BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF LINN COUNTY,
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

JOHN WARNOCK and DONNA WARNOCK,
Intervenors-Respondent.

LUBA No. 98-227

Appeal from Linn County.

William F. Buchanan, Portland, filed the petition for review. Melissa Ryan argued on behalf of petitioner. With them on the brief was Miller, Nash, Wiener, Hager & Carlsen LLP.

No appearance by respondent.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenors-respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 12/03/99

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

Briggs, Board Member.

NATURE OF THE DECISION

Petitioner appeals a decision to approve a lot of record dwelling on high-value farmland located in an Exclusive Farm Use (EFU) zone.

MOTION TO INTERVENE

John Warnock and Donna Warnock move to intervene on the side of respondent. There is no opposition to this motion and it is allowed.

FACTS

The subject property is a 7.8-acre parcel located in an EFU zone. The property is composed predominantly of high-value soils as inventoried in the *Soil Survey of the Linn County Area*, July 1987. The property is slightly larger than the median tax lot size within a quarter-mile radius. There are dwellings on most of the parcels surrounding the property, all but one of which is zoned EFU.

Intervenors-respondent (intervenors), the applicants below, purchased the subject property in 1969. The property is part of several parcels that were partitioned in the early 1960s. The subject property is located in the center of the partitioned parcels, and there are currently 22 lawfully sited dwellings on 24 lots and parcels within a quarter-mile radius of the subject property.[1]

During the 1970s, intervenors leased the subject property and an adjacent parcel they owned to a commercial farmer who cut hay and grazed sheep on the properties. The subject property also was used as a staging area for a gravel quarry that was located on property to the east of the subject property. The adjacent property, which the applicants sold in the 1990s, continues to be devoted to grazing. Cattle, sheep and poultry production are the

[1]The parties do not indicate in their briefs whether the properties were subdivided, or if they were subject to serial partitions. We use the terms partition and parcel to ensure some consistency, although it may not be the actual facts in this particular case.

predominant farming activities in the area. The applicants indicated on their plot plan that the subject property is suitable for hazelnut, berry and grass production.

The county planning commission reviewed the application and approved it. Petitioner appealed the planning commission decision to the board of county commissioners. The board of commissioners held a *de novo* hearing on the appeal, after which the board of commissioners denied the appeal and affirmed the planning commission's approval.

This appeal followed.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued applicable law and failed to follow applicable procedures in a manner that prejudiced its substantial rights, when the board of commissioners denied petitioner's request to admit tapes of testimony submitted to the planning commission into the record of the board of commissioners' proceedings. Petitioner contends that the only reason the board of commissioners gave for denying the admission of the tapes was that the proceedings before the board were *de novo* and therefore all testimony and evidence had to be presented again before the board of commissioners. Petitioner argues that it presented the tapes to rebut evidence presented in the staff report that purported to summarize the testimony of the applicant.

We must reverse or remand a decision if the process used by the local government violates a party's substantial rights. "[T]he 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Petitioner attaches to its petition for review a transcript of the hearing before the board of commissioners. The relevant testimony is as follows:

> "Just [representative of Friends of Linn County]: 'I would also like to request that the tapes of the planning commission hearing be included in the record.'

> "Schmidt [county commissioner]: 'I'm not in favor of that. This is a *de novo* hearing.'
>
> "Skiens [chair of the board of county commissioners]: 'This is a [*de novo*] hearing and so we start from the beginning.'
>
> "Just: 'Well I didn't know if it was possible or not, but it never hurts to ask.'" Petition for Review, Appendix A 20.

Petitioner's request came at the end of its testimony in opposition to the application. Petitioner did not argue before the board of commissioners that the tapes contain testimony that undermines the staff report's summation. Petitioner has not shown that its presentation was limited by the board of commissioners' refusal to accept the tapes, nor does petitioner show that it was prevented from presenting testimony to rebut the evidence presented in the staff report. Accordingly, even if the board of commissioners committed a procedural error by denying petitioner's request to include the tapes, petitioner has not demonstrated that the board of commissioners' error prejudiced its substantial rights.

The fifth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

ORS 215.705(2)(a)(C)[2] provides the criteria that must be satisfied before a lot of record dwelling may be approved on high-value farmland. The first prong of the three-part test requires that the county find

> "The lot or parcel cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity." ORS 215.705(2)(a)(C)(i).

Petitioner argues that the county's conclusion that ORS 215.705(2)(a)(C)(i) is met is based on an improper construction of applicable law and on inadequate findings, and is not supported by substantial evidence.

[2]The Linn County code includes provisions that mirror the statutory provisions. We address only the statutory provisions in this opinion.

Petitioner argues that the county misconstrued the applicable law in two ways. First, the county erred by concluding that the subject property is comprised of gravel left from a previous quarry operation, and therefore, the property could not practicably be managed for farm use, despite the presence of high-value soils. Second, petitioner argues that the county improperly relied on evidence that the subject property cannot be put to commercial farm use to show that the property cannot practicably be managed for *any* farm use. Petitioner also argues that the county erred by failing to explain how the facts it relies upon lead to the conclusion that the subject property cannot be practicably managed for farm use.

A. High-Value Soils Designation

Petitioner contends that the record demonstrates that the subject property is comprised of high-value farmland, and the only way that designation can be changed is for an independent soil evaluation to be conducted on the property. Since that was not done, petitioner argues that the county improperly concluded that the subject property is not high-value farmland. *See DLCD v. Umatilla County*, 34 Or LUBA 703, 705-06 (1998) (county improperly determined that designated high-value soils are not high-value because of frost threat).

Intervenors argue that the county did not challenge the soil designation. Instead, intervenors contend that the county found, despite the presence of high-value soils, that the subject property cannot be practicably managed for farm use. Intervenors contend that the county simply relied in part on the existence of gravel to support its finding that the property cannot be practicably managed for farm use.

The county's findings state, in relevant part:

> "The applicant stated there was a gravel crushing operation on the Vaughan property [located across Craig Lane from the subject property] more than 20 years ago. The front portion (eastern 1-2 acres) of [the subject property] was also used as part of the operation for gravel storage. When the applicants started purchasing the property in 1969, there was gravel on the surface of the land. After 20 years, grass is growing back through the gravel. Ed Schultz submitted a letter from Jack Scott, the individual that farms the property at the

north end of Craig Lane. Mr. Scott stated that he is familiar with the Warnock property and that it would not be feasible to commercially farm the property because of the size of the property and the amount of rock existing in the old river beds. He further stated that this would be true whether it would be farmed by itself or in conjunction with other property he farms.

"* * * * *

"Because of the gravel on the property, the lack of commercial farm uses in the area, the amount of development in the area and the small size of the property, the applicants have demonstrated that the property cannot practicably be managed for farm use, either by itself or in conjunction with other land." Record 5-6.

We agree with intervenors that the county did not dispute the high-value soils designation, but rather determined that the existence of gravel from previous mining operations limited the farm use of the property, and that this finding does not constitute a misconstruction of the applicable law.

This subassignment of error is denied.

B. Commercial farming

Petitioner argues that the county erred when it determined that the subject property could not be practicably managed for commercial farm use. According to petitioner, the standard requires only that the property be managed for farm use, and that it does not matter whether the property is suitable for commercial farm use.

The county's findings with regard to this aspect of ORS 215.705(2)(a)(C)(i) state:

"There are no commercial farming or forestry practices occurring on properties that adjoin the applicants' property. Hobby farming occurs on some of the surrounding tax lots but only in conjunction with an existing dwelling on the property. Cattle or sheep grazing seems to be the predominant farming activity on those surrounding tax lots. Robert Drake, a property owner to the south, stated he raises chickens, ducks, turkeys and geese on his 5.27 acres but not as a commercial venture.

"Mr. Warnock stated that when he first purchased the property, Mr. Craig, a commercial farmer in the area at the time, grazed sheep and cut hay on the property. Mr. Craig farmed the property for a few years with his only costs being to pay the property taxes. Mr. Craig stopped farming the property because even though the property taxes were only $60.00 per year, it was not

> cost effective to use this property in conjunction with the remainder of his farm property. Mr. Warnock has contacted other farmers over the last 20 years to rent the property but he has not found a farmer that is willing to use the property. The property has not been in a farm deferral program since 1992. According to the applicants, they haven't seen hay balers using Craig Lane since the early 1970's and they haven't seen any farm equipment in the last 20 years.
>
> "* * * * *
>
> "Additional testimony indicated that Mr. Jantzi, the other commercial farmer in the area, farms a portion of the Rahe property [located to the south of the subject property] but would not farm the five acres owned by Mr. and Mrs. Rahe because it was too small. This is even though Mr. Jantzi farms the 140 acre tract immediately adjacent to the five acres." Record 5-6.

Intervenors argue that the county could, and did, distinguish between those farm activities that are incidental to the residential uses of adjoining properties and those uses that have a minimum level of profitability, but are otherwise not commercial. Intervenors rely on *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 517-18 (1994) for the proposition that the county could set a threshold of profitability for determining when a property is properly viewed as capable of farm use.

It may be that the county can establish a certain level of return for determining when a parcel cannot be practicably managed for farm use. However, that is not what the county did in this case. According to the findings, the county relied upon evidence from *commercial* farmers as to whether they would either incorporate the subject property into their current farm operations, or conduct similar commercial farm operations on the subject property by itself. There is evidence in the record that adjacent property owners are using their property for farm use, notwithstanding the presence of dwellings on the property. The county erred by not considering those farm uses in its analysis of whether the property could be practicably managed for farm use.

Because we conclude that the county misconstrued the applicable law, it serves no purpose to address petitioner's remaining findings and substantial evidence arguments.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

ORS 215.705(2)(a)(C)(ii), the second prong of the test imposed by ORS 215.705(2)(a)(C), provides that a lot of record dwelling on high-value farmland may be approved if the local government finds "the dwelling will comply with the provisions of ORS 215.296(1)."[3]

Petitioner argues that the county erred in determining the subject application complied with ORS 215.705(2)(a)(C)(ii) because its conclusion is based on an improper construction of the applicable law, is based on inadequate findings and is not supported by substantial evidence in the record. Petitioner contends that the county erred by focusing only on the effect the establishment of a dwelling would have on commercial farm activities, rather than on the effect a dwelling would have on farm use in the area as a whole.[4] Petitioner also contends that the findings fail to demonstrate what factors the county relied upon to reach its conclusion that a dwelling would not force a significant change in or significantly increase the cost of farm and forest activities on surrounding properties. Petitioner further argues that there is not substantial evidence in the record to support the county's finding that the cost of farmland would not increase because of the approval of a dwelling on the subject property.

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[3]ORS 215.296(1) provides in relevant part that a nonfarm use may be approved provided the local government finds that the 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."

[4]The parties agree that there are no forest activities occurring on any of the parcels surrounding the subject property. Therefore, our discussion is limited to the parties' arguments regarding farm activities.

Petitioner contends that the county should have considered those farm uses that occur on adjacent properties when it determined that the approval of a dwelling on the subject property would not force a significant change in or significantly increase the cost of farming activities on surrounding properties devoted to farm use.

Intervenors contend that the county could, and did, make a distinction between those surrounding properties which are primarily devoted to residential uses and those where the entire use of the property is for farm use. Intervenors argue that the farm uses in conjunction with dwellings lead to the conclusion that the addition of one dwelling will not change farm practices or increase the cost of farm activities where the area already has 22 dwellings on lots of generally the same size.

The county's findings of compliance with this criterion state:

> "The subject property is surrounded by other small parcels created in the 1960's. These parcels all have some residential use * * *. All but one parcel have legally established residences. Commercial farm activities that take place are completely separated from the subject property by the intervening small parcels. The proposed development of the subject property would be nothing more than filling the center of the donut hole. As an example, since the commercial farm use in the area is grass seed production, any claim of smoke interference would first have to pass over the existing residences to get to the proposed residence. The same would apply to any applications of fertilizers or pesticides.
>
> "The applicants have demonstrated that the farm use that generally occurs on surrounding properties is livestock grazing and it occurs on small parcels that already contain dwellings. There has been no evidence of any type of commercial farming occurring on any of the adjoining properties. Testimony was provided the farm equipment has not been seen on Craig Lane in about 20 years. Based on these facts, the applicants have demonstrated that the proposed dwelling will not force a significant change in or increase the cost of accepted farm or forest practices on surrounding land devoted for farm or forest use." Record 6.

Petitioner's first two arguments provide no basis for reversal or remand. The county established that the primary farm use on the adjacent properties is livestock raising. The county's findings do not specifically identify the accepted farming practices that are associated with farm uses on surrounding lands. However, the findings do explain that the

establishment of a dwelling on the subject property will not force a significant change in or significantly increase the cost of livestock raising, the only identified farm use, because farm operators do not transport farm equipment on the same access road. In addition, the findings explain that the existence of other dwellings on nearly every other parcel in the study area indicates that the existence of dwellings, by themselves, does not affect the farm practices, including noncommercial farming practices, in the area. These findings are adequate to address ORS 215.296(1).

As for petitioner's allegation that the county failed to consider the effect of the sales price of the subject property on other farm parcels, even if petitioner's allegation that the asking price for the subject property would be higher due to the requested dwelling is correct, petitioner does not explain how that in any way would affect "farm or forest practices" under ORS 215.705(2)(a)(C)(ii).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ORS 215.705(2)(a)(C)(iii) provides the third prong of the analysis required by ORS 215.705(2)(a)(C) for determining whether a lot of record dwelling may be approved on high-value farmland. A dwelling may be approved if the county finds that "the dwelling will not materially alter the stability of the overall land use pattern in the area." ORS 215.705(2)(a)(C)(iii).

We have established that the "stability standard" requires a three-part analysis. First, the decision maker must determine the area that is the subject of the analysis. Second, the land uses within the study area must be identified. Third, the decision maker must conclude that the proposed use of the subject property will not materially alter the stability of the identified land use pattern within the study area. *Sweeten v. Clackamas County*, 17 Or LUBA 1234, 1245-46 (1989).

In this case, the county adopted findings that parallel the analysis set out in *Sweeten.* Petitioner argues that the county's findings are inadequate because the county failed to justify the scope of its study area, and failed to provide a clear picture of the land use pattern on existing EFU-zoned lands in the area. Further, petitioner argues that the findings are deficient because they fail to analyze the extent to which a dwelling would encourage further nonfarm development in the area.

The purpose of the first two parts of the *Sweeten* analysis is to provide a clear picture of the area. *DLCD v. Crook County*, 26 Or LUBA 478, 491 (1994). In this case, the county chose a one-quarter mile radius as its study area because the area radius is the same as the required study area for other nonresource dwellings on resource lands. While we may not agree in all cases that the one-quarter mile radius is adequate to provide a clear picture of the existing land use pattern, petitioner has not argued, and we do not find, that in this case, the one-quarter mile radius is inadequate to provide the necessary "clear picture." *Blosser v. Yamhill County*, 18 Or LUBA 253, 261, n 6 (1989).

Petitioner also claims that the county failed to adequately describe the existing and potential land uses in the area, and that the county improperly focused on the rural residential uses of the surrounding properties, and not on the farm uses occurring on those properties, when it described the land uses. Petitioner relies on our analysis in *Hearne v. Baker County*, 34 Or LUBA 176, 185-86 (1998) for the proposition that the focus of the stability analysis should be on the farm uses, and not on the residential uses, that may be occurring on EFU land within the study area. Intervenors argue that, taken in context with the other findings the county made, it is clear that the subject property is the last of a series of small lots to be subject to residential development and that approval of a dwelling on the subject parcel will not materially alter the land use pattern of the area.

In *Hearne*, the county made conclusory findings that a proposed dwelling would not alter the stability of the land uses in the area, because historical development in the vicinity

had created a *de facto* rural residential development. We rejected the county's conclusion, because we determined that the county had failed to consider the effect of the siting of the proposed dwelling on those remaining resource properties in the vicinity that did not contain dwellings. 34 Or LUBA at 186.

In this case, all but one of the parcels within the one-quarter mile radius of the subject property are zoned EFU. Contrary to petitioner's understanding of *Hearne*, the county should consider all of the uses located on EFU lands within the study area, both farm and nonfarm, in determining whether the addition of this particular dwelling will alter the stability of the existing land use pattern. Neither is it error for the county to identify those farm uses that the county deems to be commercial or noncommercial. The potential uses of the property may be important in those circumstances where there is evidence to show that approval of the nonresource dwelling will have a precedential effect and will encourage the establishment of new nonfarm dwellings in the area. However, in this case, the proposed dwelling is being approved under lot of record standards and is the last to be developed with a dwelling. The county could reasonably conclude under these circumstances that the approval of a dwelling on the subject parcel will not establish a precedent for the area. *Blosser* at 264.

The particular finding addressing the stability standard focuses on the existence of dwellings on existing parcels and does not otherwise discuss the farm activities on those parcels. Nevertheless, we agree with intervenors that the county's findings are sufficient to describe the uses of the properties within the study area, and support a conclusion that in this instance, where the subject property is the last vacant parcel in the study area and is completely surrounded by small parcels with dwellings on them, the stability of the land use pattern will not be materially affected by approval of a dwelling on the subject property.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In its fourth assignment of error, petitioner argues that the county's notice of proceedings failed to include statutory and local criteria, and that failure to include applicable decisional criteria prejudiced petitioner's substantial rights. Specifically, petitioner argues that the county should have provided notice that ORS 215.705(1)(c) (compliance with the local comprehensive plan and other law is required); ORS 215.705(2)(b) and Linn County Zoning Ordinance (LCZO) 2.150(7)(E) (notice to the Department of Agriculture is required); LCZO 2.110 (conformance with comprehensive plan and local ordinance); and LCZO 20.020(2)(C) (consistency with EFU zone statement of purpose) are approval standards that must be satisfied before the dwelling on the subject property may be approved. Intervenors argue that the county properly construed applicable law and considered the appropriate decisional criteria in its notices, hearing statements and findings.

A. ORS 215.705(1)(c)

ORS 215.705(1)(c) permits a dwelling to be sited pursuant to the provisions of ORS 215.705, 215.710, 215.720, 215.740 and 215.750 provided "the proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law." Petitioner contends that the county "implicitly misconstrued the applicable law by failing to include [ORS 215.705(1)(c)] in its notices, hearing statement, and findings." Petition for Review 21. ORS 197.763(3)(b) does not require that the county include statutory criteria in its notice of hearing, and the county's failure to include ORS 215.705(1)(c) in its notice is not error. *ODOT v. Clackamas County*, 23 Or LUBA 370, 374-375 (1992). Moreover, ORS 215.705(1)(c) simply states that the applicable requirements in the county's "comprehensive plan and land use regulations and other provisions of law" must be satisfied. ORS 215.705(1)(c) is not itself an approval criterion that must be addressed in the county's findings.

This subassignment of error is denied.

B. ORS 215.705(2)(b) and LCZO 2.150(7)(E)

ORS 215.705(2)(b) requires that

> "A local government shall provide notice of all applications for dwellings allowed under [ORS 215.705(2)] to the State Department of Agriculture * * * in accordance with the governing body's land use regulations but shall be mailed at least 20 calendar days prior to the public hearing * * *."

LCZO 2.150(7)(E) requires the following notice:

> "The County shall provide notice to the State Department of Agriculture of all applications for dwellings allowed under [the county's lot of record criteria.]"

Petitioner argues that the county failed to include this "substantive decision criteria" in its notices, hearing statement and findings. Petition for Review 22.

We do not agree with petitioner's characterization of ORS 215.705(2)(b) as a "substantive decisional criterion." It is a procedural requirement.

The county's failure to identify ORS 215.705(2)(b) would not be error even if it were a substantive criterion, because only criteria from the comprehensive plan and land use regulations must be listed in the local hearing notice under ORS 197.763(3)(b). With regard to the county's failure to give the notice required by LCZO 2.150(7)(E), petitioner has not argued how the failure to provide notice to the Oregon Department of Agriculture prevented petitioner from appearing and presenting testimony in opposition to the subject application. Petitioner has not shown that the county's failure to provide notice of the subject application has violated *its* substantial rights.

These subassignments of error are denied.

C. LCZO 2.110

LCZO 2.110 provides

> "The burden of proof is upon the proponent. The greater the impact of the proposal in the area, the greater the burden upon the proponent. The proposal must be supported by proof that it conforms to the applicable elements of the

> comprehensive plan and applicable provisions of this ordinance–especially specific decision criteria."

Petitioner argues that the county's failure to include LCZO 2.110 in its notice of hearing prejudiced its substantial rights because petitioner was not put on notice that the criterion was applicable. In the alternative, petitioner argues that the staff's explanation of the procedure before the board of commissioners made it clear that even if petitioner had raised the potential applicability of LCZO 2.110, such testimony would not be accepted.

Intervenors argue that petitioner failed to show that (1) LCZO 2.110 is a separate decisional criterion or (2) the county's failure to include the criterion prejudiced its substantial rights.

LCZO 2.110 specifies the proponent's burden of proof and provides that applicable criteria in the county's comprehensive plan and zoning ordinance must be satisfied. LCZO 2.110 is not itself an approval criterion, and the county's failure to list LCZO 2.110 in its notice of hearing or to address LCZO 2.110 in its findings is not error.

This subassignment of error is denied.

D. LCZO 20.020(2)(C)

LCZO 20.020(2)(C) requires a finding that a proposed conditional use is consistent with the affected zoning district's statement of purpose. Petitioner argues that the subject application must be consistent with the EFU district's statement of purpose. Like its other subassignments under this assignment of error, petitioner asserts that this failure to list the applicable criterion prevented petitioner from providing testimony regarding whether the application complied with the standard.

Intervenors argue that the issue of compliance with LCZO 20.020(2)(C) was not raised below and, further, that petitioner has not shown that it was prejudiced by the county's failure to list this criterion in its notices.

Petitioner does not explain why the conditional use permit criterion at LCZO 20.020(2)(C) is applicable, and we do not see that it is. Absent some explanation of why

LCZO 20.020(2)(C) is applicable, petitioner's argument under this subassignment of error provides no basis for reversal or remand.

This subassignment of error is denied.

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that even if the county's decision correctly applies the law and is supported by substantial evidence in the whole record, the county erred in failing to require as a condition of approval that the applicants sign and record a document prohibiting them and their successors in interest from pursuing claims alleging injury from farming practices as required by ORS 215.293.

Intervenors concede this assignment of error.

The sixth assignment of error is sustained.

The county's decision is remanded.