

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

3
4 LORREN HARWOOD and DEBBIE PETREE,)
5)
6 Petitioners,)
7)
8 vs.)
9) LUBA No. 92-001
10 LANE COUNTY,)
11) FINAL OPINION
12 Respondent/) AND ORDER
13 Cross-Respondent,)
14 and)
15)
16 LARRY FOLTZ and CHARLENE FOLTZ,)
17)
18 Intervenors-Respondent/)
19 Cross-Petitioners,)

20
21 Appeal from Lane County.

22
23 Lorren Harwood, Junction City, filed the petition for
24 review and argued on his own behalf.

25
26 Stephen L. Vorhes, Eugene, filed a response brief and
27 argued on behalf of respondent/cross-respondent.

28
29 David B. Smith, Tigard, filed the briefs and argued on
30 behalf of intervenors-respondent/cross-petitioners.

31
32 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
33 Referee, participated in the decision.

34
35 AFFIRMED 04/27/92

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the board of county
4 commissioners approving an application for special use
5 approval for a dwelling in conjunction with farm use.

6 **MOTION TO INTERVENE**

7 Larry Foltz and Charlene Foltz move to intervene on the
8 side of respondent in this appeal proceeding. There is no
9 objection to the motion, and it is allowed.

10 **FACTS**

11 The subject parcel consists of 24 acres and is zoned
12 Exclusive Farm Use (E-30). Intervenors-respondent
13 (intervenors) filed an application for approval of a
14 dwelling in conjunction with farm use on the subject parcel.
15 The application included a farm management plan under which
16 ten acres of the subject property were to be planted in
17 Christmas trees over a period of two years.

18 The planning department approved the application, and
19 petitioners appealed to the hearings officer. Before that
20 appeal hearing was held, intervenors planted ten acres of
21 the subject parcel in Christmas trees. After a public
22 hearing, the hearings officer reversed the decision of the
23 planning director and denied the application. Intervenors
24 appealed to the board of county commissioners. After
25 intervenors appealed to the board of county commissioners,
26 the hearings officer decided to reconsider his decision and

1 accept further evidence on two issues. After the hearings
2 officer's reconsideration hearing, the hearings officer
3 again issued a decision denying the application.

4 Intervenor's appealed to the board of county
5 commissioners. The board of county commissioners reversed
6 the hearings officer and approved the application. This
7 appeal followed.

8 **FIRST AND FOURTH ASSIGNMENTS OF ERROR**

9 ORS 215.213(2)(b)¹ provides the following may be
10 allowed in an EFU zone:

11 "A dwelling in conjunction with farm use or the
12 propagation or harvesting of a forest product on a
13 lot or parcel managed as a part of a farm
14 operation or a woodlot * * * if the lot or parcel:

15 "(A) * * * [I]s planted in perennials capable of
16 producing upon harvest an average of at least
17 \$10,000 in annual gross farm income[.]

18 "* * * * *"

19 Lane County Code (LC) 16.212(3) provides nearly identical
20 requirements for dwellings in conjunction with farm use in
21 the E-30 zone.

22 Petitioners argue the challenged decision erroneously
23 determines the subject parcel is in "farm use" and,
24 therefore, the proposed dwelling cannot be "in conjunction
25 with" a farm use. According to petitioners, the subject

¹Lane County has adopted marginal lands designations and, therefore, must apply ORS 215.213(1) to (3) to lands zoned EFU, rather than ORS 215.283.

1 property is not in "farm use" for two reasons. First,
2 petitioners contend that under ORS 215.203(2)(a) and
3 (3)(a),² as well as LC 16.212(3), a parcel used for growing
4 Christmas trees is not in "farm use" unless it is "used
5 exclusively" for growing Christmas trees. Petitioners state
6 the decision does not establish the subject parcel is "used
7 exclusively" for the production of Christmas trees. Second,
8 petitioners argue the trees planted on the subject parcel do
9 not constitute "cultured Christmas trees," as defined by ORS
10 215.203(3), because the decision fails to establish that the

²ORS 215.203(2)(a) provides in relevant part:

"As used in this section, 'farm use' means the current employment of land for the primary purpose of making a profit in money by raising, harvesting and selling crops * * * or any other agricultural or horticultural use * * * . It does not include the use of land subject to [certain taxation statutes] except land used exclusively for growing cultured Christmas trees * * * ." (Emphasis supplied.)

ORS 213.203(3) defines cultured Christmas trees as trees:

- "(a) Grown on lands used exclusively for that purpose, capable of preparation by intensive cultivation methods such as plowing or turning over the soil.
- "(b) Of a species for which the Department of Revenue requires a 'Report of Christmas Trees Harvested' for purposes of ad valorem taxation;
- "(c) Managed to produce trees meeting U.S. No. 2 or better standards for Christmas trees as specified by Agriculture Marketing Services of the United States Department of Agriculture; and
- "(d) Evidencing periodic maintenance practices of shearing for Douglas fir and pine species, weed and brush control and one or more of the following practices: Basal pruning, fertilizing, insect and disease control, stump culture, soil cultivation, irrigation." (Emphasis supplied.)

1 "periodic maintenance practices" required by ORS
2 215.203(3)(d) have occurred. Finally, petitioners argue the
3 decision fails to establish the dwelling is necessary for
4 the farm use of the property.

5 We disagree with petitioners' interpretation of
6 ORS 215.203(2)(a), (3)(a) and (d) and 215.213(2)(b)(A). The
7 issue presented is whether the requirements in
8 ORS 215.203(2)(a) and (3)(a) that land be "used exclusively"
9 for growing Christmas trees, and in ORS 215.203(3)(d) for
10 "evidence of periodic maintenance practices," are applicable
11 to determining whether a proposed dwelling is "in
12 conjunction with farm use" under ORS 215.213(2)(b)(A), where
13 the farm use is growing Christmas trees. As first stated in
14 Rutherford v. Armstrong, 31 Or App 1319, 1321, 572 P2d 1331
15 (1977), rev den 281 Or 431 (1978), and reemphasized in
16 Newcomer v. Clackamas County, 92 Or App 174, 181, 758 P2d
17 450, modified on other grounds, 94 Or App 33 (1988):

18 "ORS 215.203 was originally enacted as part of a
19 statutory scheme which had the 'primary purpose of
20 * * * [providing] property tax relief for farm
21 land and thus protect[ing] such land from being
22 diverted to other uses.'" (Citations omitted.)

23 In Newcomer, the Court of Appeals went on to state the
24 following concerning the "current employment" requirement of
25 ORS 215.203:

26 "Although [ORS 215.203] also has land use
27 regulatory features, and it is referred to in some
28 of the other agricultural lands statutes as well
29 as Goal 3, the 'current employment' requirement
30 was designed only as a qualification for favorable

1 tax treatment." (Citations omitted.) Id.

2 We believe the provisions of 215.203(2)(a) and (3)(a)
3 and (d) relating to the "used exclusively" requirement and
4 the requirement for "evidence of periodic maintenance
5 practices" concerning land used for cultured Christmas trees
6 are similarly designed to be qualifications for particular
7 tax treatment. The basic definition of "farm use" in ORS
8 215.203(2)(a) as being the use of land primarily for profit
9 by "raising, harvesting and selling crops * * * or any other
10 agricultural or horticultural use" would include raising
11 Christmas trees. The provisions of ORS 215.203(3) and the
12 reference to "used exclusively" in the final sentence of ORS
13 215.203(2)(a) were added to the definition of farm use by
14 1977 Oregon Laws, chapter 893, section 17a. This Act stated
15 its function as "Relating to property taxation, creating new
16 provisions * * *." During the same legislative session,
17 another legislative enactment amended ORS 215.203 in ways
18 unrelated to this case. The function of that other
19 legislation is stated as "Relating to county planning and
20 land use, creating new provisions * * *." 1977 Or Laws,
21 ch 766, sec 7.

22 We therefore do not believe the "used exclusively"
23 requirement of ORS 215.203(2)(a) and (3)(a), or the
24 "evidence of periodic maintenance practices" requirement of
25 ORS 215.203(3)(d), are standards applicable to permit
26 applications for dwellings "in conjunction with farm use"

1 under ORS 215.213(2)(b)(A).

2 Finally, nothing in LC 16.212(3) imposes a requirement
3 that the land upon which Christmas trees are grown must be
4 used exclusively for such purposes, or that certain
5 management practices be employed, before a dwelling may be
6 considered to be in conjunction with farm use. Accordingly,
7 petitioners' arguments regarding the exclusive use of the
8 subject parcel and the lack of certain management practices,
9 provide no basis for concluding the proposed dwelling is not
10 "in conjunction with farm use."³

11 Regarding petitioners' argument that the challenged
12 decision fails to establish the dwelling is "necessary" for
13 farm use of the property, there are no statutory or LC
14 requirements that a farm dwelling be "necessary" to the farm
15 use. See Forster v. Polk County, ___ Or LUBA ____ (LUBA No.
16 91-108, December 2, 1991), slip op 8. Accordingly, that the
17 decision fails to determine the dwelling is necessary to
18 farm uses of the subject property, provides no basis for
19 reversal or remand.

20 The first and fourth assignments of error are denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 "Lane County misconstrued the applicable law,
23 failed to make adequate findings of fact, and made
24 a decision not supported by substantial evidence

³There is no dispute that ten acres of the subject parcel have been planted with trees of an appropriate type to eventually produce Christmas trees.

1 in the record as a whole, in concluding that the
2 proposed dwelling is on property 'planted in
3 perennials.'

4 Petitioners contend Christmas trees do not constitute
5 "perennials." According to petitioners, the LC 16.212(3)
6 and ORS 215.213(2)(b)(A) requirements that the property be
7 planted in perennials, are not satisfied by evidence that
8 the property is planted in Christmas trees. Petitioners'
9 basis for arguing a Christmas tree is not a perennial is
10 that a Christmas tree is cut and, thereafter, the tree
11 cannot produce an agricultural product.

12 Because neither the LC nor ORS chapter 215 defines the
13 term "perennial," the commonly understood meaning of the
14 term applies. Sarti v. City of Lake Oswego, 106 Or App 594,
15 597, ___ P2d ___ (1991). Websters Third New International
16 Dictionary defines perennial as follows:

17 "a plant (as a tree or shrub, or an herb renewing
18 the top growth seasonally) that lives for an
19 indefinite number of years."

20 No party argues that any variety of Christmas tree fails to
21 renew its top growth or is unable to survive for an
22 indefinite number of years, until it is harvested.⁴
23 Regardless of whether the particular method for harvesting a
24 perennial plant may stop the plant's growth cycle, Christmas
25 trees meet the above quoted definition of perennial.

⁴Further, there is evidence in the record to support the county's determination that a Christmas tree is a perennial.

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 "Lane County misconstrued the applicable [l]aw,
4 failed to make adequate findings of fact, and made
5 a decision not supported by substantial evidence
6 in the record as a whole, in concluding that the
7 applicant's crops were capable of producing an
8 average gross [annual] income of at least
9 \$10,000."

10 Petitioners argue the county misinterpreted the income
11 standard of LC 16.212(3) and ORS 215.213(2)(b)(A).
12 Petitioners also argue the evidence in the record does not
13 support the county's determination that the Christmas trees
14 planted on the parcel are capable of producing an average of
15 \$10,000 in gross annual income, as required by LC 16.212(3)
16 and ORS 215.213(2)(b)(A). We address these arguments
17 separately below.

18 **A. Interpretation**

19 Petitioners argue LC 16.212(3) and ORS 215.213(2)(b)(A)
20 require findings that a parcel will annually produce \$10,000
21 in income.

22 We disagree. Both LC 16.212(3) and ORS
23 215.213(2)(b)(A) require a determination that the parcel is:

24 "* * * planted in perennials capable of producing
25 upon harvest an average of at least \$10,000 in
26 annual gross farm income[.]" (Emphasis supplied.)

27 Accordingly, it is only necessary that the trees produce an
28 average of \$10,000 gross annual income, not \$10,000
29 annually, as petitioners contend.

30 This subassignment of error is denied.

1 **B. Evidentiary Support**

2 We have reviewed the evidence cited by the parties
3 regarding whether the parcel is planted in Christmas trees
4 capable of producing an average of \$10,000 in gross annual
5 income. There is conflicting evidence concerning whether
6 the trees planted on the parcel are capable meeting the
7 \$10,000 income standard. However, the conflicting evidence
8 does not so undermine the evidence relied on by the county
9 such that it is unreasonable for the county to rely on that
10 evidence. It is well established that the choice between
11 conflicting believable evidence belongs to the county.
12 Vestibular Disorder Consult. v. City of Portland, 19 Or
13 LUBA 94, 103 (1990). We find the evidence in the record is
14 such that a reasonable person could conclude that the
15 Christmas trees planted on the subject parcel satisfy the
16 \$10,000 income standards contained in ORS 215.213(2)(b)(A)
17 and LC 16.212(3).

18 This subassignment of error is denied.

19 The third assignment of error is denied.

20 **FIFTH ASSIGNMENT OF ERROR**

21 "Lane County misconstrued the applicable law,
22 failed to make adequate findings of fact, and made
23 a decision not supported by substantial evidence
24 in the record as a whole, in concluding that the
25 property is small enough to qualify for a dwelling
26 under Lane Code 16.212(3)(b)."

27 LC 16.212(3)(b) authorizes approval of a dwelling in
28 conjunction with farm use on "a legal lot that is managed as

1 a part of a farm operation * * * that is smaller than
2 required under LC 16.212(6)(d)." LC 16.212(6)(d) contains
3 of list of various agricultural enterprises and
4 corresponding acreages, among which is "Horticultural
5 Specialties -- 20 acres."

6 As we understand it, petitioners argue that Christmas
7 trees, as a "horticultural specialty," have a parcel size
8 under LC 16.212(6)(d) of 20 acres. Petitioners contend that
9 because the subject parcel is 24 acres in size, it is not
10 "smaller than required by LC 16.212(6)(d)" and, therefore,
11 cannot qualify for a dwelling under LC 16.212(3)(b).

12 We disagree with petitioners' interpretation of
13 LC 16.212(3)(b). Under LC 16.212(3)(b), a farm dwelling may
14 be authorized where a "farm operation is smaller than
15 required under LC 16.212(6)(d)." (Emphasis supplied.)
16 LC 16.212(3)(b) does not require that the lot or parcel on
17 which the farm dwelling is proposed to be located be smaller
18 than the acreages provided in LC 16.212(6)(d).

19 The fifth assignment of error is denied.

20 The county's decision is affirmed.⁵

⁵Under our disposition of this appeal, we need not reach the arguments contained in intervenors' cross petition for review.