BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES JUST,
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

ROBERT B. MORRIS, JAMES F. SCOTT, III,
JEANETTE M. SCOTT and ROBERT L. SCOTT,
Intervenors-Respondents.

LUBA No. 2009-068

FINAL OPINION
AND ORDER

Appeal from Linn County.

James Just, Lebanon, filed the petition for review and argued on his own behalf.

Thomas N. Corr, County Counsel, Albany, filed a joint response brief and represented respondent. With him on the brief were Wallace W. Lien and Wallace W. Lien, P.C.

Wallace W. Lien, Salem, filed a joint response brief and argued on behalf of intervenors-respondents. With him on the brief were Wallace W. Lien, P.C. and Thomas N. Corr.

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

REMANDED 11/09/2009

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 that approves comprehensive plan and zoning map amendments for a 15-acre parcel.[1]

MOTION TO INTERVENE

Robert B. Morris, James F. Scott, III, Jeanette M. Scott and Robert L. Scott, the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted. Because respondent and intervenors filed a joint response brief, we refer to them together as respondents.

INTRODUCTION

The subject 15-acre property is located a short distance south of the City of Lebanon urban growth boundary in an area that includes mixed rural residential and farm and forest uses. Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) provide that lands that qualify as agricultural lands or forest lands must be protected for farm or forest uses. Prior to the challenged decision, the comprehensive plan map designation for the subject 15-acre parcel was Rural Residential Reserve-Farm/Forest and the zoning map designation was Farm/Forest. The county's Farm/Forest designations are applied to property that is suitable for both agricultural and forest uses. Linn County Code (LCC) 928.600.[2] The challenged decision changes those designations to Non-Resource (comprehensive plan map) and Non Resource – 5-acre minimum (NR-5) (zoning map). In approving those map changes the

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[1] The decision that is before us in this appeal includes Ordinance 2009-206 and Resolution and Order No. 2009-205. Those documents appear at Record 2-5. The resolution adopts Exhibit 1 as findings. Exhibit 1 appears at Record 6-10. Exhibit 1 appears to adopt Exhibits A and B as additional findings. Exhibit A appears at Record 11-68; Exhibit B appears at Record 69-73.

[2] LCC 928.600 provides in part:

"The purpose of the Farm/Forest (F/F) zoning district is:

"(A) to preserve land suitable for agricultural and forest uses[.]"

county found that the subject property does not qualify as either agricultural lands or forest lands. Petitioner challenges those findings in this appeal.

REPLY BRIEF

Our rules authorize reply briefs to respond to "new matters in the respondent's brief." OAR 661-010-0039. Petitioner moves for permission to file a reply brief to respond to new matters raised in respondents' brief. In their response brief, respondents challenge petitioner's standing and LUBA's jurisdiction in this matter. Those challenges both qualify as new matters, and petitioner's request for permission to file a reply brief is granted. *Boom v. Columbia County*, 31 Or LUBA 318, 319 (1996).

JURISDICTION

The notice of intent to appeal in this matter provides the following description of the appealed decision:

> "Notice is hereby given that petitioner intends to appeal that land use decision of respondent identified as 'Resolution and Order No. 2009-205, Planning and Building Department (PD08-0004).' Notice of Adoption was mailed on May 29, 2009. The county's decision approved a Comprehensive Plan map amendment and zoning map amendment on a 15.00-acre property identified as 12S-2W-27 Tax Lot 1000. The amendments changed the planning and zoning designations from Farm/Forest to Non Resource. The county's Notice of Adoption is attached as Exhibit 'A.'"

The county's Notice of Adoption that is attached to petitioner's notice of intent to appeal and referenced above as Exhibit A identifies the same 15-acre property and the same zoning and plan map amendment, but it identifies two decisions, Resolution and Order No. 2009-205 and Ordinance No. 2009-206. While petitioner's notice of intent to appeal specifically refers to Resolution and Order No. 2009-205, it makes no mention of Ordinance 2009-206.

Respondents argue that because petitioner's notice of intent to appeal makes no explicit reference to Ordinance 2009-206, petitioner's notice of intent to appeal should be understood to challenge only Resolution and Order No. 2009-205. Respondents argue Resolution and Order No. 2009-205 is only an interlocutory order that adopts the findings

that support the map amendments and directs the planning staff to prepare amendments to the comprehensive plan and zoning maps, whereas Ordinance 2009-206 is the document that actually adopted the disputed comprehensive plan and zoning map amendments. Respondents contend that Resolution and Order No. 2009-205 is not the county's final decision regarding the requested comprehensive plan and zoning map amendments. According to respondents, Ordinance 2009-206 is the county's final decision on the amendments. Because ORS 197.015(10)(a) requires that a land use decision be the local government's "final decision or determination," respondents contend LUBA does not have jurisdiction to review Resolution and Order No. 2009-205 and this appeal must be dismissed.

Respondents' jurisdictional challenge is based on a hyper-technical reading of petitioner's notice of intent to appeal that fails to give effect to all of petitioner's description of the appealed decision. While petitioner's notice of intent to appeal might be wrong about whether Resolution and Order No. 2009-205 actually adopted the new comprehensive plan and zoning map amendments for the 15-acre parcel, petitioner's notice of intent to appeal clearly describes the appealed decision as the "county's decision [that] approved a Comprehensive Plan map amendment and zoning map amendment on a 15.00-acre property identified as 12S-2W-27 Tax Lot 1000." Resolution and Order No. 2009-205 adopts findings and directs preparation of amended maps; Ordinance 2009-206 adopts the amended maps. Resolution and Order No. 2009-205 and Ordinance 2009-206 were adopted on the same day, May 27, 2009.[3] The county sent a single notice of adoption for Order No. 2009-205 and Ordinance 2009-206, and that county notice of adoption was attached to petitioner's notice of intent to appeal. Therefore, while the body of the notice of intent to appeal itself may not have expressly referenced Ordinance 2009-206, the attached county notice of

[3] Since Resolution and Order No. 2009-205 and Ordinance 2009-206 were adopted on the same day, it is not clear to us why the county adopted Resolution and Order No. 2009-205 to adopt findings and direct preparation of map amendments that had already been prepared. As far as we can tell the county could just as easily have drafted Ordinance 2009-206 to adopt the supporting findings and the amended maps.

decision did reference Ordinance 2009-206. The record submitted by the county in this appeal includes both Resolution and Order No. 2009-205 and Ordinance 2009-206. While petitioner's noticed of intent to appeal might be wrong in identifying Resolution and Order No. 2009-205 as the document that actually adopted the comprehensive plan and zoning map amendments there was no confusion that it was the comprehensive plan and zoning map amendments that petitioner wished to appeal. If petitioner were to move to amend the notice of intent to appeal to strike the reference to Resolution and Order No. 2009-205 and insert in its place a reference to Ordinance 2009-206 to correct the mistaken reference, we would grant the motion. But we see no need to require such a pointless formality, only to correct what is at most a harmless error that caused no prejudice and confused no one. Petitioner's notice of intent to appeal made it sufficiently clear that it was the comprehensive plan and zoning map amendments that petitioner wished to appeal.

STANDING

Respondents contend that because petitioner appeared below on behalf of the organization Friends of Linn County, he did not make a personal appearance on his own behalf, which is required by ORS 197.830(2) for petitioner to have standing to bring this appeal to LUBA in his individual capacity.[4] We set our respondents' argument below:

> "Petitioner brings this matter in his individual capacity, however, besides a passing reference to him appearing on his own behalf (Rec. pp. 180) all of his presentation is made on behalf of Friends of Linn County. The letter in which he states that he is also appearing on his own behalf is written on Friends of Linn County letterhead, and is signed by petitioner as 'president' of Friends of

[4] As relevant, ORS 197.830(2) provides:

> "Except as provided in ORS 197.620 (1) and (2), a person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
>
> "* * * * *
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

> Linn county and makes no signature of him in his own capacity. Looking reasonably at the presentation by petitioner, the only logical conclusion that can be arrived at is that petitioner appeared in this proceeding only in his capacity as President of Friends of Linn County, and not individually." Respondents' Brief 2-3.

A six-page letter appears at Record 180-85. As respondents correctly point out, that letter is on "Friends of Linn County" letterhead and includes the following closing:

> "Jim Just
>
> President" Record 185.[5]

The first paragraph of that letter provides:

> "Friends of Linn County (FOLC) is a charitable organization whose mission is to protect, preserve, and enhance the livability and sustainability of Linn County's farms, forests and cities. FOLC is appearing in these proceedings on behalf of its membership in Linn County. *Mr. Just, 39625 Almen Drive, Lebanon OR 97355, is also appearing on his own behalf.*" Record 180 (emphasis added).

The emphasized language is sufficient to make it clear that the letter is intended as a written appearance by both Mr. Just and Friends of Linn County. The fact that the letter's closing does not separately identify Mr. Just in his individual capacity does not matter.[6] We might feel differently if county law required that a letter that purports to constitute an appearance by more than one organization or person be signed and be signed separately by every organization and person who seeks to appear through the letter, but respondents do not argue that the county has adopted such a requirement.

Petitioner has standing to bring this appeal in his individual capacity.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner challenges the county's findings that the subject property does not qualify as forest land, subject to protection under Goal 4. Goal 4

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[5] While the letter includes the quoted closing, the copy of the letter in the record is unsigned.

[6] In fact, as we just noted, the copy of the letter that is in the record does not bear the written signature of Mr. Just in either his individual capacity or his capacity as president of Friends of Linn County.

requires that counties conserve forest lands for forest and related uses. As relevant in this appeal, forest lands include land that is: "*suitable for commercial forest uses* including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources." (Emphasis added.)[7] Petitioner contends that in determining whether the subject 15-acre parcel is "suitable for commercial forest uses" the county failed to properly apply OAR 660-006-0010 and 660-006-0005(2).

A. The County Must Consider the Data Described in OAR 660-006-0010 and 660-006-0005(2)

OAR 660-006-0010 describes how local governments are to go about inventorying forest lands.[8] OAR 660-006-0010 requires that a Goal 4 inventory "shall include a mapping of average annual wood production capability by cubic foot per acre (cf/ac)." Although OAR 660-006-0010 does not expressly say so, the required cf/ac/yr information presumably must be used in determining whether property qualifies as forest land. OAR 660-006-0005(2) defines "Cubic Foot Per Acre."[9] OAR 660-006-0005(2) requires that in determining

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[7] Petitioner's arguments before LUBA are directed at the emphasized language in the Goal 4 forest lands definition.

[8] OAR 660-006-0010 provides in part:

> "Governing bodies shall include an inventory of 'forest lands' as defined by Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural lands or lands for which an exception to Goal 4 is justified pursuant to ORS 197.732 and taken are not required to be inventoried under this rule. Outside urban growth boundaries, *this inventory shall include a mapping of average annual wood production capability by cubic foot per acre (cf/ac).* If site information is not available then an equivalent method of determining forest land suitability must be used. * * *"

[9] OAR 660-006-0005(2) provides:

> "'Cubic Foot Per Acre' means the average annual increase in cubic foot volume of wood fiber per acre for fully stocked stands at the culmination of mean annual increment as reported by the USDA Natural Resource Conservation Service (NRCS) soil survey information, USDA Forest Service plant association guides, Oregon Department of Revenue western Oregon site class maps, or other information determined by the State Forester to be of comparable quality. Where such data are not available or are shown to be inaccurate, an alternative method for determining productivity may be used. An alternative method must

the wood fiber productivity of soils, expressed as cubic feet per acre per year (cf/ac/yr), NRCS soil survey information or other information establishing cf/ac/yr that the state forester finds to be comparable must be used. Alternatively, if cf/ac/yr data are not available or are inaccurate, an alternative method that provides equivalent data as described in a Department of Forestry technical bulletin may be approved by the Department of Forestry.

As we explained in *Anderson v. Lane County*, 57 Or LUBA 562, 572 (2008), the current language of OAR 660-006-0010 and 660-006-0005(2) was adopted to "clarify and limit the types of data that may be relied upon in determining forest productivity[.]" We are not prepared to say that the data described in OAR 660-006-0010 and 660-006-0005(2) are the only data that can be considered in determining whether property qualifies as forest lands, but that data must be considered. Petitioner's arguments to the county below included the following:

> "Applicant has not addressed * * * OAR 660-006-0010 or 660-006-0005(2) or provided forest capability information expressed as cf/ac/yr.
>
> "Applicant has not met his burden of proof to establish that the subject property is not forest land protected by Goal 4. Applicant must provide an evaluation of the subject property that establishes the potential forest productivity of the property measured in cf/ac/yr. Applicant must rely on ODF-accepted data sources or, if such data is not available, must use an alternative method providing equivalent data as explained in the Oregon Department of Forestry's Technical bulletin entitled 'Land Use Planning Notes Number 3 dated April 1998' and approved by the Oregon Department of Forestry."
>
> "* * * * *
>
> "Published, ODF-approved forest productivity data establishes that the subject property is capable of producing 57 cf/ac/yr of wood fiber. Therefore the subject property is forest land protected by Goal 4. The requested plan and zoning map amendments may not be approved." Record 185.

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provide equivalent data as explained in the Oregon Department of Forestry's Technical Bulletin entitled 'Land Use Planning Notes Number 3 dated April 1998' and be approved by the Oregon Department of Forestry."

As far as we can tell, although the applicant presented a great deal of expert testimony in support of his position that the subject 15 acres are not suitable for commercial forest use, the applicant did not submit the data required by OAR 660-006-0010 or 660-006-0005(2). Petitioner argued below that if the data required by OAR 660-006-0010 or 660-006-0005(2) are used, the soils on the subject property are capable of producing 57 cf/ac/yr. Petitioner takes the position that soils with that level of productivity are suitable for commercial forest use. In support of that argument, petitioner submitted correspondence from the Oregon Department of Forestry. The Oregon Department of Forestry has not adopted a cf/ac/yr threshold for determining whether land is properly viewed as forest land under Goal 4, but the correspondence notes that "forestlands with a site productivity of at least 20 cubic feet per acre per year [are] subject to the reforestation requirements of the Oregon Forest Practices Act [and o]ther technical references use 20 cubic feet per acre per year as the minimum threshold for defining commercial forestland." Record 194. A May 6, 2009 planning staff report appears to take the position that the subject 15 acres would produce 931.35 cubic feet of wood fiber per year or approximately 62 cubic feet per acre per year.[10] Despite the fact that petitioner argued that OAR 660-006-0010 and 660-006-0005(2) require that the county consider the cf/ac/yr data from NRCS and despite the fact that both petitioner and planning staff provided similar cf/ac/yr figures for the property, the county's decision does not consider, in any express way, the cubic feet per acre per year data required by OAR 660-006-0010 and 660-006-0005(2) in making its decision in this matter. Based on that failure, remand is required.[11]

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[10] We may be misreading the table prepared by planning staff, and the cubic feet per acre per year data used by petitioner and planning staff are not the same. On remand the county needs to resolve which data are correct.

[11] Although the county's decision adopts a number of documents by reference, *see* n 1, it does not adopt the staff report as findings to support the challenged decision.

B. OAR 660-006-0010 and 660-006-0005(2) Do Not Include Bright-Line Thresholds

Although we agree with petitioner that OAR 660-006-0010 and 660-006-0005(2) require that the county consider the cf/ac/yr data that those rules require to be considered, we do not agree with petitioner's suggestion that productivity of 57 cf/ac/yr or 62 cf/ac/yr means that the subject property is suitable for commercial forest use as a matter of law. For some purposes, the Oregon Department of Forestry appears to believe that productivity of at least 20 cf/ac/yr is indicative of land that is suitable for commercial forest use. However, although the Land Conservation and Development Commission (LCDC) requires that cf/ac/yr data be considered in determining whether to inventory land as suitable for commercial forest use, it has not established a threshold or thresholds for the level of cf/ac/yr productivity that qualifies land as suitable for commercial forest use. LUBA's cases on that question similarly have not established bright-line productivity standards. For example, where a property's soils are capable of producing 20 cf/ac/yr of wood fiber, LUBA concluded that level of productivity, is not sufficient, in and of itself, to establish that the property *is suitable* for commercial forest use. *Palmer v. Lane County*, 44 Or LUBA 334, 339 (2003). On the other hand, LUBA also concluded in *Palmer* that a finding that a property's soils are not sufficient to produce 50 cf/ac/yr was not adequate, by itself, to establish that the property *is not suitable* for commercial forest use. *Id*. Similarly, LUBA held that a county erred by finding that a 25-acre portion of a 111-acre parcel was not suitable for commercial forest use, simply because its soils were only capable of producing 63 cf/ac/yr. *Waugh v. Coos County*, 26 Or LUBA 300, 313-14 (1993). In a 1998 decision, LUBA pointed out that no "particular level of cf/ac/year" is determinative in determining whether land qualifies as "'forest land' under Goal 4," and questioned whether "a potential yield of 48.48 cf/ac/yr is 'below acceptable commercial productivity rates,' or why, if so, the property is not suitable for commercial forestry." *Dept. of Transportation v. Coos County*, 35 Or LUBA 285, 294 n 5, *rev'd and rem'd on other grounds* 158 Or App 568, 976 P2d 68 (1998).

Our cases suggest that land with a productivity of less than 20 cf/ac/yr may be unsuitable for commercial forest use unless there are factors that compensate for the land's relatively low productivity.[12] But land in a middle range from a low of approximately 40 cf/ac/yr to a high of approximately 80 cf/ac/yr is unlikely to be unsuitable for commercial forest use unless there are additional factors that render those moderately productive soils unsuitable for commercial forest use. Rural land with a wood fiber productivity of over 80 cf/ac/yr is almost certainly suitable for commercial forest use, even if there are limiting factors.

While not directly applicable here, we note that the cf/ac/yr productivity of property is used in the exclusive farm use zoning statutes to more strictly limit non-resource use of lands with high wood fiber productivity, as compared to lands with moderate or poor wood fiber productivity. Although those statutes are not written in terms of suitability for commercial forest use, they are at least some indication that the legislature may view the productivity level that is indicative of land that is suitable for commercial forest use to be approximately 20 cf/ac/yr in Eastern Oregon and approximately 50 cf/ac/yr in Western Oregon. For example, ORS 215.263(4)(b)(D)(i) requires that new parcels proposed for nonfarm dwellings in Western Oregon outside the Willamette Valley not be capable of producing "50 cubic feet per acre per year of wood fiber[.]" That suggests that the legislature believes property in Western Oregon outside the Willamette Valley that is capable of producing 50 cf/ac/yr is worthy of protection from nonfarm dwellings. In eastern Oregon, ORS 215.263(5)(b)(D)(i) requires that new parcels for nonfarm dwellings not be capable of producing "more than * * * 20 cubic feet per acre per year of wood fiber[.]" ORS 215.263(5)(b)(D)(i) suggests that the legislature believes that property in Eastern Oregon that

[12] For example, if a small parcel that produces fewer than 20 cf/ac/yr is currently covered with trees and part of a much larger tract of highly productive forest land, that parcel is almost certainly suitable for commercial forest use.

is capable of producing at least 20 cf/ac/yr is worthy of protection from nonfarm dwellings. ORS 215.284(4) authorizes counties in the Willamette Valley to approve new parcels for nonfarm dwellings if certain criteria are met. One of those criteria requires that the parcel be "composed of at least 95 percent soils not capable or producing 50 cubic feet per acre per year of wood fiber." ORS 215.284(4)(a)(C). ORS 215.284(4)(a)(C) suggests that the legislature believes that property in the Willamette Valley that is capable of producing at least 50 cf/ac/yr is worthy of protection from nonfarm dwellings.

ORS 215.750 sets out standards for what are referred to as forest template dwellings. Under ORS 215.750(1) the required level of parcelization within a 160-acre template to qualify for a forest template dwelling in Western Oregon increases as the productivity of the soils increases from "0 to 49 cubic feet per acre per year" (three parcels) to "50 to 85 cubic feet per acre per year of wood fiber" (seven parcels) to "more than 85 cubic feet per acre per year of wood fiber" (eleven parcels). ORS 215.750 provides some idea of what the legislature believes to be forest lands of low, moderate and high productivity in Western Oregon. ORS 215.750(2) sets out a similar regulatory scheme for forest template dwellings in Eastern Oregon where productivity ranges from "0 to 20 cubic feet per acre per year," "21 to 50 cubic feet per acre per year" and "more than 50 cubic feet per acre per year."

C. Other Factors Can be Considered

Finally, petitioner appears to argue that the decision about whether land qualifies as suitable for commercial forest use must be based *solely* on the data described in OAR 660-006-0010 and 660-006-0005(2), and cannot consider other factors. We do not agree. It may be that the cf/ac/yr productivity for a parcel using the data required by OAR 660-006-0010 and 660-006-0005(2) could be so high that the parcel is suitable for commercial forest use as a matter of law or that it could be so low that the parcel is unsuitable for commercial forest use as a matter of law. But this does not appear to be such a case, because the evidence in the record suggests the soils' productivity is approximately 60 cf/ac/yr. If the county on

remand determines that the cf/ac/yr productivity of the 15 acres is not determinative, by itself, the county may consider the other factors that bear on the suitability of the 15 acres for commercial forest use. Based on the arguments presented in this appeal, we believe at least some of the factors that the county considered in reaching the challenged decision can be considered. It seems likely that LCDC intended that the data described by OAR 660-006-0010 and 660-006-0005(2) to be the only direct measures of wood fiber productivity that can be considered in determining whether the subject property is suitable for commercial forest use.[13] But the suitability of the subject property for commercial forest use could also be affected by a number of on-site and off-site physical impacts and limitations that are not accurately reflected in or accounted for in the data described by OAR 660-006-0010 and 660-006-0005(2).[14] We see no reason why the county could not consider those impacts and limitations in making its decision on remand. But the county must first consider the data that OAR 660-006-0010 and 660-006-0005(2) obligate the county to consider. We therefore remand the decision so that the county may do so.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Goal 3 requires that the county protect rural agricultural lands. As defined by Goal 3, in Western Oregon agricultural lands include the following:

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[13] Therefore, because it appears that cf/ac/yr data from the NRCS is available for the soils on the property, the county should not have relied on the applicant's contention that the subject property is "cubic foot site class VI or site index 60 (100 year basis)," Record 74, since the rules appear to require that NRCS cf/ac/yr data be used if available.

[14] For example, the county appears to have relied heavily on the presence of the existing dwelling on the property and adjoining rural residences and the relative isolation of the subject property from larger parcels in commercial forest use. If the soils on the 15-acre parcel are otherwise suitable for commercial forest use, those factors alone likely would not be sufficient to support a finding that the parcel is thereby rendered unsuitable for commercial forest use. But if the residence on the property, the adjoining residences and the property's separation from nearby commercial forests would make it difficult or impossible to carry out the forest practices necessary to engage in commercial forestry on the 15-acre parcel, those difficulties along with the parcel's other limitations might support a finding that the parcel is unsuitable for commercial forest use.

> "[L]and of predominantly Class I, II, III and IV soils * * * as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and *other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices.* Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event." (Emphasis added.)

OAR 660-033-0020(1)(a)(B) sets out the same seven factors that are identified in the italicized language in Goal 3.[15] In his second assignment of error, petitioner challenges the adequacy of the county's findings concerning these seven factors and the evidentiary support for those findings. We set out the county's relevant findings regarding these factors before turning to the parties' arguments.

A. The County's Findings Regarding the OAR 660-033-0020(1)(a)(B) Factors

1. Soil Fertility

The county's soil fertility findings point out that there are two Class VI soils that make up two-thirds of the property, Philomath and Witzel. The findings explain the limitations posed by those soils:

> "* * * The NRCS soil survey describes significant limitations with Philomath soils even for grazing of livestock because of the high clay content, cobbles on the surface and the shallow depth to bedrock. The use of farm equipment is also limited, according to the same NRCS report, because of the stones on the surface and the slope. The NRCS report further cautions that conducting field operations when the soil is wet reduces tilth and destroys structure, resulting in increased runoff and erosion.
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> "The other Class VI soil occurring on the site is Witzel 104E. The Witzel soil has similar limitations to those attributed above to Philomath soil. * * * When

[15] OAR 660-033-0020(1)(a)(B) provides that agricultural lands include the following:

> "Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices[.]"

grazing is attempted, the main limitation is droughtiness. The soil in this unit is droughty because of low rainfall in summer and shallow depth to bedrock. Lack of sufficient moisture limits the amount of fertilizer that can be used by plants. * * * Stones on the surface limit the use of equipment.

"These characteristics as observed and reported by NRCS, lead to the clear conclusion that the soil fertility, a general measure of several factors, is low. The 'resource-worthy' soils only constitute 35% of the site and are located on the portion of the property where the current dwelling already exists." Record 22-23.

2. Suitability for Grazing

The county adopted the following findings:

"NRCS cautions that grazing when the Philomath and Witzel soils are moist results in compaction of the subsurface layer, poor tilth (the physical condition of soil as related to tillage, seedbed preparation, seedling emergence and root penetration), and excessive runoff. Additionally, the local experience is that much of the grasses are low-yield (slow growing). The conclusion is that this site is not suitable for effective, commercial use." Record 23

3. Climactic Conditions

The findings note the droughty character of the soils, and conclude as follows:

"The shallowness of the Philomath and Witzel soils coupled with their rock content means that available water is not held long enough in the soil horizon to promote good plant growth." *Id.*

4. Existing and Future Availability of Water for Farm Irrigation

The findings explain that while there is sufficient groundwater for rural residential needs, there are practical problems with obtaining enough water to meet the demand for irrigation in the summer. Record 23-24.

5. Existing Land Use Pattern

The findings explain that there are a number of areas close to the subject property for which exceptions to Goals 3 and 4 have been adopted. A map that is included at page 79 of the record shows that the subject property is a rectangle approximately 2000 feet long and 400 feet wide with approximately 400 feet of frontage on Rock Hill Road and the parcel's

long dimension running generally south from Rock Hill Road. Developed rural residential lots adjoin the entire length of the 2000-foot eastern parcel line and the 2000-foot western parcel line. Additional rural residential development is present on the parcels to the north across Rock Hill Road. The findings go on to explain:

> "Dwellings on the applicant's property will be compatible with adjacent uses. The amendment will not adversely impact the overall land use pattern in the area. As the applicant's property is surrounded by a combination of existing R/R-5 exception area and by residences created under previous Rural Residential zoning, the proposed residence is therefore a continuation of established land use pattern." Record 24.

Finally, the county's findings conclude that because the subject property is separated from larger farm and forest uses to the west and south and separated from those uses by existing residential development, the two new dwellings that would be made possible by the challenged decision would not have adverse impacts on those farm and forest uses.

6. Technological and Energy Inputs Required

The findings note that farming the subject property is complicated by the location of the existing house on the front one-third of the property where the only good soils are located and the existing two-acre woodlot in the middle of the property that divides the remaining two-thirds of the property with poor soils. The findings explain that energy inputs to farm the property would be high and the poor soils mean that the resulting production would not justify the cost of such inputs. Record 25.

7. Accepted Farming Practices

In addressing this factor, the county's findings simply refer to earlier findings:

> "The significant cautionary observations by NRCS regarding standard farming limitations have been raised previously in this application." Record 25.

B. Waiver

As earlier noted, in his second assignment of error, petitioner challenges the adequacy of the county's findings regarding the OAR 660-033-0020(1)(a)(B) factors and the

evidentiary support for those findings. Under ORS 197.763(1), issues that are raised to LUBA in an appeal of a quasi-judicial land use decision must first be raised prior to the close of the final evidentiary hearing before the local government.[16] Under ORS 197.835(3) our scope of review is limited to issues that were raised before the county during its proceedings below.[17] Respondents contend that petitioner raised no issue below concerning the OAR 660-033-0020(1)(a)(B) factors, and that failing to do so petitioner has waived his right challenge the county's findings concerning those factors or their evidentiary support.[18]

When respondents raise a waiver defense under ORS 197.763(1) and 197.835(3), LUBA relies on the petitioner to identify where the issue was raised below. *Holloway v. Clatsop County*, 52 Or LUBA 644, 662 (2006), *aff'd* 210 Or App 467, 151 P3d 961 (2007); *Davenport v. City of Tigard*, 27 Or LUBA 243, 247 (1994); *Wethers v. City of Portland*, 21 Or LUBA 78, 92 (1991). Although petitioner filed a reply brief to respond to respondents' jurisdictional and standing challenges, petitioner did not respond to respondents' waiver argument in the reply brief. Petitioner's only response to respondents' waiver argument was at oral argument, and we limit our consideration to that response.

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[16] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

[17] ORS 197.835(3) sets out the following limit on LUBA's scope of review:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[18] Respondents' waiver arguments appear in footnotes in their brief: Soil Fertility/Grazing (Respondents' Brief 13, n 8), Climate/Water (Respondent's Brief 17, n 12), Land Use Patterns (Respondent's Brief 18, n 15), Technological and Environmental Inputs (Respondent's Brief 20, n 17), Accepted Farming Practices (Respondent's Brief 22 n 18).

Petitioner first argues that the applicant himself raised the issue of compliance with the OAR 660-033-0020(1)(a)(B) factors by submitting the proposed findings addressing those factors that were ultimately adopted by the county. Record 20-23. If we understand petitioner's argument correctly, it would allow an opponent in a quasi-judicial land use matter to make a minimal appearance to achieve standing and then sit back and say nothing while an applicant produces evidence and argument concerning the applicable approval criteria. The opponent could then appeal the decision to LUBA and for the first time argue that the application does not comply with the applicable approval criteria. That is not how the "raise it or waive it" requirement in ORS 197.763(1) and 197.835(3) works. The only "issue" that the *applicant* raised below is that the subject property *is not agricultural land*, based on the OAR 660-033-0020(1)(a)(B) factors. For petitioner to preserve his right to assign error to the county's findings concerning the OAR 660-033-0020(1)(a)(B) factors and the evidentiary support for those findings, petitioner or some other party must have taken the position that one or more of those factors supports a conclusion that the subject property qualifies as "other lands which are suitable for farm use" that qualify for protection as agricultural lands. The applicant's application did not raise that issue. The applicant's application only took the position that the subject property *does not qualify* as "other lands which are suitable for farm use" that qualify for protection as agricultural lands.

Petitioner also argues that he raised the issue presented in the second assignment of error at Record 180 and 184. The only issue that petitioner raised below concerning the OAR 660-033-0020(1)(a)(B) factors appears at Record 184 and is set out below:

> "The applicant has not addressed compliance with * * * OAR 660-033-0020(1)(a)(B) * * * or established that the subject property is not predominantly composed of Class I-IV soils or land 'otherwise suitable for farm use.'
>
> "* * * * *
>
> "NRCS data shows that 75% of the soils on the subject property are commonly used for farm uses including hay, pasture, grass seed, and grain.

> Applicant has not explained why the soils on the subject property are not similarly suitable for farm use." Record 184.

In applying the "raise it or waive it" requirement imposed by ORS 197.763(1) and 197.835(3), we do not require the same level of specificity that is required to preserve issues in judicial proceedings, but issues must be raised with sufficient specificity to give the local government fair notice of those issues. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). The above language from page 184 of the record is sufficient to raise the issue that the subject property should be considered "other lands which are suitable for farm use" that must be protected as agricultural lands, based on "soil fertility," "suitability for grazing" and "accepted farm practices" (factors 1, 2 and 7 above). But the above is not sufficient to preserve petitioner's right to challenge the county's findings concerning "climatic conditions," "existing and future availability of water for irrigation purposes," "existing land use patterns," or "technological and energy inputs required" (factors 3, 4, 5 and 6 above).

C. Petitioner's Challenges to the County's Findings Regarding the OAR 660-033-0020(1)(a)(B) Factors

A detailed discussion of petitioner's challenges is not required. Given enough inputs and effort, almost any rural land can be made to produce a farm crop or forage for grazing. Depending on how the question is approached and the assumptions that are made, estimates of that productivity may be large or small. As is usually the case in appeals concerning the "other lands which are suitable for farm use" prong of the Goal 3 definition of agricultural lands, the applicant emphasizes the factors that complicate farm use of the property, factors which in some cases also led to the soils being classified Class V or worse. Petitioner emphasizes that, even with those constraints, it is possible to grow forage on the soils that are present and graze farm animals on that forage for at least part of the year. Based on our review of the parties' arguments and limiting our review to factors 1, 2 and 7, the subject property seems to be close to the line that divides "other [predominantly Class V or worse]

lands which are suitable for farm use" from predominantly Class V or worse soils that are not suitable for farm use. Given the prominent role that preservation of farm land plays in Oregon's land use planning program, our cases have generally erred on the preservation side in close cases. *See Wetherell v. Douglas County*, 54 Or LUBA 678, 682 (2007) (that land is only suitable for seasonal grazing does not mean that the land is not "suitable for grazing" as that term is used in the OAR 660-033-0020(1)(a)(B) definition of agricultural land); *Riggs v. Douglas County*, 37 Or LUBA 432, 4442-43 (1999) (parcel that might not be suitable for farm use by itself may be suitable for farm use in conjunction with other nearby parcels); *Clark v. Jackson County*, 17 Or LUBA 594, 606 (1989) (past use of property for grazing is a substantial obstacle to finding the property is unsuitable for grazing). But here the county appears to have relied in significant part on other OAR 660-033-0020(1)(a)(B) factors, including the lack of potential for irrigation, the impact of residential development on the 15-acre parcel and the impact of adjoining residential development that nearly surrounds the 15-acre parcel. Petitioner waived his right to challenge those aspects of the county's decision. We believe those factors could reasonably lead the county to conclude that the subject 15-acre parcel does not qualify as "other [predominantly Class V or worse] lands which are suitable for farm use," notwithstanding the minimal suitability of the soils for grazing.

The second assignment of error is denied.

The county's decision is remanded.