BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON NATURAL DESERT ASSOCIATION,
Petitioner,

vs.

HARNEY COUNTY,
Respondent,

and

STEENS MOUNTAIN PACKERS INC.,
Intervenor-Respondent.

LUBA No. 2001-181

FINAL OPINION
AND ORDER

Appeal from Harney County.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by Harney County.

David J. Hunnicutt, Tigard, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Oregonians in Action Legal Center.

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

REMANDED 05/14/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a dwelling in conjunction with farm use, on a 160-acre parcel zoned for exclusive farm and range use (EFRU-1).

MOTION TO INTERVENE

Steens Mountain Packers, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is an undeveloped 160-acre parcel, located at an elevation of 7,000 feet above sea level on the flanks of Steens Mountain, approximately 15 miles from the community of Frenchglen. John Witzel acquired the subject property in 1986, as part of a 480-acre parcel. At the same time, Witzel sought and obtained conditional use approval from the county to operate an outfitting service on the 480-acre parcel. The outfitting service provides hunting guides and horsepacking trips into the Steens Mountain area.

In 1992 Witzel partitioned the parent parcel into three 160-acre parcels. In 1999, Witzel transferred the subject 160 acres to intervenor.[1] In 2000, intervenor sought and obtained county approval for a career school and associated facilities in conjunction with the existing outfitting business on the subject property. The proposed career school allowed intervenor to train students as hunting guides, horsepack guides and trail guides. This Board reversed the county's approval. *Warburton v. Harney County*, 39 Or LUBA 398, *aff'd* 174 Or App 322, 25 P3d 978, *rev den* 332 Or 559 (2001).

[1]Intervenor is apparently a closely-held corporation owned by Witzel and his family.

The existing outfitting business occupies and uses one-half acre of the subject property.[2] The remainder is used to pasture approximately 25 horses. Forage on the property can support approximately 100 AUMs (animal unit months).[3]

In July 2001, intervenor filed an application with the county for a dwelling in conjunction with farm use, pursuant to Harney County Zoning Ordinance (HCZO) 3.010(4)(A).[4] The county planning director approved the application. Petitioner appealed the planning director's approval to the county planning commission. The planning commission conducted a hearing and denied petitioner's appeal. Petitioner then appealed to the county court, which also denied the appeal, approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

OAR 660-033-0135(1) provides that a dwelling may be considered customarily provided in conjunction with farm use if, among other things, the parcel is at least 160 acres if not designated rangeland, or 320 acres if designated rangeland.[5]

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[2]The conditional use permit authorizes placement of portable structures; however, it is not clear from the record whether portable structures, or any structures at all, are presently on the portion of the property used for the outfitting business.

[3]An "animal unit month" is apparently the amount of forage required for one month by a bull or cow-calf pair. *See Day v. Griffith*, 283 Or 393 396 n 2, 584 P2d 261 (1978).

[4]HCZO 3.010(4)(A) provides in relevant part:

> "A dwelling may be considered customarily provided in conjunction with farm use if:
>
> "a. The parcel on which the dwelling will be located is at least 160 acres;
>
> "b. The subject tract is currently employed for farm use, as defined in ORS 215.203.
>
> "c. The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock at a commercial scale[.]"

[5]OAR 660-033-0135(1) provides in pertinent part:

> "On land not identified as high-value farmland pursuant to OAR 660-033-0020(8), a dwelling may be considered customarily provided in conjunction with farm use if:

Petitioner argues that the subject parcel is zoned EFRU-1, that the EFRU-1 zone is a rangeland zone, and that the property is in fact rangeland for purposes of OAR 660-033-0135(1)(a). Therefore, petitioner contends, the minimum parcel size necessary for a farm dwelling under OAR 660-033-0135(1)(a) is 320 acres.

Intervenor counters that the EFRU-1 zone is not a rangeland zone and that in fact the county's comprehensive plan and land use regulations do not designate any zone or property in the county for rangeland. Intervenor notes the county has two agricultural zones, EFRU-1 and EFRU-2, and that each of these zones allows a dwelling customarily provided in conjunction with farm use if the subject parcel is at least 160 acres. *See* n 4; *see also* HCZO 3.020(4)(A)(a) (similar 160-acre minimum for farm dwelling in EFRU-2 zone). Intervenor argues that the county's zoning ordinance has been acknowledged to comply with Goal 3 (Agricultural Lands) and the Goal 3 rule, including, presumably, OAR 660-033-0135(1)(a).[6] Because the county's code specifies a 160-acre minimum parcel size in the EFRU-1 zone to obtain a dwelling in conjunction with farm use rather than 320 acres, intervenor argues, it is clear that the EFRU-1 zone is not a rangeland zone and the subject property is not designated rangeland.

> "(a) The parcel on which the dwelling will be located is at least:
>
> > "(A) 160 acres and not designated rangeland; or
> >
> > "(B) 320 acres and designated rangeland; or
> >
> > "(C) As large as the minimum parcel size if located in a zoning district with an acknowledged minimum parcel size larger than indicated in paragraph (A) or (B) of this subsection.
>
> "(b) The subject tract is currently employed for farm use, as defined in ORS 215.203;
>
> "(c) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale[.]"

[6]On February 5, 2001, as part of a recent periodic review, the Department of Land Conservation and Development (DLCD) approved the current applicable versions of HCZO 3.010 and 3.020.

Petitioner may well be correct that the EFRU-1 zone is a rangeland zone and that the county has designated the subject property rangeland.[7] We note that pursuant to ORS 215.780(1), the minimum permissible parcel size for land in an exclusive farm use zone is 80 acres or, for land designated rangeland, 160 acres. The minimum parcel size under the EFRU-2 zone is 80 acres, while the minimum parcel size in the EFRU-1 zone is 160 acres. HCZO 3.010(8)(A)(b); 3.020(8)(A)(b). That suggests either that for some reason the county chose to impose a higher minimum parcel size on land zoned EFRU-1 than is required by statute, or that the county considers land zoned EFRU-1 to constitute rangeland. If the latter is the case, then the code provisions allowing a farm dwelling on a 160-acre parcel in the EFRU-1 zone are inconsistent with OAR 660-033-0135(1)(a).

However, even if the latter is the case, we agree with intervenor that because the county's code is acknowledged to comply with Goal 3 and the Goal 3 rule, the county may apply its code requirements notwithstanding any inconsistency with OAR 660-033-0135(1)(a). *See Byrd v. Stringer*, 295 Or 311, 313, 666 P2d 1332 (1983) (after acknowledgment, land use decision must be measured against the acknowledged plan and implementing ordinances, not the goals); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350 (1996) (any errors in the acknowledgment process can only be rectified through periodic review). Therefore, the county did not err in applying the 160-acre minimum parcel size at HCZO 3.010(4)(A)(a).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0135(1)(b) requires a finding that the property proposed for a dwelling in conjunction with farm use is "currently employed for farm use, as defined in ORS 215.203." *See* n 5. The county's findings conclude that the subject property is

[7]Although various statutes and rules set forth standards governing "rangeland," we are aware of no statute or rule that defines rangeland or that requires a county to designate land as rangeland.

currently in farm use as defined in ORS 215.203(2)(a) in part because (1) the property is currently used for "grazing purposes" and forage production; (2) the property is subject to a "farm-related government program," and therefore is "currently employed" for farm use pursuant to ORS 215.203(2)(b); and (3) current use of the property includes "riding lessons," apparently as part of intervenor's outfitting business, and therefore the current use meets the definition of farm use at ORS 215.203(2)(a), specifically "stabling or training equines including, but not limited to, riding lessons, training clinics and schooling shows." Petitioner challenges each of these bases for compliance with OAR 660-033-0135(1)(b).

A. Grazing and Forage Production

The parties appear to agree that forage on the subject property is currently used to support seasonal grazing for 25 horses, and that the horses are used as part of intervenor's outfitting business. However, petitioner argues that because the grazing and forage production are used solely to support intervenor's nonfarm outfitting business, such activities do not constitute farm uses as defined in ORS 215.203(2)(a).[8]

Petitioner concedes that grazing of livestock or forage production can constitute farm uses under ORS 215.203(2)(a), at least where such employment of land has the "primary purpose of obtaining a profit in money" by raising and selling forage or the "feeding, breeding, management and sale of, or the produce of, livestock[.]" However, petitioner argues that any current grazing and forage production on the subject property are related

[8]ORS 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 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. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. * * *"

solely to intervenor's outfitting business, a nonfarm use, and therefore do not constitute the feeding or production of livestock or any other activity described in ORS 215.203(2)(a). *See Moore v. Coos County*, 144 Or App 195, 200, 925 P2d 927 (1996) (grazing of horses is a component of virtually all operations involving live horses and does not necessarily constitute the "production of livestock," for purposes of ORS 215.284).[9]

If we understand petitioner correctly, it argues that while "grazing" may be a component of feeding or producing livestock, it is not sufficient in itself to constitute a farm use, at least where that grazing is solely intended to support a nonfarm use and does not also involve, for example, the sale of the livestock fed or produced. In essence, petitioner argues that the primary purpose of the putative farm use must be to "obtain a profit in money" directly from the farm use itself. Where the primary purpose of the putative farm use is merely to support a nonfarm use, and any profit that may be obtained will come from the nonfarm use, we understand petitioner to argue the putative farm use is not a farm use as defined by ORS 215.203(2)(a).

Intervenor responds generally that producing forage on the subject property to support grazing of 25 head of horses constitutes the "current employment of land" for farm use for purposes of ORS 215.203(2)(a) and OAR 660-033-0135(1)(b). We understand intervenor to argue that the fact that intervenor obtains "a profit in money" by using the horses in its outfitting business rather than using those horses for some other purpose is irrelevant, for purposes of ORS 215.203(2)(a).

We agree with intervenor. In relevant part, ORS 215.203(2)(a) defines "farm use" as (1) the current employment of land (2) for the primary purpose of obtaining a profit in money

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[9]Petitioner's argument presumes that horses are or can be "livestock" for purposes of ORS 215.203(2)(a). Although we are aware of no applicable statutory definition or other authority for that presumption, it is consistent with other statutory provisions regarding horses and livestock. *See* Oregon Laws 1997, chapter 728, section 1(6)(c) (uncodified statute providing that, for purposes of siting a guest ranch in eastern Oregon, "livestock" means cattle, sheep, horses and bison); ORS 609.125 (for purposes of the animal control provisions at ORS 609.135 to 609.190, "livestock" includes horses, mules, and jackasses).

(3) by engaging in listed activities, including the "feeding, breeding, management and sale of, or the produce of, livestock[.]" That ORS 215.203(2)(a) separately lists "sale" of livestock from other listed activities involving livestock suggests that such other activities may constitute a farm use even if they do not include the sale of the livestock. We see nothing in the statute that would preclude "obtaining a profit in money" from listed activities involving livestock by means other than selling the livestock. As long as the primary purpose of the listed activity is to obtain a profit in money, the activity is a farm use. The statute is silent as to the mechanism by which that profit in money may be realized.[10]

In the present case, petitioner does not dispute that intervenor is currently employing all but one-half acre of its land by engaging in one or more of the activities described in ORS 215.203(2)(a). That intervenor does not derive profit directly from those activities, but only indirectly by using the horses as part of its outfitting business, does not mean that those activities constitute something other than a farm use. Accordingly, the county did not err in finding that the subject property is "currently employed for farm use," as defined in ORS 215.203(2)(a).

Because we affirm one of the county's bases for finding that the subject property is "currently employed for farm use" for purposes of OAR 660-033-0135(1)(b), we need not address petitioner's challenges to the county's other bases. However, as discussed below, OAR 660-033-0135(1)(c) requires that occupants of the proposed dwelling will be principally engaged in farm uses "at a commercial scale." The challenged decision principally describes the proposed farm use of the property as "riding lessons" and "training clinics." Record 11. In order to resolve petitioner's challenges to the county's finding of

[10]That mechanism might involve renting or leasing the livestock. An example discussed at oral argument was a landowner who grazes horses on his property, but profits from doing so only by renting his horses to an adjoining resort, for tourist-oriented trail rides. We do not understand petitioner to dispute that grazing horses under those circumstances would be for "the primary purpose of obtaining a profit in money" and thus constitute a farm use.

compliance with OAR 660-033-0135(1)(c), we must address the preliminary question of whether the proposed "riding lessons" and "training clinics" are correctly viewed as farm uses.

B. Riding Lessons and Training Clinics

The county's decision relies on evidence that intervenor has provided riding lessons on the subject property and proposes to provide riding lessons and training clinics in the future, as a partial basis to conclude that the subject property is currently employed and will be employed for farm use. That conclusion is based on the county's interpretation of ORS 215.203(2)(a), which provides in relevant part that farm use also includes "the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows." *See* n 8.

Petitioner argues that under the above-quoted portion of ORS 215.203(2)(a) riding lessons and training clinics are not, in themselves, farm uses. The predicate for those activities, petitioner argues, is "stabling or training equines." According to petitioner, stabling or training equines may *include* ancillary activities such as riding lessons, training clinics or schooling shows, but such activities do not necessarily constitute either stabling or training of equines, and do not constitute farm uses, when viewed in isolation from stabling or training equines. Petitioner contends that the county erred to the extent it construed ORS 215.203(2)(a) otherwise.

Intervenor responds that the pertinent language can also be read to provide that riding lessons, training clinics and schooling shows are part of "training equines." Because intervenor offers riding lessons on the subject property, it is therefore engaged in "training equines."

The parties appear to agree under this sentence of ORS 215.203(2)(a) that an activity must involve "stabling or training equines" in order to constitute a farm use. They disagree

on whether providing "riding lessons," "training clinics," or "schooling shows" can, by themselves, constitute "stabling or training equines" within the meaning of ORS 215.203(2)(a). If we understand intervenor correctly, it argues that "riding lessons" and "training clinics" *are* a type of training for equines, and therefore those activities, without more, constitute "training equines."[11]

The text of ORS 215.203(2)(a) can support either of the foregoing views. Accordingly, we consult legislative history. That history generally supports petitioner's view. Prior to 1993, ORS 215.203(2)(a) did not mention equines, and the boarding or training of horses in farm zones was considered a nonfarm use under other statutes.[12] In 1993, at the request of the Horse Council of Oregon, the legislature adopted HB 2934. HB 2934 deleted the statutory provisions that treated horse boarding and training facilities as a nonfarm use, and amended ORS 215.203(2)(a) to provide that farm use includes "the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines." Or Laws 1993, chapter 704, section 1. The apparent purpose of HB 2934 was to "solve the longstanding problem of siting horse boarding and training facilities in farm zones."[13] In 1995, the Horse Council of Oregon sponsored SB 946, which amended ORS 215.203(2)(a) to add the language "including but not limited to providing riding

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[11]As noted above, petitioner argues that any current or proposed riding lessons or training clinics on the subject property are or will be in conjunction with intervenor's existing outfitter business, which apparently may require that clients learn how to ride a horse provided by intervenor. Petitioner disputes that such "training" involves "training equines."

[12]Prior to 1993, ORS 215.213(2)(j) allowed as a permitted nonfarm use the "boarding of horses for profit" in marginal lands counties, while ORS 215.283(1)(p) allowed as a conditional use the "breeding, boarding and training of horses for profit" in all other counties. *See also Capsey v. Dept. of Rev.*, 294 Or 455, 657 P2d 680 (1983) (holding that leasing a barn and pasture for horse grazing, *i.e.*, a horse boarding facility, is not a "farm use" as defined in ORS 215.203(2)(a), where the lessees rented the barn and pasture for personal reasons, and not for the primary purpose of obtaining a profit within the meaning of the statute); *Moore v. Coos County*, 144 Or App at 200 (grazing of horses in conjunction with an adjacent boarding stable is not the "production of livestock" for purposes of the "generally unsuitable" calculus for siting nonfarm dwellings under ORS 215.284).

[13]Testimony of Jack Graham, representing the Horse Council of Oregon, before the Senate Committee on Agriculture, Natural Resources & Environment, March 27, 1995, 2 (quoting the "Digest of the 1993 Session").

lessons, training clinics and schooling shows." The intent of this amendment was to clarify that a "horse boarding and training stable may engage in common practices in conjunction with the stable," such as riding lessons, training clinics and schooling shows. Minutes, House Natural Resources Committee Work Session, May 3, 1995, 8-9.[14]

The foregoing history indicates that the legislature contemplated that "stabling or training equines" refers to a horse boarding or training facility. Further, the legislature intended the phrase "including but not limited to providing riding lessons, training clinics and schooling shows" to clarify that activities that technically may not constitute boarding or training horses but that are commonly associated with boarding and training facilities may also be allowed, in conjunction with the boarding or training facilities. Accordingly, such activities are not properly viewed as "farm uses" in themselves, in isolation from "stabling or training equines." We agree with petitioner that the county erred to the extent it construed ORS 215.203(2)(a) to provide otherwise.

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[14]In addition, the proponent of SB 946 explained the purpose of the bill as follows:

> "[A] few local planners have interpreted this lack of specificity [in HB 2934] as an intentional restriction to the narrowest possible definition of stabling and training.
>
> "As a result, two counties have now ordered long established stables to cease providing riding lessons, clinics and shows, all of which are very common practices among horse stables. In other words, we can feed and train horses but we cannot teach people to ride, help them train their own horse with clinics or offer shows and competitions in which they enjoy the fruits of their training efforts.
>
> "* * * * *
>
> "So, here we are again, with a request to clarify the law to prevent local planners from chipping away at the intent of legislation enacted last Session. [SB 946] adds language which expressly authorizes stables located in exclusive farm use zones to provide riding lessons, clinics and shows. This is not an all inclusive list. The law clearly allows such horse farms to engage in these and other common practices of this type of farm.
>
> "This additional language is not an expansion of the action of the 1993 Legislative Session. It is a clarification intended to avoid expensive and unnecessary law suits by individual stables to establish their legal right to engage in the normal activities of this type of farm. * * *" Testimony of Jack Graham, representing the Horse Council of Oregon, before the Senate Committee on Agriculture, Natural Resources & Environment, March 27, 1995, 2-3 (emphasis omitted).

There remains the question of whether the current and proposed uses of the subject property in the present case constitute "stabling or training equines" within the meaning of ORS 215.203(2)(a). The county made no finding to that effect, and intervenor does not argue that the current or proposed use of the property constitutes either stabling or training equines, except in the limited sense we rejected above.

The second assignment of error is sustained, in part.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

OAR 660-033-0135(1)(c) requires a finding that the proposed farm dwelling "will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale." *See* n 5. Petitioner challenges the county's finding of compliance with OAR 660-033-0135(1)(c), arguing that the county's findings and record evidence are insufficient to establish that (1) the proposed dwelling will be occupied by persons "principally engaged" in the farm use; (2) the proposed farm use constitutes "planting, harvesting, marketing or caring for livestock"; (3) the proposed dwelling is "customarily provided" in conjunction with the alleged type of farm use; and (4) the proposed farm use is "commercial" in scale.

A. "Principally Engaged" in Farm Use

The county's findings state in relevant part that:

> "[T]he person or persons who will be principally engaged in the farm use of the land at a commercial scale will be the applicants—John and Cindy Witzel as they so indicated this fact on the associated land use permit application. It will be a condition of these findings that those that will live in this dwelling will be ONLY those that are 'principally engaged in farm practices' and are the principal ones 'earning a profit in money' from those farming practices (*i.e.* the legal owners of the property). Thus, any other person(s) that are seasonal workers and/or farmhands, instructors, students of the riding clinics or training classes, etc. are not to use the dwelling as living quarters either temporarily or permanently." Record 9 (record and rule citations omitted).

Petitioner argues that the county's finding misconstrues OAR 660-033-0135(1)(c). According to petitioner, the proper inquiry under the rule is not who, of all the people

engaged in the farm use, will be the ones principally engaged in that farm use. Instead, petitioner argues, the proper inquiry is whether the proposed occupants of the farm dwelling will be principally engaged in farm use of the property, as opposed to some other use or activity. Petitioner argues that that test is not met in this case, as the record is clear that the proposed occupants will be principally engaged in a nonfarm use—the outfitting business—rather than any farm use.

Intervenor responds that OAR 660-033-0135(1)(c) does not require a finding that the proposed occupants will be engaged principally in farm use of the property, as opposed to another use or activity. Reading the rule in that manner, intervenor argues, ignores the economic reality that many bona fide farmers and ranchers must supplement their farm income with nonfarm work or businesses. As long as an occupant is the principle operator of a farm use on the property, intervenor argues, the fact that that occupant may be principally engaged in nonfarm pursuits, such as operating a nonfarm business on the property, is irrelevant.

OAR 660-033-0135 does not define the phrase "principally engaged in * * * farm use," and we are aware of no cases that construe that language. As a textual matter, the phrase is susceptible to either of the meanings the parties assign to it. The context of OAR 660-033-0135(1) includes other provisions that allow a farm dwelling customarily provided in conjunction with farm use. Among them is OAR 660-033-0135(2)(f), which provides for a farm dwelling under an indefinite income standard where, among other things, the dwelling will be occupied by a person "who will be principally engaged in the farm use of the land."[15] In contrast, OAR 660-033-0135(5) allows for a dwelling without regard for

[15]OAR 660-033-0135(2) provides in relevant part:

> "If a county prepares the potential gross sales figures pursuant to section (4) of this rule, the county may determine that on land, not identified as high-value farmland pursuant to OAR 660-033-0020(8), a dwelling may be considered customarily provided in conjunction with farm use if:

lot size where, in relevant part, the property has produced at least $40,000 in gross annual income from the sale of farm products, and the dwelling "will be occupied by a person or persons who produced the commodities which grossed the income * * *."[16] *See also*

> "(a) The subject tract is at least as large as the median size of those commercial farm or ranch tracts capable of generating at least $10,000 in annual gross sales that are located within a study area which includes all tracts wholly or partially within one mile from the perimeter of the subject tract; and
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> "(b) The subject tract is capable of producing at least the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the tract size in subsection (a) of this section; and
>
> "(c) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in subsection (b) of this section; and
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> "(d) The subject lot or parcel on which the dwelling is proposed is not less than ten acres in western Oregon or 20 acres in eastern Oregon; and
>
> "* * * * *
>
> "(f) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale; and
>
> "(g) If no farm use has been established at the time of application, land use approval shall be subject to a condition that no building permit may be issued prior to the establishment of the farm use required by subsection (c) of this section."

[16]The county implemented OAR 660-033-0135(5) by adopting parallel provisions at HCZO 3.010(4)(B). OAR 660-033-0135(5) provides in relevant part:

> "On land not identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:
>
> "(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
>
> "(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; and
>
> "* * * * *

OAR 660-033-0135(7)(c) (same language regarding farm dwellings on high-value farmland).[17] Unlike subsection (1)(c), subsections (5)(c) and (7)(c) contain no qualification that the occupant must be "principally" engaged in farm use, merely that the occupant (and not someone else) produce the commodities that satisfy the income test.

The intent of the Land Conservation and Development Commission (LCDC) in adopting parallel provisions at OAR 660-033-0135(1)(c) and (2)(f) on this point, while adopting dissimilar provisions at OAR 660-033-0135(1)(c) and (5)(c), is not clear to us. However, the lack of parallelism suggests that LCDC intended different meanings. Because (5)(c) and (7)(c) seem, as relevant here, to have the meaning intervenor assigns to (1)(c), the lack of parallelism between these sets of provisions suggests that (1)(c) means something other, or more, than what intervenor asserts it does. Nonetheless, the text and context of (1)(c) do not make LCDC's intent clear. Accordingly we consult legislative history.

OAR 660-033-0135 was adopted in 1994. Prior to 1993, OAR 660-05-030 governed farm dwellings.[18] In relevant part, OAR 660-05-030(4) required a showing that "day-to-day

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> "(c) The dwelling will be occupied by a person or persons who produced the commodities which grossed the income in subsection (a) of this section[.]"

[17]OAR 660-033-0135(7) provides in relevant part:

> "On land identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:
>
> "(a) The subject tract is currently employed for the farm use, as defined in ORS 215.203, that produced at least $80,000 (1994 dollars) in gross annual income from the sale of farm products in the last two years or three of the last five years; and
>
> "* * * * *
>
> "(c) The dwelling will be occupied by a person or persons who produced the commodities which grossed the income in subsection (a) of this section[.]"

[18]OAR 660-05-030, repealed August 7, 1993, provided in relevant part:

> "(3) Dwellings proposed for parcels which satisfy the Goal 3 minimum lot size standard cannot be approved within an exclusive farm use zone without the county governing body or its designate first determining whether the dwelling satisfies the additional statutory standard in ORS 215.213(1)(g) or 215.283(1)(f). This standard requires a

activities on the subject land are principally directed to the farm use of the land." If the land will be "principally used" for residential purposes rather than for farm use, a farm dwelling is not permitted. *Id.* Under that rule, the county must examine the day-to-day activities on the property and allow a farm dwelling only if those activities are "principally directed" at farm use rather than residential use. OAR 660-05-030 was repealed in August 1993, apparently because those rules had been superseded by new rules adopted in December 1992.

The rules adopted in December 1992 created OAR chapter 660, division 33, and included *former* OAR 660-33-130(1), which allowed a farm dwelling where, among other things, the occupant "will be principally engaged in the farm use of the land."[19] That

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> determination that the dwelling is 'customarily provided in conjunction with farm use.'
>
> "(4) ORS 215.213(1)(g) and 215.283(1)(f) authorize a 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 provides 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. * * *" (Citations omitted.)

[19]OAR 660-33-130(1) (1993) provided in relevant part:

> "A dwelling on farmland may be considered customarily provided in conjunction with farm use if:
>
> "(a) The subject farm or ranch is currently employed for farm use as defined in ORS 215.203,
>
> "(b) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock at a commercial scale,
>
> "(c) There is no other dwelling on the subject farm or ranch that is vacant or currently employed by persons not working on the subject farm or ranch and could reasonably be used as the requested farm or ranch dwelling, [and]
>
> "(d) On high value farmland only, the subject ranch or farm has produced gross annual farm income in the last two years or three of the last five years 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 1987 census of agriculture, or at least $40,000 (1992 dollars), whichever is lower."

language apparently reflects a combination of two options in an earlier draft of the rule, one of which would allow a farm dwelling where "[t]he principal work of one or more residents of the proposed dwelling is directed principally to deriving a profit from farm use." Memorandum of Richard P. Benner, DLCD Director, October 20, 1992, 4.

After adoption of OAR chapter 660, division 33, LCDC set up a technical resource committee to review rules regarding farm dwellings. The resource committee recommended a scheme of three tests, which formed the basis for the tests found in the present rule at OAR 660-033-0135(1), (2), (5) and (7). The resource committee's recommendation for what became OAR 660-033-0135(1) did not include any language requiring that the occupant be "principally engaged" in farm use, although such language was included in the test for what became OAR 660-033-0135(2). DLCD staff expressed concern that without that language or some other mechanism to ensure that a farmer resides in the farm dwelling, the test under the rule that became OAR 660-033-0135(1) would not meet the statutory standard that the dwelling be "customarily provided in conjunction with farm use."[20] In voting to adopt the test that became OAR 660-033-0135(1), LCDC amended the test to include the current language requiring that the occupant be "principally engaged" in the farm use.

The foregoing legislative history suggests that LCDC intended the phrase "principally engaged in farm use" in OAR 660-033-0135(1)(c) to have the same meaning as the same phrase in *former* OAR 660-33-130(1). In turn, it is reasonably clear that LCDC intended *former* OAR 660-33-130(1), consistent with its predecessor OAR 660-05-030(4), to impose a requirement that at least one occupant of the putative farm dwelling be principally engaged in farm use of the property, as opposed to being principally engaged in nonfarm uses. We see nothing in the legislative history available to us supporting intervenor's view that the phrase "principally engaged in * * * farm use" is satisfied where the occupants are

[20]Minutes of the Hearing on Proposed Amendments to Goal 3 rule, February 17, 1994, 47 (Testimony of Ron Eber, DLCD staff).

principally engaged in nonfarm use of the land, merely because some level of farm use also occurs on the property and the occupants are the primary actors in that farm use.

Consequently, we agree with petitioner that the county erred in failing to evaluate the extent to which the occupants of the proposed dwelling will be engaged in farm use of the property, as opposed to nonfarm use. It is undisputed that the occupants of the proposed dwelling operate a nonfarm business on the property that, as far as the record discloses, represents their primary economic livelihood. Accordingly, the county must evaluate the extent to which the occupants of the proposed dwelling will be engaged in farm use of the property, as opposed to nonfarm uses, and allow the dwelling only if the evidence shows at least one occupant will be "principally engaged" in farm use.[21]

This subassignment of error is sustained.

B. Planting, Harvesting, Marketing or Caring for Livestock

Petitioner also argues that, under OAR 660-033-0135(1)(c), the "farm use" in which the occupants must be "principally engaged" is limited to "planting, harvesting, marketing or caring for livestock," and does not include the entire universe of activities described in ORS 215.203. Petitioner argues that activities such as riding lessons or training clinics do not constitute "planting, harvesting, marketing or caring for livestock" and, therefore, are not "farm uses" in which the occupant of the proposed dwelling can be "principally engaged," for purposes of OAR 660-033-0135(1)(c). To the extent intervenor relies on caring for livestock, petitioner repeats its argument that the occupants of the proposed dwelling will be "principally engaged" in nonfarm uses, not caring for livestock.

[21]It is unclear whether the "principally engaged" standard is concerned that the occupants be principally engaged in farm use of the property, compared to nonfarm uses of the property, or whether the standard is *also* concerned that the occupants be principally engaged in farm use of the property, compared to income-generating activity off the property, *e.g.*, the part-time farmer with a business in town. Because the present case does not involve the latter circumstance, we do not decide that question.

We concluded, above, that "riding lessons" and "training clinics" are not farm uses in themselves, in isolation from "stabling or training equines." We address petitioner's arguments regarding "caring for livestock" under other subassignments of error. Consequently, the arguments under this subassignment of error provide no basis, or at least no independent basis, to reverse or remand the challenged decision. Accordingly, we see no need to resolve the interpretational issue presented under this subassignment of error.

C. Customarily Provided in Conjunction with Farm Use

Petitioner argues that ORS 215.283(1)(f) allows a dwelling in conjunction with farm use only if the county also finds that a dwelling is "customarily provided" in conjunction with that farm use.[22] *See Doughton v. Douglas County*, 82 Or App 444, 449, 728 P2d 887 (1986) (to allow a farm dwelling, there must be a showing that the type of farm use is customarily combined with a residence); *Ramsay v. Linn County*, 30 Or LUBA 283, 290-91 (1996) (same); *Elliott v. Jackson County*, 23 Or LUBA 257, 261 (1992) (same). Petitioner contends that the county made no findings that the proposed dwelling is customarily provided in conjunction with the proposed farm use. Further, petitioner submits that there is no evidence that the proposed farm uses—grazing of horses and riding lessons and training clinics associated with intervenor's outfitting business—are the type of farm uses that are customarily combined with a residence.

Intervenor responds that the above-cited cases predate OAR 660-033-0135, and that that rule now comprehensively defines the standards under which a "dwelling may be considered customarily provided in conjunction with farm use." OAR 660-033-0135(1). We agree. In *Elliott*, we concluded that OAR 660-05-030(3) codifies the case law requirement that counties determine that a proposed farm dwelling is one "customarily provided" in

[22]ORS 215.283(1)(f), which OAR 660-033-0135 implements, provides that the following use may be established in an EFU zone: "Primary or accessory dwellings and other buildings customarily provided in conjunction with farm use."

conjunction with farm use. *See* n 18. As explained above, LCDC repealed OAR 660-05-030 in 1993, and ultimately replaced it with an entirely new scheme governing farm dwellings, at OAR 660-033-0135. Nothing in OAR 660-033-0135(1) requires a separate determination that the proposed dwelling is "customarily provided" in conjunction with farm use, in addition to satisfying the four standards at OAR 660-033-0135(1)(a) through (d). Instead, the rule plainly states that a dwelling may be considered customarily provided in conjunction with farm use *if* it satisfies those four standards. Because LCDC repealed a rule expressly requiring a determination that the dwelling is "customarily provided" and replaced that rule with a scheme that does not require such an express determination, it is reasonably clear that LCDC no longer views a separate determination to that effect as necessary to approve a farm dwelling. Petitioner does not argue that LCDC's judgment on this point is inconsistent with state law, or provide any other basis to require that the county conduct a separate inquiry into whether the proposed dwelling is one "customarily provided" in conjunction with the proposed farm use.

This subassignment of error is denied.

D. Commercial Scale

Finally, petitioner challenges the county's finding that the proposed farm use will be "at a commercial scale," as inadequate and not supported by substantial evidence. According to petitioner, the county's decision contains no analysis or explanation establishing that the proposed farm use will be at a commercial scale.

The only evidence on this point, petitioner argues, is the applicant's statement that forage on the property will facilitate "$40,000 gross receipts from riding lessons and training clinics." Record 358. However, petitioner argues that this figure obviously reflects gross income from the outfitting business, not any proposed farm use. Petitioner notes that in another part of the application intervenor estimated the annual value of forage on the property to be $1,500. Record 340. Further, petitioner cites to evidence that total gross

revenues in 1996 from intervenor's outfitting business were $28,000. Record 210. Based on these figures, petitioner submits that the cited $40,000 figure represents the gross receipts from the outfitting business, rather than the value of the forage or the potential income derived from "riding lessons and training clinics." Petitioner argues that the outfitting business conducted pursuant to the conditional use permit is a multi-faceted tourist business that encompasses far more activities than "riding lessons and training clinics."[23] To the extent "riding lessons and training clinics" are properly considered farm uses, petitioner argues, intervenor must separate out income from those activities from other activities conducted under intervenor's conditional use permit. According to petitioner, intervenor failed to establish, and the county failed to find, that the proposed farm uses, as opposed to activities pursuant to the conditional use permit, are "at a commercial scale."

Intervenor responds that the applicant's statement that forage on the property will facilitate $40,000 in gross receipts from riding lessons and training clinics is substantial evidence sufficient to establish that the proposed farm use will be "at a commercial scale."

We agree with petitioner that the county's findings are conclusory and not supported by substantial evidence. We generally agree that income or activities pursuant to the outfitting business that is authorized by the conditional use permit are not properly considered, for purposes of determining whether proposed farm uses are "at a commercial scale." It is not clear from the record whether the $40,000 figure includes income from activities pursuant to the outfitting business. In any case, that figure is based at least in part on projected income from "riding lessons and training clinics." Record 358. As explained above, "riding lessons and training clinics" are not properly considered farm uses in themselves, unless they are part of a facility for "stabling or training equines."

[23]Petitioner cites to evidence in the record indicating that the activities of the outfitting business include, in addition to guided hunting and fishing trips, cross-country skiing, snowmobiling, snowshoeing, bird watching, hiking, trail rides, interpretative tours, and study programs in geology, cultural history and astronomy.

However, we also held that grazing 25 horses and profiting from those horses by their use in a nonfarm business is sufficient to constitute the current employment of land for farm use, as defined at ORS 215.203(2)(a). The relevant question then becomes whether that farm use, in combination with any other proposed farm use of the property, will be "at a commercial scale."

The parties fundamentally disagree regarding what level of income or activity constitutes a "commercial scale" under OAR 660-033-0135(1)(c). The term "commercial scale" in OAR 660-033-0135(1)(c) is undefined, and we are aware of no cases construing it.[24] Petitioner argues that, as an adjective modifying "scale," the term "commercial" must mean "large": a large-scale farm use. Both parties discuss *Friends of Linn County v. Linn County*, 39 Or LUBA 627, 637 (2001), in which we stated that, for purposes of OAR 660-033-0135(2), it is clear that LCDC views farms generating $10,000 in annual income to be small commercial farms.[25] *See* n 15. The $10,000 figure used in OAR 660-033-0135(2) is the initial part of a complex formula for determining whether a farm dwelling may be allowed under that provision. As petitioner points out, the necessary level of qualifying income resulting from that formula may greatly exceed $10,000. We understand petitioner to urge that, to the extent we rely upon OAR 660-033-0135(2) and our statement in *Friends of Linn County* to construe the term "commercial scale" in OAR 660-033-0135(1)(c), we should recognize the limited role played by the $10,000 figure under OAR 660-033-0135(2). We

[24]OAR 660-033-0020(2) defines the term "Commercial Agricultural Enterprise." That term is used in OAR 660-033-0100, which deals with minimum parcel size requirements in agricultural zones. Although the parties do not discuss either OAR 660-033-0020(2) or 660-033-0100, both provisions are context for OAR 660-033-0135(1)(c), and may be pertinent to determining the meaning of the term "commercial scale."

[25]*Friends of Linn County* involved a lot of record dwelling on a small parcel with high-value soils that was permitted only if the county found that the parcel "cannot practicably be managed for farm use." The county concluded that farm use was "impracticable" if the parcel could not produce sufficient farm income to be characterized as a commercial farm, which the county understood, based on OAR 660-033-0135(2), to mean a farm that generates at least $10,000 in annual farm income. We agreed that OAR 660-033-0135(2) reflects LCDC's judgment that property generating $10,000 in annual farm revenue is a small commercial farm; however, we disagreed with the county that inability to generate that level of income means that the property cannot practicably be managed for farm use. 39 Or LUBA at 637-38.

understand intervenor to argue, on the other hand, that the $10,000 figure in OAR 660-033-0135(2) and our statement in *Friends of Linn County* should be used to construe the term "commercial scale" in OAR 660-033-0135(1)(c).

As stated, the county's finding that the proposed farm use will be "commercial scale" is conclusory. Assuming that finding was based on the applicant's statement regarding the projected $40,000 in gross receipts from riding lessons and training clinics, the finding is also inadequate for the additional reasons set forth above. On remand, the county must adopt adequate findings addressing this issue. We need not and do not attempt to prescribe any particular method the applicant and the county must use to identify how much income is properly attributable to grazing the 25 horses and making them available for use in the outfitting business. However, identifying the cost to intervenor if it were required to lease, transport and provide forage for 25 horses for use in the outfitting business would appear to be a reasonable starting point.

With regard to the meaning of "commercial scale," we decline to interpret that term in the present posture of this case. LCDC has not chosen to define the term, the county did not interpret the term in this case, and the parties' arguments regarding its meaning are not particularly developed. It is more consistent with "sound principles of judicial review" to decline to resolve the parties' dispute on this point until the decision, the parties' positions and the factual record are more adequately developed for review. ORS 197.805.

This subassignment of error is sustained.

For the foregoing reasons, the third and fourth assignments of error are sustained, in part.

The county's decision is remanded.