of a different and more expensive livestock feed, etc.) So too are the interest rates against which net income might be measured. And of course, the establishment of a net income standard can be considered just as arbitrary as the establishment of a gross income standard.
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> "The applicant has argued that the farm operation standards of Lane Code 16.212(6)(d) should be applied to determine suitability of a parcel for farm crop and livestock production. This has been the test applied by the Hearings Official in the past. However, the scrutiny given this case indicates that this standard can not be considered adequate to test suitability. The standard of LC 16.212(6)(d) was, in part, derived from responses of County Extension Agents regarding primary crops within different regions of the County. [See Table VIII of the addendum to Working Paper: Agricultural Lands (November 1983)]. Map 1 of the Addendum seems to indicate that the subject property is not located in a farm region so there is no indication of what would be the smallest viable field size. <u>However, the smallest viable parcel size in the 23 farm regions identified in Table VII was 20 acres for grass seed and 10 acres for pasture</u>. Presumably, these were in the areas represented by the richest soils.
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> "The Hearings Official is convinced that none of the above-described measures of 'suitability' should be elevated to the status of 'The Standard,' against which all requests for dwellings not in conjunction with farm use should be judged. However, it does seem appropriate to employ these tests as a method of determining whether it is 'reasonable' to expect that a particular parcel is suitable for the production of crops and livestock. An argument based upon a showing of the net income potential of a parcel is valuable in that it most closely approximates the thought process applied by a 'reasonable farmer.'" (Emphasis supplied.) Record 30-31.

Respondent and intervenor (respondents) argue that the hearings official's findings are adequate to establish that the entire subject parcel is generally unsuitable for the production of farm crops and livestock. Respondents also argue that the hearings official correctly applied the general unsuitability standard, and all of the factors listed in LC 16.212(4)(j)(iii), to determine the suitability for the production of farm crops and livestock of the 2.5 acre open area of the subject property. Respondents contend that the net income/reasonable farmer analyses employed by the hearings official simply apply factors, considered along with others, in determining whether the 2.5 acre open area is generally unsuitable for the production of farm crops and livestock under LC 16.212(4)(j)(iii).

The challenged decision does not determine whether the entire 11.34 acre parcel is generally unsuitable for the production of farm crops and livestock. The hearings official, in the November 20, 1989 decision, stated the following with regard to the suitability of the entire parcel for the production of farm crops and livestock:

> "The Hearings Official in his October 25 decision, found that only 2.5 acres of the property were useable for agricultural pursuit. The remainder of the property was considered to be wetland. * * *" Record 28.
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> "In the present case, the Hearings Official has concluded that because the property is heavily impacted by wetland and a drainage way, only two and one-half acres of the property is useful for agricultural purposes. * * *" Record 31.

These findings do not explain why the "wetland" area is generally unsuitable for the production of farm crops and livestock. The findings are, therefore, conclusory and are inadequate to establish that the entire 11.34 acre parcel is generally unsuitable for the production of farm crops and livestock.

The challenged decision also adopts by reference the findings of fact from the hearings official's September 25, 1989 decision. Accordingly, we examine the September 25, 1989 findings of fact to determine whether they are adequate to establish that the entire subject parcel is generally unsuitable for the production of farm crops and livestock. The hearings official's September 25, 1989 decision states the following:

> "The property is occupied by 85 Natroy silty clay loam soil. The soil, which is characterized by a 5-inch thick surface layer of silty clay loam over a 21 inch thick clay layer, has an SCS agricultural rating of IVw and no woodland rating. It has limited value for farming due to its shallow rooting depth, wetness, slow permeability and surface cracking in late summer. The Natroy soil, according to SCS "Soil Interpretations Record for Lane County Area, Oregon," is suitable for pasture, hay or grass seed. It is also considered to be a hydric soil. The SCS Soil Interpretations Record indicates that under high management conditions and without irrigation Natroy silty clay loam can yield 700 pounds of rye grass seed and 8 AUM (Animal Unit Months) of pasture per acre."
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> "* * * * *
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> "The Hearings Official took a site view of the

> property on September 1, 1989. During this view, the Hearings Official observed that the portion of the property abutting Spencer Creek was heavily vegetated with hardwood species and brushland [and] was dotted with mounds formed from the deposit of dredge spoils taken from Spencer Creek. This area was clearly delineated from the southern portion of the property by its thick vegetative cover. This wetland area which abuts Spencer Creek appeared to be impassible to farm equipment, even during late summer months. The southern portion of the property was characterized by tall grass which was generally barren of large bushes or trees. * * *
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> "* * * * *
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> "The portion of the property abutting Spencer Creek is identified as a Palustrine Forested Wetland by the U.S. Fish and Wildlife National Wetlands Inventory map. The identified wetlands on this map do not overlay the proposed dwelling site. The site was visited by [a representative] of the Oregon Division of State Lands. [The representative] has determined that the wetlands do not include the site of the proposed dwelling * * *." (Emphasis supplied.) Record 38-39.

We agree with petitioner that these findings are inadequate to establish that the 11.34 acre subject property, viewed as a whole, is generally unsuitable for the production of farm crops and livestock. The findings indicate that the soils on the subject property are suitable for pasture, hay or grass seed, production. The emphasized findings state that with intensive management practices, substantial quantities of rye grass seed, and approximately 88 AUM's of pasture could be produced on the parcel. The findings also state that the "wetland" area on the subject property appears to be impassible to farm equipment.

However, the findings give no explanation of why this conclusion is reached or its significance concerning the suitability of the 11.34 acres for production of farm crops and livestock. In short, there are no findings addressing (1) whether the area which the hearings official believed to be impassible to farm equipment could be cleared, (2) why the intensive management practices referred to in the findings could not be employed, or (3) why the entire parcel could not be devoted to pasture for livestock, including goats.[4] This is error.

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[4]Evidence was produced at the hearing that a neighboring property owner raises goats on property similar to that at issue in this case. The decision addresses this evidence as follows:

> "Opponents of this application speculate that the subject property could support goats. They further speculate that more than two and one-half acres of the subject property could be used[,] as goats would feed on the brush, blackberries and grasses which are not considered useable by cattle or other livestock. One individual testified that she grossed $700 after raising three female goats for two years and hoped to gross $1,500 in 1990. However, it is unclear as to how many acres were necessary for her goat operation and no estimate was provided of the expenses necessary to raise the goats or whether any net profit was derived. Neither has evidence been presented that would indicate that, contrary to the Agricultural Lands Working Paper & Addendum, goat raising is a normal farm practice in this area. The Hearings Official is unconvinced that this goat operation represents a viable farm operation or the type of farm use for which the subject property might be suitable." Record 32.

Additionally, the standards contained in LC 16.212(4)(j)(iii) require an analysis of the physical attributes of the exclusive farm use zoned land which is the subject of a nonfarm dwelling application. The hearings official relied in part on a "net income" or "reasonable farmer" test to determine that the 2.5 acre open portion of the subject parcel is generally unsuitable for the production of farm crops and livestock. In Rutherford v. Armstrong, 31, Or App 1319, 572 P2d 1331 (1978), the court held:

> "In order for lands to qualify under [ORS 215.213(3)(b)], the land must be generally unsuitable for the production of farm crops and livestock considering the terrain, soil conditions, drainage, flooding, vegetation, location and size. The fact that the property cannot be farmed as an economically self-sufficient unit is irrelevant if it is otherwise suitable to produce farm crops and livestock." (Emphasis supplied.)

At best, whether a particular farmer can make a profit, at a particular period in time, on a particular piece of

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Where a relevant issue is raised, the county must address that issue in its findings. City of Wood Village v Portland Area Metro LGBC, 48 Or App 79, 97, 616 P2d 528 (1980); Norvell v. City of Portland, 43 Or App 849, 853, 604 P2d 896 (1979); Highway 213 Coalition v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-060, December 15, 1988), slip op 5; Grover's Beaver Electric v. City of Klamath Falls, 12 Or LUBA 61, 66 (1984). The county's findings are inadequate to address the relevant issue the opponents in this case raised regarding the suitability of the subject property for raising goats. Additionally, we note that the challenged findings incorrectly suggest it is the opponent's burden to establish that the property is suitable for farm use. The burden of establishing the proposal conforms to each approval criterion belongs to the applicant. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 18, 569 P2d 1063 (1977).

farm land, is indirect evidence of whether the land itself is suitable for the production of farm crops and livestock. The hearings official must determine whether the land itself is suitable for the production of farm crops and livestock, under the factors specified in LC 16.212(4)(j)(iii). See Stefan v. Yamhill County, ___ Or LUBA ___ (LUBA No. 89-118, February 16, 1990), slip op 9-11 (findings determining parcel is suitable for production of farm crops and livestock, but that agricultural uses are not "warranted" due to unidentified limiting factors, are inadequate).

Petitioner also contends there is no evidentiary support for the challenged decision. However, no purpose would be served in considering the evidentiary support for inadequate findings. DLCD v. Columbia County, 16 Or LUBA 467, 471 (1988).

The first assignment of error is sustained.[5]

SECOND ASSIGNMENT OF ERROR

> "The Hearings Official failed to follow applicable procedures."

LC 14.535 provides the hearings official with authority to:

[5]Petitioner also suggests that in no circumstances could a nonfarm dwelling application be approved on land zoned for exclusive farm use, and that the proper course for intervenor to seek is to apply for rezoning of the subject parcel. We disagree. The Lane Code explicitly authorizes approval of nonfarm dwelling requests in the E-40 zone where particular criteria are satisfied. Nothing in the Lane Code requires rezoning as a prerequisite to approval of nonfarm dwelling request.

"* * * affirm, modify or reverse his or her initial decision and to supplement findings as necessary. * * *"[6]

Petitioner argues intervenor was allowed to present written evidence at the reconsideration hearing, and that the evidence was not available to the public for review at least five days before the hearing, in violation of LC 14.300(5).[7]

At the time of the reconsideration hearing, LC 14.300(5) provided:

"Written Materials. All documents or evidence relied upon by the applicant shall be submitted to the department and made available to the public at least 20 days prior to the first evidentiary

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[6]LC 14.535(2)(c) provides the hearings official may reconsider the decision based on additional evidence produced at a further hearing as follows:

"Limited Hearings. If the reconsideration is not limited to the existing record and if the Hearings Official wishes to reopen the record and to conduct a hearing to address limited issues, then the Hearings Official shall:

"(i) Within seven days of acceptance of the appeal by the Director, mail notice to all persons who qualified as parties at the hearings or hearings for the decision which is being reconsidered. The notice shall disclose the same information required by LC 14.070(3) above. LC 14.200 and LC 14.300 above shall be followed in the conduct of the hearing.

"(ii) Within 10 days of the date of the hearing, issue a reconsideration decision and supplemental findings, and within this same time period, mail copies of the decision and findings to persons who have qualified as witnesses."

[7]Petitioner also argues that the hearings official had no authority to hold a reconsideration hearing. We disagree. LC 14.535 provides specific authority for the hearings official to reconsider a decision and to hold a hearing on the issues to be reconsidered.

hearing. Unless otherwise specified by the Approval Authority, all other written materials, documents or evidence exceeding two pages in length must be submitted to and received by the Department at least 10 days in advance of the hearing. The Approval Authority may allow written materials to be submitted and received after this 10-day deadline if:

"(a) The written materials are solely responsive to written materials submitted at least 10 days in advance of the hearing, and

"(b) The responsive, written materials could not have been reasonably prepared and submitted at least 10 days in advance of the hearing.

"If additional documents, evidence or written materials are provided contrary to the above deadlines, any party shall be entitled to a continuance of the hearing. Upon request, the application file containing these materials shall be made available to the public by the Department for inspection at no cost and copies will be provided at reasonable cost."

The county argues:

"[LC 14.300(5)] does not prohibit the admission of written materials if the Hearings Official determines that admission is appropriate. When the Hearings Official admits such evidence, the decision may also involve analysis of objections and any allegations of prejudice. The provisions of LC 14.300(5) regulating admission of written materials in excess of two pages are directory and not mandatory. LC 14.200(1). The Hearings Official may receive all evidence offered at the hearing unless the Hearings Official finds that the evidence is inconsistent with any of the provisions of [LC] Chapter 14. LC 14.200(3)(a).

"The provisions of LC 14.300(5) enable admission if the hearings official specifically rules that they should be allowed. That ruling <u>may</u> include findings addressing LC 14.300(5)(a) and (b) or other relevant Code provisions. * * * Exclusion

[of evidence] may be appropriate only if an objection establishes prejudice to the substantial rights of a party will occur by the admission of the offered evidence. In most cases, a continuance to allow time for a response should adequately provide for any potential prejudice occasioned by admission of the evidence. * * * [T]he erroneous admission of evidence shall not preclude action by the Hearings Official or cause reversal upon appeal to the Board of County Commissioners unless shown to have substantially prejudiced the rights of a party. LC 14.200(3)(i). * * *

"The Hearings Official acted within the discretion authorized by [LC] Chapter 14 by admitting materials in excess of two pages offered by both applicant and petitioner. There is no indication petitioner or his counsel requested a continuance to enable a response to the evidence submitted by applicant after the deadline. * * *" (Emphasis in original.) Respondent's Brief 11-12.

LC 14.200 provides in part:

"General Hearings Rules. Review of applications or appeals subject to any of the public hearing procedures of this Chapter shall also be subject to the following general hearing rules:

"(1) Procedures Directory. The procedures and the limits set forth in this Chapter to be followed by the Approval Authority are directory and not mandatory, and failure to follow or complete the action in the manner provided shall not invalidate the decision.

"* * * * *

"(3) Standards of Evidence.

(a) The Approval Authority may receive all evidence offered at the hearing, unless excluded by motion of the Approval Authority with a finding that such evidence is inconsistent with any of the

provisions of this Chapter.

"* * * * *"

As we understand it, the county argues the above quoted provisions of LC Chapter 14 authorize the hearings official to accept evidence at an evidentiary hearing even though that evidence does not satisfy the requirements of LC 14.300(5), so long as the hearings official continues the hearing, if requested to do so by a party claiming to be prejudiced because the written materials were not timely submitted under LC 14.300(5).

In 1000 Friends of Oregon v. Lane County, ___ Or App ___ (CA A64166, June 6, 1990), the Court of Appeals held that where an applicant submits evidence in violation of LC 14.300(5), a continuance at the request of a party allows adequate time for preparation and participation, and serves "the objective of enabling the applicant, as well as the other parties, to participate in the process fully and effectively." 1000 Friends of Oregon v. Lane County, supra, slip op at 6. Consequently, the fact that evidence is submitted after the deadline for submission of evidence imposed by LC 14.300(5), is not, of itself, error warranting remand.[8]

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[8]The issue in 1000 Friends of Oregon v Lane County, supra, was whether LC 14.300(5) violated ORS 197.763(4)(a) and (b), which provide:

"(a) All documents or evidence relied upon by the applicant shall be submitted to the local

While petitioner objected to intervenor's submission of written material not previously available for public review at the reconsideration evidentiary hearing, petitioner did not request a continuance, and does not explain how he was prejudiced by the county's action. Under these circumstances, the hearings official's acceptance of intervenor's evidence, even if procedural error, provides no basis for reversal or remand.

The second assignment of error is denied.

The county's decision is remanded.

> government and made available to the public at the time notice * * * is provided.
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> "(b) Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence is provided in support of the application, any party shall be entitled to a continuance of the hearing. Such continuance shall not be subject to the limitations of ORS 215.428 or 227.178."

LC 14.300(5) was adopted by the county in response to legislative changes to ORS 197.763 requiring a party to have raised issues before the local decision-making body in order to raise those issues in an appeal to LUBA. ORS 197.763 sets forth various procedural requirements to implement this "raise it or waive it" requirement.

While no party has raised the compliance of LC 14.300(5) with ORS 197.763 as an issue in this case, we believe that the principle stated in 1000 Friends v. Lane County, supra, applies.