BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McKAY CREEK VALLEY ASSOCIATION,	)	
	)	
Petitioner,	)	LUBA Nos. 89-137, 89-138, 89-139 and 89-140
	)	
vs.	)	
	)	FINAL OPINION
WASHINGTON COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Washington County.

F. Blair Batson and Neil S.Kagan, Portland, filed the petition for review on behalf of petitioner. F. Blair Batson filed a reply brief and argued on behalf of petitioner.

David C. Noren, Hillsboro, filed the response brief and argued on behalf of respondent.

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

AFFIRMED IN PART; 08/27/90
REMANDED IN PART

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 DECISION

Petitioner appeals Washington County Ordinances No. 337, 338, 339 and 340, all of which amend the Washington County Community Development Code (CDC). Petitioner challenges provisions of these ordinances governing authorization of farm and forest dwellings and land use hearing procedures.[1]

MOTION TO FILE REPLY BRIEF

Petitioner requests permission to file a reply brief to respond to two new matters raised in the response brief. Respondent does not object to petitioner's motion, and it is allowed.[2]

FACTS

The Washington County Comprehensive Plan is comprised of a number of planning documents, including the Rural/Natural Resources Plan (Rural Plan) and the CDC. CDC Article II (Procedures) establishes procedures for reviewing development proposals. CDC Article III (Land Use Districts)

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[1]The parties agree that petitioner does not challenge any provisions of Ordinances No. 337 or 340, and that these ordinances, therefore, may be affirmed, irrespective of our disposition of petitioner's challenges to provisions of Ordinances No. 338 and 339.

[2]In its reply brief, petitioner states the parties agree that Appendix 1-1 through 1-4 to the response brief, and specific references to that appendix in the text of the response brief, should be stricken from the record. Accordingly, the Board shall not consider Appendix 1-1 through 1-4 to the response brief or the references to that appendix in the response brief which are identified at pages 1-2 of the reply brief.

contains the code's primary and overlay zoning districts, describing the uses allowed and identifying the type of procedure for approval of the uses allowed in each district. CDC Article IV (Development Standards) sets out standards for development in general and specific standards for particular uses.

On October 24, 1989, the county adopted the four ordinances amending the CDC which are challenged in this appeal. Ordinance No. 338 amends CDC Article III, including Sections 340 (Exclusive Farm Use (EFU) District), 342 (Exclusive Forest and Conservation (EFC) District) and 344 (Agriculture and Forest (AF-20) District), with regard to dwellings in conjunction with farm and forest uses. Ordinance No. 338 also amends CDC Article IV with regard to the standards applicable to farm and forest dwellings. Ordinance No. 339 amends CDC Article II, changing county procedures to reflect the requirements of ORS 197.763.[3]

FIRST ASSIGNMENT OF ERROR

> "The amendments to the criteria and standards for approving 'dwellings in conjunction with farm use' in CDC 430-37.2 and Appendix B do not comply with the comprehensive plan, Goal 3, ORS [ch] 215 or OAR 660-05-030(4) and are not supported by substantial evidence in the record as a whole."

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[3]ORS 197.763 was enacted by the 1989 legislature and became effective on October 3, 1989. It sets out procedural requirements for local government conduct of quasi-judicial land use hearings, and requires that such procedures be incorporated into local government comprehensive plans and land use regulations. See Seventh Assignment of Error, infra.

A. Statutory Definition of Farm Use

Petitioner points out that the CDC is Volume II of the county's comprehensive plan. Petitioner argues that Rural Plan Policy 1, Implementing Strategy (Strategy) p requires that all plan amendments:

> "(1) Be in conformance with LCDC Goals, State Statutes, and Administrative Rules; and
>
> "(2) Be in conformance with policies and strategies of the Rural/Natural Resource Plan Element."

Petitioner asserts that Rural Plan Policy 15, Strategy e provides:

> "Limit residential uses within the [EFU] District to those dwellings in conjunction with farm or forest use as defined in ORS 215.203(2)(C) [sic 215.203(2)(a)] and to non-farm dwellings as provided in ORS 215.213."

Petitioner contends that the county approval standards for farm dwellings found in CDC 430-37.2A, as amended by Ordinance No. 338, do not comply with ORS ch 215, Statewide Planning Goal 3 (Agricultural Lands) or Rural Plan Policy 15, Strategy e because they fail to require that the farm use with which proposed dwellings are in conjunction satisfy the statutory definition of "farm use" in ORS 215.203(2)(a).

Prior to adoption of the challenged ordinances, the CDC listed the following as uses permitted through Type I

procedures[4] in the EFU, EFC and AF-20 districts, respectively:

> "Dwelling Unit (including a mobile home) in conjunction with farm use -- Section 430-37.2A." CDC 340-2.3(1986).[5]
>
> "Dwelling Unit (including a mobile home) in conjunction with farm use as defined in ORS [ch]215 -- Section 430-37.2A(1)(a) and (b)." (Emphasis added.) CDC 342-2.5(1986).
>
> "Dwelling Unit (including a mobile home) in conjunction with farm use -- Section 430-37.2A." CDC 344-2.3(1986).

CDC 430-37.2A(1986) provided as follows:

> "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 tenant farmer.
>
> "A dwelling in the EFU, AF-20 or 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 [standards]:
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> "* * * * *" (Emphasis added.)

In McKay Creek Valley Assoc. v. Washington County, ___ Or LUBA ___ (LUBA Nos. 89-027 and 89-028, September 18, 1989) (McKay Creek I), slip op 20, we held that the CDC

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[4]Under the county's Type I procedures, a decision is made by the planning director without notice or hearing, and is subject to appeal only by the applicant. CDC 202-1.

[5]Citations to the version of the CDC in existence prior to adoption of the subject ordinances are indicated by the suffix (1986).

provisions emphasized above required that proposed farm dwellings in the EFC zone be in conjunction with a farm use which satisfies the statutory definition of "farm use" in ORS 215.203(2).

Ordinance No. 338 deleted CDC 340-2.3(1986), 342-2.5(1986) and 344-2.3(1986), quoted above. However, Ordinance No. 338 adopted CDC 340-3.NEW2,[6] 342-3.NEW2 and 344-3.NEW2, which add the following to the list of uses permitted through Type II procedures[7] in the EFU, EFC and AF-20 zones:

> "Dwelling Units (including a mobile home) in conjunction with farm use * * * as defined in ORS Ch. 215 -- Section 430-37.2A.NEW1 and [NEW]2." (Emphasis added.)

Furthermore, Ordinance No. 338 amended CDC 430-37.2A to provide as follows:

> "A Dwelling Unit(s) (including a mobile home) in conjunction with farm use * * * as defined in ORS Ch. 215 may be approved subject to Section 430-37.2A.1 or 2, whichever is applicable.
>
> "The standards to review requests pursuant to Sections 430-37.2A.NEW1 and [NEW]2 are set forth in Appendix B." (Emphasis added.)

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[6]In Ordinances No. 338 and 339, the county indicated newly adopted provisions (as opposed to amended provisions) by labelling those provisions with the designation "NEW" in front of the subsection, paragraph or paragraph designation, as appropriate. Citations used in this opinion are as the county cited the provisions in Ordinances No. 338 and 339.

[7]Under Type II procedures, a decision is made by the planning director after notice of the proposed action and an opportunity to comment are given, and the opportunity to appeal the planning director's decision is not limited to the applicant.

We agree with the county that the changes made to the CDC by Ordinance No. 338 do not alter the requirement, which we determined in McKay Creek I to be imposed by the CDC, that the county determine proposed farm dwellings are in conjunction with "farm use," as defined in ORS 215.203(2)(a).

This subassignment of error is denied.

B. OAR 660-05-030(4)

CDC 430-37.2A.NEW1 and NEW2, which follow the above quoted provisions of CDC 430-37.2A, are virtual quotes of ORS 215.213(2)(a) and (b).[8] The statutory and code provisions state that a dwelling "in conjunction with farm use" may be established in an exclusive farm use zone if the farm operation meets certain enumerated size and income standards. CDC 430-37.2A also incorporates the provisions of "Appendix B" as standards for determining compliance with CDC 430-37.2A.NEW1 and NEW2. Petitioner maintains that these standards for farm dwellings adopted by Ordinance No. 338 are inadequate because neither CDC 430-37.2A.NEW1 and NEW2 nor Appendix B satisfies the requirements of OAR 660-05-030(4).

OAR 660-05-030(4) provides:

"ORS 215.213(1)(g) and 215.283(1)(f) authorize a

[8]Washington County has chosen to designate marginal lands pursuant to ORS 197.247 and, therefore, its land zoned for exclusive farm use must comply with ORS 215.213(1) to (3). ORS 215.288.

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

Petitioner contends that OAR 660-05-030(4) applies to farm dwellings authorized under ORS 215.213(2)(a) and (b) (dwellings "in conjunction with farm use"), as well as to ones authorized under ORS 215.213(1)(g) and 215.283(1)(f) (dwellings "customarily provided in conjunction with farm use"). Petitioner argues that in the emphasized portion of the rule, the Land Conservation and Development Commission (LCDC) has interpreted the ORS 215.203(2)(a) definition of "farm use" to require that "the day-to-day activities on the subject land [be] principally directed to the farm use of the land." Petitioner claims the administrative history of OAR 660-05-030(4) indicates OAR 660-05-030(4) was intended to define what constitutes "farm use," rather than what dwellings are "customarily provided" in conjunction with farm use. According to petitioner, the failure of Ordinance No. 338 to include the requirements of OAR 660-05-030(4) in CDC 430-37.2A and Appendix B constitutes a violation of ORS ch 215, Goal 3 and Rural Plan Policy 1, Strategy e(1),

quoted supra.

The county argues that its amendments to CDC 430-37.2A and its adoption of CDC 430-37.2A.NEW1 and NEW2, using the language of ORS 215.213(2)(a) and (b), clearly demonstrate the county's intent that farm dwellings in the EFU, EFC and AF-20 zones are authorized pursuant to ORS 215.213(2)(a) and (b), and not ORS 215.213(1)(g) or 215.283(1)(f). The county contends OAR 660-05-030(4) applies by its terms only to dwellings "customarily provided in conjunction with farm use" under ORS 215.213(1)(g) and 215.283(1)(f). According to the county, because there are no criteria in ORS 215.213(1)(g) or 215.283(1)(f) for determining whether a dwelling is "customarily provided in conjunction with farm use," OAR 660-05-030(4) provides the necessary guidance for making such a determination. On the other hand, the county argues, such guidance is not needed for determining whether dwellings are "in conjunction with farm use" pursuant to ORS 215.213(2)(a) or (b), because the statutory provisions themselves include objective size and income standards.

We agree with the county that the amendment of CDC 430-37.2A and adoption of CDC 430-37.2A.NEW1 and NEW2 by Ordinance No. 338 indicates that those provisions are intended to authorize dwellings in conjunction with farm use pursuant to ORS 215.213(2)(a) and (b). We further agree with the county that OAR 660-05-030(4) is by its own terms applicable only to determining whether dwellings are

"customarily provided in conjunction with farm use" under ORS 215.213(1)(g) and 215.283(1)(f).[9] Therefore, neither ORS ch 215, Goal 3 nor Rural Plan Policy 1, Strategy e(1) require that the CDC provisions governing such farm dwellings incorporate the requirements of OAR 660-05-030(4).

This subassignment of error is denied.

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[9]We note that in OAR 660-05-030(1), LCDC lists six types of dwellings which may be authorized in an exclusive farm use zone. The list includes both those customarily provided in conjunction with farm use under ORS 215.213(1)(g) and 215.283(1)(f) and those in conjunction with farm use under ORS 215.213(2)(a). OAR 660-05-030(1)(b) and (d). This indicates that LCDC was well aware of these different types of farm dwellings when it drafted the rule and could have identified dwellings under ORS 215.213(2)(a) as the subject of OAR 660-05-030(4) if it so chose. See Rebmann v. Linn County, ___ Or LUBA ___ (LUBA No. 90-015, June 29, 1990), slip op 5 n 5.

We also note that the administrative history of OAR 660-05-030(4) cited by petitioner actually favors an interpretation of that rule as applying only to dwellings "customarily provided in conjunction with farm use" under ORS 215.213(1)(g) and 215.283(1)(f). In a March 6, 1985 memorandum to LCDC from the DLCD director regarding the proposed rule amendments, the director testified that the amendments of OAR 660-05-030(4) originally proposed, which consisted of what is now the first sentence of that section of the rule, were inadequate because they "still did not clarify how to determine if a dwelling is 'customarily provided in conjunction with farm use,' as required by ORS ch 215." (Emphasis added.) Petition for Review App. 7-7. The director proceeds to discuss the issue of how to determine whether a dwelling is "customarily provided:"

> "* * * It has been and continues to be customary for farm families to reside on their farms. Neither the residential nor farm use is predominate over the other. Rather the residential use is simply a matter of custom.
>
> "The key issue is whether the principal use of the land in question is for farming or residential purposes. To provide direction regarding this issue the following has been added to the rule:
>
> "* * * * *" Id.

The director suggests adding what is now the second and third sentences of OAR 660-05-030(4) to the rule.

C. Rural Plan Policy 17, Summary Findings and Conclusions

Petitioner argues that the Summary Findings and Conclusions of Rural Plan Policy 17 lists the "Economic Average Unit Size" for a number of crops grown in the county. Petitioner argues the findings describe these unit sizes as "the average size or economically feasible operation size in Washington County at this time." Petition for Review App. 5-19. Petitioner further argues that these findings are supported by consistent acreage figures given in the Plan Resource Document for the average size of various types of farming operations in the county. Id. at App. 6-4 to 6-7.

Petitioner contends that Standards 5 and 6 of Appendix B, adopted by Ordinance No. 338, are inconsistent with these plan provisions because the standards would allow approval of a farm dwelling on farms smaller in size than the "economic average unit size" identified in the plan. Petitioner also argues that Standards 5 and 6 would allow approval of dwellings where the day-to-day activities of the residents would not be devoted principally to farm use and, therefore, are inconsistent with Goal 3 and ORS ch 215.

The county responds that Standards 5 and 6, in conjunction with CDC 430-37.2A.NEW2 allow a dwelling in conjunction with farm use if the property is capable of producing $10,000 in gross annual farm income. The county argues these provisions are consistent with

ORS 215.213(2)(b).[10] According to the county, if a "farm operation is substantial enough to meet the minimum size or income standards of ORS 215.213(2)(a) and (b), then the Legislature has determined a dwelling in conjunction with that use is appropriate." Respondent's Brief 14.

Petitioner identifies no provision of the plan which requires that the county's implementation standards for farm dwellings ensure that such dwellings are authorized only on parcels which are consistent with the "economic average unit sizes" identified in the plan findings. Further, we agree with the county that CDC 430-37.2A.NEW2 and Appendix B, Standards 5 and 6 are designed to implement ORS 215.213(2)(b). There is no requirement in ORS ch 215 or Goal 3 that farm dwellings authorized pursuant to ORS 215.213(2)(b) be on acreages sufficient to support residents whose principal occupation is farming. To the contrary, ORS 215.213(2)(b) specifically recognizes that a farm dwelling may be allowed on a parcel capable of

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[10]ORS 215.213(2)(b) provides in relevant part:

> "A dwelling in conjunction with farm use * * * as part of a farm operation or woodlot * * *, if the lot or parcel:
>
> "(A) Has produced at least $10,000 in annual gross farm income in two consecutive calendar years out of the three calendar years before the year in which the application for the dwelling was made or is planted in perennials capable of producing upon harvest an average of at least $10,000 in annual gross farm income; or
>
> "(B) Is a woodlot capable of producing an average over the growth cycle of $10,000 in annual gross farm income."

producing $10,000 in annual gross farm income.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "CDC 342-3.NEW1, 342-3.NEW2 and 342-3.NEW3, as implemented through the new and amended standards in CDC 430-37.2A and 430-37.2A.NEW1 and [NEW]2 and Appendix B, violate Goal 4 and Rural Plan Policy 16 by authorizing farm dwellings in a forest zone without requiring the use to be compatible with and conducive to the retention and protection of forest land."

A. Goal 4 (Forest Lands)

The county's EFC zone is a forest zone. Petitioner argues that the new and amended provisions of CDC 342-3.NEW1, 342-3.NEW2 and 342-3.NEW3 authorizing farm dwellings in the EFC zone,[11] pursuant to the standards of CDC 430-37.2A.NEW1 and NEW2 and Appendix B, do not comply with Statewide Planning Goal 4 (Forest Lands). Petitioner argues that Goal 4 allows dwellings on forest land only if they are "necessary and accessory" to forest use. See 1000

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[11]CDC 342-3.NEW1, NEW2 and NEW3 provide as follows:

> "NEW1 Detached Dwelling Units (including a mobile home) in conjunction with farm use for additional farm related dwelling(s) necessary for full time farm help -- Section 430-37.2D.
>
> "NEW2 Dwelling Units (including a mobile home) in conjunction with farm use as defined in ORS Ch. 215 -- Section 430-37.2A.NEW1 and NEW2(a) and (b).
>
> "NEW3 Dwelling Unit(s) (including a mobile home) occupied by a relative of the farm operator who assists or will assist with the management of the farming - Section 430-37.2C."

Friends of Oregon v. LCDC (Lane County), 305 Or 384, 396, 752 P2d 271 (1988) (Lane County); Lamb v. Lane County, 7 Or LUBA 137 (1983). Additionally, according to petitioner, farm dwellings allowed pursuant to ORS 215.213(2)(a) and (b) are not appropriate in forest zones unless they are found "compatible with and conducive to the retention and protection of forest land." Lane County, 305 Or at 402.

Petitioner contends CDC 342-3.NEW2 authorizes the dwellings described in CDC 430-37.2A (i.e. "dwellings in conjunction with farm use or the propagation or harvesting of a forest product") in the EFC zone. Petitioner argues, however, that Ordinance No. 338 violates Goal 4 because neither CDC 342-3.NEW2, 430-37.2A, Appendix B nor any other CDC standard imposes (1) the "necessary and accessory" requirement for forest and farm dwellings in the EFC zone; or (2) the requirement that farm dwellings in the EFC zone be compatible with and conducive to the retention and protection of forest land.

The county argues that Ordinance No. 338, in adopting CDC 342-3.NEW1, NEW2 and NEW3 (allowing certain farm dwellings in the EFC zone through Type II procedures), simply readopted the language of CDC 342-2.4(1986), 342-2.5(1986) and 342-2.6(1986) (allowing the same farm dwellings in the EFC zone through Type I procedures). The county also argues that Ordinance No. 338 adopted a new requirement to show that such proposed farm dwellings in the

EFC zone will not force a significant change in, or significantly increase the cost of, accepted practices on surrounding lands devoted to forest uses. CDC 342-3.2.

Therefore, the county contends the effect of the changes made by Ordinance No. 338 is to provide both procedural and substantive protection to assure that dwelling units in conjunction with farm use will be compatible with forest use. According to the county, because the challenged ordinance provides additional standards to ensure compatibility of farm dwellings in the EFC zone with forest use, and merely readopts the previously acknowledged CDC provisions authorizing farm dwellings in the EFC zone, the reenactment of the authorization for these uses is not reviewable by this Board. See Apalategui v. Washington County, 80 Or App 508, 516, 723 P2d 1021 (1986).

In the alternative, the county disagrees with petitioner's contention that Goal 4 and Lane County, supra, require all uses in the EFC zone to be forest uses or uses "necessary and accessory" to a forest use. The county argues that in Lane County, supra, the Supreme Court remanded LCDC's acknowledgment of the county's plan because it allowed a farm use in a forest zone without requiring a showing that the farm use was compatible with forest use. The county maintains that newly adopted CDC 342-3.2 satisfies the Goal 4 requirement for compatibility with forest use.

We must first determine the scope of petitioner's challenge in this assignment of error. As the county points out, Ordinance No. 338 authorizes three different types of farm dwellings in the EFC zone through Type II procedures, rather than through Type I procedures. Although petitioner mentions all three types of farm dwellings in its assignment of error, its argument addresses only one -- dwellings "in conjunction with farm use" allowed under CDC 342-3.NEW2, pursuant to standards in CDC 430-37.2A and Appendix B. The other two types of farm dwellings, farm help dwellings (CDC 342-3.NEW1) and dwellings for relatives of the farm operator (CDC 342-3.NEW3) are subject to different approval standards -- CDC 430-37.2D and 430-37.2C, respectively. Petitioner does not mention these latter standards in its argument or explain why they are in error. We, therefore, address only petitioner's challenge to the ordinance provisions allowing in the EFC zone dwellings "in conjunction with farm use" under CDC 342-3.NEW2, CDC 430-37.2A and Appendix B.[12]

Although the CDC did authorize dwellings in conjunction

[12]Further, CDC 342-3.NEW2 authorizes in the EFU zone only dwellings in conjunction with farm use. We, therefore, reject petitioner's challenge to CDC 430-37.2A and Appendix B as standards for forest dwellings in the EFC zone. In the EFC zone, dwellings in conjunction with forest use are authorized by CDC 342-2.2, through Type I procedures, pursuant to standards in CDC 430-37.2F. CDC 430-37.2A includes forest dwellings in its opening sentence because CDC 430-37.2A does provide the standards for approving dwellings in conjunction with forest use in certain other zones, such as EFU and AF-20. See CDC 340-3.NEW2 and 344-3.NEW2.

with farm use in the EFC zone prior to the appealed decision, Ordinance No. 338 essentially repealed the previous approval standards for such dwellings (CDC 430-37.2A(1)(a) and (b)(1986)) and adopted entirely new approval standards (CDC 342-3.2, 430-37.2A.NEW1 and NEW2 and Appendix B). LUBA has the authority to review these new approval standards for dwellings in conjunction with farm use in the EFC zone for compliance with Goal 4. ORS 197.835(5)(b).

We agree with the county that the Supreme Court did not say in Lane County that all nonforest uses in a forest zone must be "accessory and necessary" to a forest use. However, the Supreme Court did say that for a nonforest use to be allowed on forest land, "the use must be compatible with and conducive to the retention and protection of forest land, and must be supported by findings in the record." Lane County, 305 Or at 402. The court also said LCDC violated Goal 4 by allowing "farm uses on forest lands without a showing of compatibility with forest uses." Id. Thus, the court indicated the protection afforded by Goal 4 is for both forest lands and forest uses. We review the county's criteria for dwellings in conjunction with farm use in the EFC zone against this standard.

The county points to nothing, and we are aware of nothing, in CDC 430-37.2A.NEW1 and NEW2 or Appendix B which is responsive to the Goal 4 requirement. However,

CDC 342-3.2 provides:

> "The proposed use will not:
>
> "(A) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(B) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "An applicant may demonstrate that these standards for approval will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective."

The above quoted standard addresses compatibility with and protection of "forest practices." Neither the CDC nor the plan define this term. However, the Oregon Forest Practices Act defines "forest practice" as:

> "* * * any operation conducted on or pertaining to forest land, including but not limited to :
>
> "(a) Reforestation of forest land;
>
> "(b) Road construction and maintenance;
>
> "(c) Harvesting of forest tree species;
>
> "(d) Application of chemicals; and
>
> "(e) Disposal of slash." ORS 527.620(5).

The definitions of forest land and forest uses found in Goal 4 are broader than the above definition of "forest practices." CDC 342-3.2 does not satisfy the requirements of Goal 4.

We, therefore, conclude that the CDC, as amended by Ordinance No. 338, does not comply with Goal 4 with regard

to authorization of dwellings in conjunction with farm use in the EFC zone, because it does not require that such dwellings be found compatible with and conducive to the retention and protection of forest land and uses.

This subassignment of error is sustained in part.

B. Rural Plan Policy 16, Implementing Strategy c

Rural Plan Policy 16 states "[i]t is the policy of Washington County to conserve forest lands for forest uses." Implementing Strategy (Strategy) c for that policy states the county will:

> "Limit residential uses on forest lands to those dwellings necessary to conduct farm or forest activities * * *."

Petitioners contend that the amendments to CDC 430-37.2A and the newly adopted adopted CDC 430-37.2A.NEW1 and NEW2 and Appendix B violate the above quoted strategy because they authorize farm and forest dwellings in the EFC zone without a showing that the dwellings are "necessary to conduct farm or forest activities."

The county argues, as it did under the previous subassignment of error, that because the challenged amendments do not adversely affect the compliance of the acknowledged CDC with Rural Plan Policy 16, this Board does not have authority to review the challenged amendments for compliance with that policy or its implementing

strategies.[13]

As we stated above, Ordinance No. 338 adopted new standards for dwellings in conjunction with farm use in the EFC zone.[14] We have authority to review those amendments for compliance with the county's comprehensive plan. ORS 197.835(5)(a). We agree with petitioner that the challenged provisions do not require that dwellings in conjunction with farm use in the EFC zone be "necessary to conduct farm or forest practices," as specified by Policy 16, Strategy c.

This subassignment of error is sustained in part.

The second assignment of error is sustained in part. This requires remand of Ordinance No. 338.

THIRD ASSIGNMENT OF ERROR

> "The new and amended regulations [for the AF-20 zone] violate Goal 4 by authorizing farm uses in a mixed farm and forest zone without requiring the uses be compatible with and conducive to the retention and protection of forest land and by authorizing forest dwellings without a showing the dwellings are 'accessory and necessary' to the forest use."

Petitioner's entire argument under this assignment of error is dependent upon its contention that the AF-20 zone

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[13]The county does not argue here or under other assignments of error that it is not required to comply with the implementing strategies of its rural plan policies.

[14]As we also stated above, the provisions challenged by petitioner are not approval standards for forest dwellings in the EFC zone and, therefore, that aspect of petitioner's argument is rejected.

is a mixed farm and forest district which must comply with both Goal 3 and Goal 4. Petitioner bases this contention on the following language of Rural Plan Policy 17:

> "It is the policy of Washington County to designate those lands as Agriculture and Forest-20 that were zoned AF-5 and AF-10 by the 1973 Comprehensive Framework Plan and for which a Goal 2 exception has not been [adopted], and in doing so strive to retain small scale and part-time agriculture and forest production."

The county replies that the implementing strategies for Policy 17 and the Intent and Purpose section for the AF-20 district clearly indicate that the AF-20 district is an exclusive farm use zone, not a mixed farm and forest zone.

The Intent and Purpose section for the AF-20 district states:

> "The intent of the Exclusive Agriculture and Forest AF-20 District is to provide an exclusive farm use zone within the County which recognizes that certain lands therein may be marginal.
>
> "The purpose of the District is to allow EFU uses and parcels * * *." CDC 344-1.

The implementing strategies for Policy 17 provide that the county will:

> "a. Adopt and implement an Agriculture and Forest-20 Land Use District (AF-20) consistent with LCDC Goal 3 and Oregon Revised Statutes Chapter 215;
>
> "b. Provide for all of the uses allowed in an EFU District pursuant to ORS Chapter 215 in the AF-20 Land Use District;
>
> "* * * * *"

The strategies make no mention of compliance with Goal 4 or ensuring that all forest uses are allowed in the district.

We agree with the county that the above quoted provisions make it clear that the AF-20 district is an exclusive farm use zone.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "Standard No. 3 of Appendix B adopted by Ordinance 338 misconstrues the applicable law and does not comply with Goal 3 or the comprehensive plan because it is inconsistent with the criteria set forth in ORS 215.213(2) and CDC Section 430-37.2A.NEW2."

ORS 215.213(2)(b)(A) and CDC 430-37.2A.NEW2(a) authorize a farm or forest dwelling on a lot or parcel that:

> "[h]as produced at least $10,000 in annual gross farm income in two consecutive calendar years out of the three calendar years before the year in which the application for the dwelling was made * * *."

CDC 430-37.2A states that standards for reviewing requests pursuant to CDC 430-37.2A.NEW1 and NEW2 are set out in Appendix B. Standard 3 of Appendix B states that in determining compliance with CDC 430-37.2A.NEW2(a):

> "The County may use statistical information complied by the Oregon State University Extension or other objective criteria to calculate income in addition to any one of the criteria below:
>
> "1. Federal income tax returns.
>
> "2. Sales receipts of products sold from the property or other information as may be necessary to prove income.

> "3. [A signed] affidavit certifying that income requirements have been met. * * *" (Emphasis added.)

Petitioner argues that reliance on statistics to determine whether the standard of ORS 215.213(2)(b)(A) and CDC 430-37.2A.NEW2(a) is met is improper. Petitioner's argument is based on its interpretation of Standard 3 as allowing a determination of compliance with these standards based solely on statistical information.

The county responds that Standard 3 only allows it to use statistical data in addition to the three other types of evidence listed. According to the county, the clear intent of the provision is

> "to allow the County to rely on available statistical information as a basis for rejecting an application * * * by weighing the evidence of statistics against the evidence provided by the applicant." Respondent's Brief 19.

We agree with the county's interpretation of Standard 3.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "There is not substantial evidence in the whole record showing Standard No. 5 of 'Farm Dwelling Income Standards' complies with the farm dwelling criteria contained in ORS 215.213(2)(a) [sic (b)], as required by Goal 3 and CDC Section 430-37.2A.NEW1 [sic NEW2]."

ORS 215.213(2)(b)(A) and CDC 430-37.2A.NEW2(b) authorize:

> "A dwelling in conjunction with farm use * * * as

> part of a farm operation * * *, if the lot or parcel:
>
> "* * * is planted in perennials capable of producing upon harvest an average of at least $10,000 in annual gross farm income * * *"

CDC 430-37.2A states that the standards for review of applications under CDC 430-37.2A.NEW2 are set out in Appendix B. Standard 5 of Appendix B is identified as the standards for CDC 430-37.2A.NEW2(b) and describes itself as a:

> "[p]artial list of Washington County Perennials listing the minimum acreage of various perennials which are capable of producing upon harvest an average of at least $10,000 in annual gross farm income."

This statement is followed by a list of types of crops and, for each crop type, corresponding figures for minimum number of plants per acre and minimum acreage required. Record 326.

The findings in support of Ordinance No. 338 state:

> "The County's farm dwelling income standards * * * have been incorporated into the Code as Appendix B. Sufficient evaluation has been conducted by the County to determine the acreage requirements needed to meet the $10,000 gross annual income requirement of ORS Ch. 215.213(2)(a)(A and B) [sic 215.213(2)(b)(A) and (B)] as shown in Attachment 1 (Methodology for Determining Acreage Requirements). In addition, staff from the [DLCD] previously verbally stated the County's methodology for determining these standards is acceptable." (Emphasis added.) Record 21.

Attachment 1, incorporated into the county's findings by the

statement emphasized above, explains that "the legislative history [of ORS 215.213(2)(b)] clearly shows that the income requirements were intended to be met through reliance on statistical data from OSU Extension Service." Record 28. Attachment 1 also includes the following findings with regard to Standard 5:

> "The perennial crop provision (ORS 215.213(2)(b)(A)) is based on OSU Extension Service Farm Income Data for Washington County. Income data for sixteen perennial crops are utilized. The income date [sic] for each crop is based on a five year average which is updated annually. Each year contains average yield per acres and average price. These yearly prices are then averaged over five years. A simple calculation yields the acreage necessary to produce $10,000 gross farm income. These acreage requirements are shown on Standard #5 of Appendix B. * * *" Id.

Petitioner points out that Standard 5 itself lists as its source "OSU Extension Service, Farm Income Data for Washington County (1984-1988)." Record 326. Petitioner contends this document is not, however, in the record. Petitioner argues the only relevant evidence in the record indicates the figures of Standard 5 are "grossly small." Petition for Review 22. The evidence cited by petitioner is the findings in the Rural Plan concerning economic average unit size for various types of farms in Washington County, previously described under subassignment C of the first assignment of error. See Petition for Review App. 5-19 to 5-20; 6-4 to 6-7.

Petitioner argues that we must remand Ordinance No. 338 because there is not substantial evidence in the record to support the conclusion that the acreage and density of perennial crops listed in Standard 5 are capable of producing an average of at least $10,000 gross annual farm income, as required by ORS 215.213(2)(b)(A), Goal 3 and CDC 430-37.2A.NEW2(b). ORS 197.835(7)(a)(C). According to petitioner, at a minimum there needs to be in the record testimony from the person who prepared the data base, explaining whether it can be reliably used in the manner of Standard 5 to determine minimum $10,000 farm income acreage requirements.[15] Petitioner maintains that the record, when viewed as a whole, could not permit a reasonable person to conclude that the acreage requirements of Standard 5 satisfy the statutory, goal and code standard. Younger v. City of Portland, 305 Or 346, 752 P2d 262 (1988).

The county argues the findings properly state that the figures in Standard 5 are based on OSU Extension Service farm income data and explain the methodology for calculating required densities and acreages. Record 21, 28-29. The county argues that the farm income standards of

[15]Petitioner raises specific questions concerning whether statistical information on existing crop production in the county can be reliably extrapolated for all areas of the county, regardless of soil quality, elevation or other factors. Petitioner also questions whether the data relied on includes income figures from farms of all sizes, and whether the farm income from the small acreages listed in Standard 5 can be reliably assumed to be proportional to that of large farms included in the data base.

ORS 215.213(2)(b) were adopted as part of the marginal lands legislation of Oregon Laws 1983, chapter 826. The county contends that legislative history of that 1983 act indicates counties were intended to use statistical data to determine whether a farm is capable of producing the $10,000 in gross farm income required by ORS 215.213(2)(b). The county also argues the findings of Attachment 1 are supported by a September 15, 1983 memorandum from the director of the DLCD which explains that it was intended by the marginal lands legislation that counties rely upon OSU Extension Service statistical farm income data in determining acreages required to produce $10,000 in gross annual farm income. Record 615.

We agree with the county that it may, as a general proposition, rely on statistical data in establishing standards for determining whether the farm income standards of ORS 215.213(2)(b) and CDC 430-37.2A.NEW2 are met. However, we agree with petitioner that the county's adoption of Standard 5 must be supported by substantial evidence in the whole record upon which a reasonable person may conclude that the acreages and densities of perennial crops listed in Standard 5 are capable of producing an average of at least $10,000 in gross annual farm income. Younger v. City of Portland, supra. In this case we are cited to no evidence in the record supporting the density and acreage figures

adopted in Standard 5.[16]

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law in amending the definition of 'commercial activities in conjunction with farm use' contained in CDC Section 430-33."

Ordinance No. 339 replaced the CDC's definition of "Commercial Activities in Conjunction with Farm Use" with the following:

> "Commercial activities are limited to providing products and services essential to the practice of commercial agriculture.
>
> "* * * The storage, sale and application of farm chemicals used in conjunction with the growing of farm crops necessary to serve nearby farm uses shall also be considered a commercial activity subject to meeting the following standards:
>
> "a. The chemicals shall be limited to those used in conjunction with the growing of farm crops; chemicals used only for other uses, such as forest uses, cannot be stored, sold or applied; and
>
> "b. The sale of farm chemicals shall be limited to quantities purchased by operators of commercial farm enterprises which contribute in a substantial way to the area's existing agricultural economy and help maintain

[16]We do not imply that the county must place the entire OSU Extension Service farm income data base into the record. However, the adoption of a standard such as Standard 5 must be supported at least by oral or written testimony of a qualified county staff member or other qualified individual stating they have analyzed the data base, describing the methodology used and explaining the conclusions drawn. See Columbia Steel Castings v. City of Portland, ___ Or LUBA ___ (LUBA No. 89-058, July 18, 1990), slip op 12-15.

> agricultural processors and established farm markets." (Emphasis added.) CDC 430-33.

Petitioner argues that the new definition of "commercial activities in conjunction with farm use" misconstrues the applicable law because the portion of the definition emphasized above does not require the storage and sale of chemical products and services to be "limited to providing products and services essential to the practice of agriculture directly to the surrounding agricultural businesses." (Emphasis added by petitioner.) Balin v. Klamath County, 3 LCDC 8, 19 (1979) (Balin).

The county argues that although the language of CDC 430-33 is not identical to that in Balin, it accomplishes what Balin requires.

We see no significant difference between providing chemicals and chemical services "essential to the practice of agriculture directly to the surrounding agricultural businesses" and providing chemicals and chemical services "used in conjunction with the growing of farm crops [and] necessary to serve nearby farm uses," particularly where the sale of such farm chemicals "shall be limited to quantities purchased by operators of commercial farm enterprises which contribute in a substantial way to the area's existing agricultural economy and help maintain agricultural processors and established farm markets."

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction and improperly construed the applicable law in amending the code by violating ORS 197.763."

A. Contents of Hearing Notice

ORS 197.763(3)(a) states that the notices of quasi-judicial land use hearings conducted by the local governments shall:

> "Explain the nature of the application and the proposed use or uses which could be authorized."

Further, ORS 197.763 requires that this procedural requirement be incorporated into the county's plan and land use regulations.

Petitioner argues that ORS 197.763 imposes more detailed requirements for the content of land use hearing notices so that ordinary citizens will be able to respond fully to land use applications at the local level. Petitioner asserts Ordinance No. 339 readopted a code provision which requires notices of quasi-judicial land use hearings to state "the nature of the proposed development." CDC 204-4.3.B. According to petitioner, CDC 204-4.3.B does not comply with ORS 197.763(3)(a) because where an applicant simultaneously seeks approval of a zone change and permission to engage in a particular use allowed by the zone, the notice would merely have to explain the nature of the proposed use. It would not have to explain the nature of the other uses which could be allowed in the requested

zone.

The county argues that CDC 204-4.3.B complies with ORS 197.763(3)(a), because the latter requires only that the nature of proposed uses be explained. According to the county, where no particular use is proposed, and only a zone change is requested, the statute does not require identification of all possible developments that could occur as a result of the zone change.

As best we understand, the parties agree that when a zone change is requested, under CDC 204-4.3.B the county is simply required to identify, in its notices of hearing, that a zone change from one zoning district to another is proposed, but does not have to describe the nature of the uses which could potentially be allowed in the proposed zoning district. The parties also agree that if approval for a specific use is requested in conjunction with the zone change, under CDC 204-4.3.B the county's notices of hearing are required to describe the nature of that proposed use. However, petitioner contends that CDC 204-4.3.B is inconsistent with ORS 197.763(3)(a) because, in these instances, the statute requires the notices of hearing to also describe the nature of other uses which potentially could be allowed in the proposed zoning district.

We believe the requirement of ORS 197.763(3)(a) that notices of quasi-judicial land use hearings "explain the nature of * * * the proposed uses or uses which could be

authorized" refers to specific proposed uses for which land use approval is sought in the subject hearing. When there is no specific proposed use, as in the case of a simple zone change, this statutory provision does not apply. In such an instance, it is sufficient if the notices of hearing "explain the nature of the application," i.e., that it is a for a zone change from one identified zoning district to another identified zoning district.

This subassignment of error is denied.

B. Submittal of Evidence by the Applicant

Petitioner argues that readopted CDC 203-4.5 and newly adopted CDC 203-4.NEW violate the requirement of ORS 197.763(4)(a) that all evidence relied on by the applicant be submitted to the local government by the time notice of hearing is provided, because they authorize the submission of evidence by the applicant at a later time if a continuance is granted.

In 1000 Friends of Oregon v. Lane County, ___ Or LUBA ___ (LUBA No. 89-132, February 21, 1990), slip op 15-18, we interpreted ORS 197.763(4)(a) and (b) together to allow an applicant to submit evidence after the time notice of a hearing is provided, so long as a continuance of the hearing is granted upon request of any party. The Court of Appeals affirmed our interpretation. 1000 Friends of Oregon v. Lane County, 102 Or App 68, 74, ___ P2d ___ (1990).

This subassignment of error is denied.

C. Availability of Staff Report

ORS 197.763(4)(b) requires that "[a]ny staff report used at [a quasi-judicial land use] hearing shall be available at least seven days prior to the hearing."

Ordinance No. 339 readopted CDC 203-5.2, which requires that a "staff report shall be available no later than seven (7) calendar days before a hearing on Type III actions or any hearing upon appeal." However, Ordinance No. 339 also readopted CDC 203-5.3, which provides:

> "A decision on a development action shall be deferred to a time and date certain no later than the next regularly scheduled hearing if a staff report is not available on or before the due date, unless the Review Authority determines that:
>
> "A. The delay or unavailability has not substantially prejudiced the parties; and
>
> "B. An adequate review can be conducted without the advance availability of the report." (Emphasis added.)

Petitioner argues that the portions of CDC 203-5.3 emphasized above violate ORS 197.763(4)(b) because they allow the county to hold a quasi-judicial land use hearing without having the staff report available seven days prior to the hearing. Petitioner argues the statute does not excuse compliance with this requirement under any circumstances.

The county essentially concedes that CDC 203-5.3, when applied to decisions requiring quasi-judicial land use hearings, does not comply with ORS 197.763(4)(b). However,

the county argues that CDC 203-5.3 applies both to decisions made without a hearing, following Type II procedures (pursuant to ORS 215.416(11)), and to decisions made after a quasi-judicial hearing, following Type III procedures. According to the county, CDC 203-5.3 therefore complies with ORS 197.763(4)(b) so long as it is not applied to the conduct of quasi-judicial land use hearings. The county argues that this is not inconsistent with ORS 197.763(4)(b) because Ordinance No. 339 amended CDC 202 to provide that all land use actions shall follow the Type I, II, III or IV procedures specified by CDC Article II "unless State law mandates different or additional procedures for particular land use actions or categories of land use actions."

ORS 197.763 requires that its procedural requirements for the conduct of quasi-judicial land use hearings "shall be incorporated into [local government] comprehensive plan[s] and land use regulations." This requirement is not satisfied by a code which sets out procedures that are inconsistent with ORS 197.763, but includes a general statement that the procedures apply unless state law mandates different procedures. Furthermore, we agree with the parties that CDC 203-5.3, as applied to land use decisions requiring quasi-judicial hearings, does not comply with ORS 197.763(4)(b).

This subassignment of error is sustained.

The seventh assignment of error is sustained in part.

Washington County Ordinances No. 337 and 340 are affirmed. Washington County Ordinances No. 338 and 339 are remanded.