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. 2001-023

FINAL OPINION
AND ORDER

Appeal from Linn County.

Christopher D. Crean, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Miller Nash, LLP.

No appearance by Linn County.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Weatherford, Thompson, Ashenfelter and Cowgill, PC.

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

REMANDED 04/13/2001

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

Opinion by Holstun.

**NATURE OF THE DECISION**

Petitioner appeals a county decision granting a conditional use permit for a "lot of record" dwelling on a parcel zoned for exclusive farm use (EFU).

**MOTION TO INTERVENE**

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

**REPLY BRIEF**

Petitioner requests permission to file a reply brief. There is no opposition to the motion, and it is allowed.

**STANDING**

In this appeal, petitioner challenges a county decision that was adopted following our remand in *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999) (*Warnock I*). Intervenors challenge petitioner's standing to bring this appeal. Intervenors base their standing challenge on an alleged oral agreement between petitioner and county planning staff during the prior proceedings that led to the county's earlier decision that we remanded in *Warnock I*. Intervenors contend petitioner agreed not to appeal the planning commission's decision to the county board of commissioners and that one of petitioner's members violated that agreement by appealing the planning commission's decision in *Warnock I*.[1] Petitioner denies that it entered into such an agreement.

We have some difficulty seeing how the alleged violation of an agreement not to file a local appeal during the county's earlier proceedings could have any bearing on petitioner's standing to bring the present appeal to LUBA. In any event, we have no way of confirming intervenors' allegations and petitioner disputes them. Accordingly, petitioner's standing is

[1]According to intervenors, they learned of the alleged agreement after our decision in *Warnock I*.

governed solely by ORS 197.830(2).[2] Petitioner filed a notice of intent to appeal, and intervenors do not dispute that petitioner appeared during the county's proceedings on remand. Petitioner has standing to bring this appeal.

## FACTS

The material facts are stated in the petition for review as follows:

> "The subject property is a 7.80-acre parcel located in an EFU zone in Linn County, Oregon. The soil on the [p]roperty is composed of predominantly (86 percent) type-1 high-value soils as inventoried by *the Soil Survey of Linn County Area, Oregon*, July 1987, and other information provided by the U.S. Soil Conservation Service. Of the 18 surrounding properties, 11 are receiving farm tax deferral. Of the 11 properties receiving farm tax deferral, nine are engaged in personal agricultural activities and two are engaged in commercial agricultural activities. Tax lots 703 and 404, which abut the subject property to the north, are owned or leased by Mr. Self and are in commercial production. Tax lot 405, which abuts the subject property to the south, is owned by Mr. Drake and also is in commercial production. The subject property received farm use tax deferral until 1992.
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> "Intervenors purchased the property in 1969. They leased the property to a commercial farmer who cut hay and grazed sheep on the property. The adjacent property, which [a]pplicants sold in the early 1990s, continues to be devoted to grazing. Cattle and sheep grazing and poultry production are the predominant agricultural activities conducted on the surrounding lots. More recently, the [a]pplicants have listed the [p]roperty for sale * * *. The [a]pplicants have indicated in their plot plan that the [p]roperty is suitable for hazelnut, berry, and grass production. The [p]roperty is slightly larger than the median tax lot size within a quarter-mile radius." Petition for Review 2-3 (record citations omitted).

## SECOND AND THIRD ASSIGNMENTS OF ERROR

### A. Lot or Parcel Cannot Practicably be Managed for Farm Use

In specified circumstances, counties are authorized by statute to approve nonfarm

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[2]ORS 197.830(2) provides that a person has standing to appeal to LUBA, if the person:

> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

dwellings in EFU zones. Specific provisions for nonfarm dwellings are set out at ORS 215.705 for certain lots that were lawfully created and acquired before 1985 (hereafter lots of record). Different approval criteria must be met for lot of record dwellings, depending on whether the lot of record includes high-value farmland. ORS 215.705(2) sets out criteria for approval of such lot of record dwellings on parcels, such as the subject parcel, that include high-value farmland. As relevant in this appeal, ORS 215.705(2)(a)(C)(i) establishes the following approval criterion for such dwellings:

> "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." (Emphasis added.)

The central dispute in this appeal is whether the county adequately demonstrated that the subject parcel "cannot practicably be managed for farm use." To resolve that dispute, an understanding of the meaning of the operative terms is required.

The term "practicably" is not defined in the statutes. The dictionary definition of "practicable" is as follows:

> "[P]ossible to practice or perform : capable of being put into practice, done or accomplished : Feasible[.]" *Webster's Third New International Dictionary*, 1780 (unabridged ed. 1981).

The impracticability standard is employed in other land use planning contexts, most notably as the ultimate standard for granting irrevocably committed exceptions. In that context, a local government may allow uses that are not allowed by the goals, where "relevant factors make uses allowed by the applicable goal impracticable[.]" OAR 660-004-0028(1). The impracticability standard in that context does not require that all uses allowed by the goal must be "impossible." OAR 660-004-0028(3).[3] However, the impracticability standard is a

[3]OAR 660-004-0028(3) provides in part:

demanding one. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357, 365 (2000); *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 519 (1994). Farm use is not "impracticable" simply because it is not easy to manage the subject property for farm use and obstacles must be overcome to do so.

When the term "farm use" is used in ORS chapter 215, it has the meaning set out at ORS 215.203. ORS 215.010(4). As relevant here, ORS 215.203 defines "farm use," as follows:

> "'[F]arm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. * * *"

As all parties recognize, the reference to "profit in money" in ORS 215.203 means "gross income," not "profit in the ordinary sense." *1000 Friends of Oregon v. Benton County*, 32 Or App 413, 429, 575 P2d 651 (1978). Property that is (1) in farm use and (2) located in an EFU zone qualifies for special assessment without being required to demonstrate how much gross income the property has generated in the past. ORS 308A.062. Property that is (1) in farm use and (2) not in an EFU zone may nevertheless qualify for special farm use assessment if it is part of a farm unit that has generated specified minimum levels of gross income in three of the past five years.[4]

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> "* * * It shall not be required that local governments demonstrate that every use allowed by the applicable goal is 'impossible'. For exceptions to Goals 3 and 4, local governments are required to demonstrate that only [specified] uses or activities are impracticable[.]"

The quoted rule language was adopted in part to make it clear that not all of the many uses allowed under Goals 3 (Agricultural Lands) and 4 (Forest Lands) must be shown to be impracticable, only those uses that are specified in the rule. However, the first sentence also makes it reasonably clear that, in this context at least, the Land Conservation and Development Commission (LCDC) does not view the "impracticability" standard as imposing an "impossibility" standard.

[4]The minimum levels of gross income specified by ORS 308A.071(2)(a) are as follows:

In *Warnock I*, we agreed with petitioner that the county incorrectly assumed that it is not "practicable" to manage the subject property "for farm use," within the meaning of ORS 215.705(2)(a)(C)(i), if "commercial" farm use is impracticable. We agree with petitioner that the county has committed a similar error in its decision on remand. In hopes of clarifying what we thought was clear in our prior opinion, we first set out the critical language from our prior decision. We then set out the critical findings adopted by the county on remand. Finally, we explain why the county's decision on remand misconstrues applicable law and again must be remanded.

**B. Warnock I**

In *Warnock I*, we explained:

> "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.
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> "It may be that the county can establish a certain level of return for determining when a parcel cannot practicably be 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

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> "(A) If the farm unit consists of six acres or less, the gross income from farm use shall be at least $650.
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> "(B) If the farm unit consists of more than six acres but less than 30 acres, the gross income from farm use shall be at least equal to the product of $100 times the number of acres and any fraction of an acre of land included.
>
> "(C) If the farm unit consists of 30 acres or more, the gross income from farm use shall be at least $3,000."

uses in its analysis of whether the property could practicably be managed for farm use." 37 Or LUBA at 304-05 (emphasis in original).

As relevant here, our prior decision did two things. First, it found that the county improperly relied on the subject parcel's unsuitability for commercial farm use in concluding that the subject property "cannot practicably be managed for farm use" under ORS 215.705(2)(a)(C)(i).[5] Second, our decision left open the possibility that the county might be able to identify a minimum "level of return" to assist it in determining whether the subject property cannot practicably be managed for farm use.[6] *But see Lovinger v. Lane County*, 36 Or LUBA 1, 19, *aff'd* 161 Or App 198, 984 P2d 958 (1999) (expressing "doubt that there is any definite or broadly applicable 'threshold' in determining whether farm uses are impracticable under OAR 660-004-0028 and ORS 215.203(2)(a)").

**C. The County's Decision on Remand**

In granting the challenged conditional use permit, the county adopted the following findings:

> "The final issue before Linn County is whether or not the county should set the threshold of profitability for determining when property is properly viewed as capable of farm use. The invitation to undertake this task is contained within the LUBA opinion * * *.
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> "In this case, the applicants urged the county to adopt a standard of $10,000 per annum as the minimum gross income that would be earned on a parcel. The applicants further urge the county to adopt this test as applied to only the specific facts of this case. The applicants point out that this is the same test that Linn County currently uses on its non-high value farmland. Friends of Linn County has offered no alternative test nor advanced any credible argument of why $10,000 should not be used as the test.
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> "Linn County agrees with the applicants that $10,000 is a fair test. Linn County agrees that by definition, high value farm ground should produce

[5]We further discuss the distinction between commercial and noncommercial farm use below.

[6]We did not, as the county states in its decision and intervenors suggest in their brief, "invite" the county to attempt to set a minimum income level. We simply noted that such an approach may be open to the county if it wishes to pursue it.

> more income on less land than low value farm ground. Linn County also agrees with the applicants that because the test is adopted in a quasi-judicial setting, the test must be applied only to the facts of this case. This test applies only to a situation when the property is in a former rural subdivision and the surrounding properties have been developed to a residential use. Under the facts produced at the hearing, the only property in farm deferral that generated any income was property rented for $250 per year to Mr. Self. Mr. Self has submitted evidence indicating why he does not want to use the subject property, and believes the subject property should be used for residential purposes as requested by the applicants." Record 10.

The county apparently adopts the view that an EFU-zoned parcel that includes high-value farm land and that is not capable of earning at least $10,000 in gross annual income "cannot practicably be managed for farm use," within the meaning of ORS 215.705(2)(a)(C)(i) and 215.203. The county limits its decision to the facts of this case, and concludes that because the subject parcel cannot satisfy the $10,000 gross income threshold, it cannot practicably be managed for farm use.[7]

**D. The County's Decision Misconstrues the Applicable Law**

Our prior decision cites and relies on our decision in *1000 Friends of Oregon v. Yamhill County*. That decision explains that both commercial and noncommercial farm and forest uses are protected under Goals 3 and 4:

> "[P]reservation of commercial agricultural and forest enterprise is a major objective expressed in Goals 3 and 4. That objective is implemented under those goals and their implementing rules, in part, by requiring that new parcels be of sufficient size to continue 'commercial' agricultural and forest enterprises. However, the clear bias under Goals 3 and 4 in favor of commercial agricultural and forest enterprises does not mean the county may assume that noncommercial farm and forest uses are not 'uses allowed by the applicable goal' for which a proposed exception area's suitability must be considered in granting an exception. *DLCD v. Klamath County*, 16 Or LUBA

[7]Intervenors contend petitioner waived its right to challenge the $10,000 threshold by failing to object to it below and further contend that the $10,000 test was but one of many factors the county considered. The issue of imposing a $10,000 standard was raised by intervenors late in the local proceedings. Petitioner did not waive its right to challenge the validity of that standard by failing to object to intervenors' suggestion that the county adopt it. We also do not agree with intervenors that it is possible to ignore the county's findings concerning the $10,000 test and affirm the decision based on other findings. The county clearly relied on the $10,000 test in making its decision.

23, 28 (1987); *DLCD v. Columbia County*, 15 Or LUBA 302, 304-05 (1987); *1000 Friends of Oregon v. Douglas County*, 4 Or LUBA 24, 31-32 (1981).

> "ORS 215.203(2) defines 'farm use' as 'the current employment of land for the primary purpose of obtaining a profit in money by [engaging in certain listed agricultural activities].' It may be, as respondent argues, that the county has some latitude to set a threshold level of profitability for determining when property is properly viewed as capable of farm use, within the meaning of ORS 215.203. *See 1000 Friends of Oregon v. Benton County*, 32 Or App 413, 428-29, 573 P2d 651 (1978); *1000 Friends of Oregon v. Douglas County*, *supra* 4 Or LUBA at 32. However, we reject the county's suggestion that it may establish the level of profitability necessary to qualify as a 'farm use,' as that term is defined by ORS 215.203, at [the] same level that would qualify a farm use as a commercial agricultural enterprise. The goals protect and allow farm and forest uses other than commercial agricultural and forest enterprises." 27 Or LUBA at 517-18 (citations and footnotes omitted.).

*1000 Friends of Oregon v. Yamhill County* makes it clear that any minimum gross income level that the county may identify and apply in determining whether farm use is practicable cannot be set at a level that would indicate commercial agricultural enterprise. Any minimum profitability level selected by the county would have to be consistent with the income generated by the county's noncommercial farms, which are protected under Goal 3 and the EFU statutes. In *1000 Friends of Oregon v. Yamhill County* we cite *1000 Friends of Oregon v. Douglas County*. In that decision, LUBA indicated that a reasonable minimum threshold income level for determining whether farm use is practicable might vary in different parts of the state, but we suggested that the gross income requirements for special assessment of non-EFU-zoned lands "could act as a guide." 4 Or LUBA. at 32. For a 7.8-acre parcel such as the subject parcel that would be $100 per acre or $780. *See* n 4.

The challenged decision does not specifically identify the source of the $10,000 standard that the county adopted in the challenged decision. In their brief, intervenors argue that the county appropriately relied on Linn County Code (LCC) 933.400, which appears to have been adopted to implement OAR 660-033-0135. Assuming the county relied on LCC 933.400 to support its $10,000 minimum threshold income requirement to determine whether it is practicable to put the subject property to farm use, the county erred.

Although the figure $10,000 is certainly mentioned in LCC 933.400 and OAR 660-033-0135, we fail to see how the use of that figure in LCC 933.400 and OAR 660-033-0135 has any relevance in establishing a minimum threshold income level for determining whether farm use is practicable. ORS 215.283(1)(f) authorizes "dwellings * * * customarily provided in conjunction with farm use." LCC 933.400 and OAR 660-033-0135 establish standards that are designed to ensure that a farm is either large enough or generates sufficient income to warrant an assumption that a dwelling on the farm is one that is properly viewed as "customarily provided in conjunction with farm use." It is clear from the rule that farms generating $10,000 in annual income are considered to be small commercial farms.[8] There is nothing that we can find in LCC 933.400 and OAR 660-033-0135 that provides any support for the county's conclusion that it may properly assume that farm use of a 7.8-acre EFU-zoned parcel of land with high-value soils is not practicable unless it will generate $10,000 of annual gross income.

EFU zoning represents a significant area of overlap in the state's property tax policies and land use policies, even if the property tax and land use statutes do not constitute coordinated or integrated statutory schemes.[9] *Springer v. LCDC*, 111 Or App 262, 268-69,

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[8]LCC 933.400(C) duplicates OAR 660-033-0135(5). As relevant, OAR 660-033-0135(5) provides:

> "On land not identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:
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> "(a) The subject tract is currently employed for the farm use, as defined in ORS 215.203, that produced in the last two years or three of the last five years the lower of the following:
>
> "(A) At least $40,000 (1994 dollars) in gross annual income from the sale of farm products; or
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> "(B) Gross annual income of at least the midpoint of the median income range of gross annual sales for farms in the county with gross annual sales of $10,000 or more according to the 1992 Census of Agriculture, Oregon[.]"

[9]In fact, although it does not appear to have any bearing in this case, the legislature in 1999 amended the property tax statutes to add a definition of farm use. Or Laws 1999, ch 314, § 3. That definition is codified at

826 P2d 54 (1992). We continue to believe the minimum gross income levels the legislature established at ORS 308A.071(2)(a) for non-EFU-zoned parcels to qualify for special assessment are the best available indication of the level of gross income that the legislature believes is indicative of practicable farm use.[10] *1000 Friends of Oregon v. Douglas County*, 4 Or LUBA at 32.

We recognize that ORS 308A.071(2)(a) was adopted to establish minimum levels of income that are required for non-EFU-zoned property to qualify for special farm use assessment, rather than as an express statement of the legislature's view of the minimum gross income that is required for practicable farm use. For that reason, it is certainly possible that the county could, with appropriate documentation, justify setting a minimum gross income level for purposes of determining whether farm use is practicable under ORS 215.705(2)(a)(C)(i) that is different than the minimum gross income levels set in ORS 308A.071(2)(a). However, the $10,000 level selected by the county and applied to a 7.8-acre parcel in this case is so clearly inconsistent with the protection that is afforded noncommercial farms under Goal 3 and the EFU zoning statutes that it would be impossible to justify.

Because the county erred in adopting the $10,000 gross income standard, and the decision must therefore be remanded, we do not consider petitioner's evidentiary challenges in detail. However, we note two arguments that petitioner advances under its evidentiary challenges with which we agree.

In applying ORS 215.705(2)(a)(C)(i), the question is whether farm use of the subject

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ORS 308A.056 and appears to be the same definition that appears at ORS 215.203 with new punctuation and nonsubstantive rephrasing.

[10]Although LCDC has not adopted rules to set a minimum gross income level for use in determining whether farm use is practicable under ORS 215.705(2)(a)(C)(i), or established a procedure to be followed in establishing such minimum gross income levels, its use of the $10,000 figure in OAR 660-033-0135 makes it reasonably clear that LCDC views farms that generate $10,000 in annual gross income as small commercial farms.

property is practicable, not whether the subject property has historically been put to farm use or whether its similarly situated neighbors are in farm use or how much gross income farm use of the subject property and neighboring properties may be generating or have generated in the past. Such evidence may be relevant, and may be indicative of what the subject property is capable of, but it is not necessarily determinative. Whether such evidence is sufficient to constitute substantial evidence that farm use is impracticable will depend on a number of factors. One of the more important factors will be whether there is evidence in the record to suggest that any historical or current farm income data that the county is relying on does not accurately reflect the property's capability. *See Reed v. Lane County*, 19 Or LUBA 276, 284 (1990) (whether a particular farmer can profitably farm a particular piece of farm land at a particular time is at best indirect evidence of whether the land itself is suitable for the production of farm crops and livestock).

We also note that under ORS 215.705(2)(a)(C)(i) a property's impracticability for farm use must be "due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity." In the challenged decision, the county appears to rely heavily on the particular mixture of soil types on the property, prior quarrying activity on the property and the separation of the subject property into three terraces with different elevations, to conclude that farm use is impracticable. Petitioner cites evidence that other nearby properties also have multiple soil types and are terraced. We agree with petitioner that the county's findings are inadequate to demonstrate that the cited factors are not shared by neighboring properties or justify a conclusion that farm use of the subject property is rendered impracticable by those factors. In particular, the findings do not explain what it is about the cited factors that makes farm use impracticable.[11]

[11]The challenged decision includes a finding that there was testimony that the mix of soils presents a "conundrum." Record 9. Intervenors cite this finding, and argue that this means there are no practical solutions to the problems presented by the unique mix of soils on the property that would allow the property to

The second and third assignments of error are sustained.

**FIRST ASSIGNMENT OF ERROR**

In its first assignment of error, petitioner argues the county's erroneous application of a $10,000 minimum income standard under ORS 215.705(2)(a)(C)(i) constitutes (1) improper adoption of an approval standard without following required procedures and (2) erroneous application of an approval criterion that was not in existence when the application was submitted. The operative term "practicable" in ORS 215.705(2)(a)(C)(i) is not defined in ORS chapter 215. The county therefore has some interpretive discretion in identifying the factors that it will consider in deciding whether farm use of the subject property is practicable under ORS 215.705(2)(a)(C)(i). If the county wants to rely on an appropriate and justified minimum gross income threshold in making its practicability determination, it may do so on a case by case basis. The county need not go through a legislative process to adopt a generally applicable threshold.

The first assignment of error is denied.

The county's decision is remanded.

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be put to farm use. However, intervenors do not identify where the cited testimony is located in the record, and we are unable to determine what the county meant by the reference to a conundrum.