BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON NATURAL DESERT ASSOCIATION,
Petitioner,

vs.

HARNEY COUNTY,
Respondent,

and

DIAMOND VALLEY RANCH,
Intervenor-Respondent.

LUBA No. 2011-097

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.

Tia M. Lewis, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Schwabe, Williamson & Wyatt, PC.

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

REMANDED 05/03/2012

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 county approval of a dwelling in conjunction with farm use on a 480-acre parcel located on the western slope of Steens Mountain.

FACTS

The subject property is a vacant 480-acre parcel zoned for exclusive farm use (EFRU-1) that was created by a 2011 partition. The subject property is located at an elevation of over 6,100 feet, with access via a single road that is closed due to snow for over six months of the year. The parcel is part of a 3,400-acre tract of contiguous parcels owned by intervenor-respondent Diamond Valley Ranch (intervenor), which in turn is part of a multi-tract 17,000-acre ranching operation owned by intervenor and related entities.

ORS 215.283(1)(e) allows in EFU zones "[p]rimary or accessory dwellings and other buildings customarily provided in conjunction with farm use." Similarly, OAR 660-033-0120, Table 1, provides for a "[d]welling customarily provided in conjunction with farm use" (hereafter, farm dwellings), subject to standards at OAR 660-033-0135. In March 2011, intervenor applied to the county for a farm dwelling on the subject 480-acre parcel. The stated purpose of the dwelling is to provide seasonal shelter for ranch hands and cowboys, to be occupied approximately five months per year as needed for land and livestock management.[1] The county planning director approved the application, and petitioner appealed that decision to the county planning commission, which also approved it. During the time when the appeal proceedings were before the planning commission, Pete Runnels, a

[1]OAR 660-033-0120, Table 1, also provides, separately, for an "Accessory Farm Dwelling for year-round and seasonal farm workers," subject to standards at OAR 660-033-0130(24). Given the stated purpose of the proposed dwelling to provide seasonal shelter to ranch hands and cowboys as part of a larger ranch operation, it would seem that the proposed dwelling would most accurately be categorized as an "accessory" farm dwelling rather than a "primary" farm dwelling, for purposes of ORS 215.283(1)(e) and OAR 660-033-0120, Table 1. However, no issue is raised in this appeal that the proposed dwelling cannot *also* be approved as a primary farm dwelling if it satisfies the standards in OAR 660-033-0130(1), and we consider the point no further.

recently elected member of the County Court, the governing body, published a September 21, 2011 guest opinion in the *Burns Times Herald* in which the Commissioner Runnels referred to petitioner as an "extreme environmental organization" and a "silent killer" engaged in "terrorism," with reference to petitioner's pending local appeal of the farm dwelling approval at issue in this appeal. Record 20, *see* n 2.

Petitioner appealed the planning commission decision to the county court. At the hearing, petitioner's counsel requested that Commissioner Runnels recuse himself due to bias against petitioner. Commissioner Runnels stated that he would recuse himself unless his vote was needed to break a tie. Record 16. Commissioner Runnels then sat through the hearing with the other commissioners, who proceeded to deliberations. Both the county judge and the other commissioner made comments indicating that they favored denying petitioner's appeal and approving the application. Prior to the vote, the presiding county judge asked Commissioner Runnells if he wanted to say anything. Commissioner Runnels commented that he agreed with the county judge's analysis, and that he thought petitioner was "grasping at straws." However, Commissioner Runnels stated that he would not vote, and the other two members proceeded to vote to approve the application, 2-0, with Commissioner Runnels abstaining. On October 5, 2011, all three members of the County Court, including Commissioner Runnels, signed the county's final decision denying petitioner's appeal and approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that it was error for Commissioner Runnels to participate in the decision, because he exhibited bias toward petitioner and petitioner's appeal of the farm dwelling permit. *See Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 179-80 (2007) (city councilor who signed a letter personally attacking a development opponent exhibited bias); *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002) (city councilor who signed a petition in favor of proposed development exhibited bias). Generally, bias can

be found where there is "evidence of a strong emotional commitment by a decisionmaker to approve or to defeat an application for the land use approval." *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157, 165-166 (2009).

As noted, Commissioner Runnels published a guest opinion in a local newspaper that exhibits, to put it mildly, a degree of hostility toward petitioner and its legal actions, using as an example petitioner's appeal of the farm dwelling approval at issue in this appeal that was then pending before the county.[2] Although intervenor makes an effort to argue otherwise, there can be no reasonable dispute that the editorial is evidence of a strong emotional bias by Commissioner Runnels against petitioner and petitioner's local appeal, and we do not hesitate in concluding that he was obligated to recuse himself from participating in petitioner's appeal.

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[2] The editorial states, in relevant part:

> "It's hard to know where to start when I try to put into words what I have seen during my first few months as a Harney County Commissioner. But one thing that stands out is terrorism. Call it eco-terrorism, if you like.
>
> "By far, the most frustrating issue is seeing the strangle hold that this county fights every day against an extreme environmental group. We all know this group as O.N.D.A.—Oregon Natural Desert Association headquartered in Bend.
>
> "Looking at their website as of this writing they have many lawsuits currently filed that target some kind of activity in Harney County. Furthermore, they have just gone one step further by appealing a local farm use permit on private land. A new first for them. They are a silent killer to all of us, who do their damage through the courts. * * *
>
> "* * * * *
>
> "I pray for the day the court of appeals and judges one day soon see the dangerous game they are playing to the detriment of so many. * * *
>
> "As for the terrorists, they need to come to the table willing to really listen, hear and cooperate with every decision, and not turn around behind our backs and file unending lawsuits. You can't negotiate with terrorists.
>
> "Pete Runnels, Harney County Commissioner." Record 20.

The more difficult question is whether the commissioner's nominal recusal and limited participation in the appeal and decision warrants remand. In an ideal world, a biased decision maker would announce his recusal at the beginning of the hearing and then either step down from the hearings body decision making panel or remain silent during the deliberations. If his participation is necessary to break a tie vote, he would then be ready for that contingency. Obviously, if his participation turned out not to be necessary to render the county's final decision, he should not participate in the deliberations or vote on any motions on the merits of the appeal.[3]

In the present case Commissioner Runnels correctly indicated that he would recuse himself due to bias and ultimately did not vote on petitioner's appeal. However, the validity of that recusal was significantly undercut by the fact that Commissioner Runnels provided, at the invitation of the County Judge, brief comments concurring with the other decision makers and indicating that he was in favor of denying the appeal.[4]

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[3] Ideally, a decision maker recused for bias would also refrain from signing the final written decision, or sign only as an abstaining member if the local code required a\his signature as a ministerial necessity, to avoid creating the impression that the biased decision maker participated in the local government's final decision. essity, to avoid creating the impression that the biased decision maker participated in the local government's final decision.

[4] The transcript attached to the response brief states, in relevant part:

> "Hon. Grasty: Pete, I don't want you gagged in any manner but you said earlier that you might stay out of this until we're—a decision is made.
>
> "Comm. Runnels: Yep.
>
> "Hon. Grasty: I—it is—at worst it would be a two-to-one vote at this point, but I—is that—do you want to say anything?
>
> "Comm. Runnels: Just a few words, one—the seventh point you each had, some overlaps—something different and my feelings, too, they were grasping at straws kind of to turn this application. And I will say no more than that and to my word what I told them that my vote (inaudible) will not vote.
>
> "Hon Grasty: So I—I would make the motion that we uphold the decision of the Planning Commission in its entirety * * *." Response Brief, Appendix C, 8.

Commissioner Runnels' brief participation in the County Court's deliberations is not necessarily a basis for remand of the county's decision. Because the other two County Court members constituted a quorum, both indicated that they favored denying the appeal before Commissioner Runnels' spoke, and both ultimately voted to deny petitioner's appeal and approve the farm dwelling application, it is arguable that Commissioner Runnels' limited participation in the decision had no effect on the outcome or otherwise tainted the decision. However, it is impossible to know from the record to what extent, if any, Commissioner Runnel's limited participation influenced the other members' deliberations and votes. In *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 190 (2007), we remanded the decision for new deliberations and a new decision, notwithstanding that the biased decision maker's vote was not essential to the outcome, because we could not tell from the record whether the biased decision-maker's participation might have influenced the remaining decision-makers' deliberations or votes.

In the present case, we must remand the decision in any event under the third assignment of error, as discussed below. Accordingly, we need not decide if Commissioner Runnel's limited participation in the decision would, on its own, warrant remand. On remand, the County Court should address the basis for remand under the third assignment of error, and also conduct new deliberations and a new vote on the merits of the appeal and application without any participation from Commissioner Runnel. Such proceedings on remand should cure the effects, if any, of bias on the county's decision.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0135 provides two tracks or sets of standards for farm dwellings: one based on minimum acreage and the other based on minimum gross farm income. Intervenor applied to the county under local regulations implementing the acreage track, at OAR 660-

033-0135(1).[5] OAR 660-033-0135(1)(d) requires a finding that "there is no other dwelling on the subject tract." OAR 660-033-0020(13) defines "tract" as "one or more contiguous lots or parcels in the same ownership." "Contiguous" is defined as "connected in such a manner as to form a single block of land." OAR 660-033-0020(3). "Parcel" has the meaning set forth in ORS 215.010, which includes units of land created by partition. OAR 660-033-0020(12).

Under this assignment of error, petitioner argues that, because the subject 480-acre parcel is, or was, part of a "tract" with another parcel on which the county approved another dwelling in 2010, the county erred in concluding that the proposed farm dwelling that the county approved in 2011 complies with OAR 660-033-0135(1)(d).

Resolution of this assignment of error requires additional factual background. In November 2010, the county approved a "lot of record" dwelling pursuant to ORS 215.705(1), based on analysis of a 4,855-acre area that also included the area of the 480-acre subject parcel. The 2010 lot of record approval contemplated that the dwelling would be located on

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[5] OAR 660-033-0135(1) provides, in relevant 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:
>
> "(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; * * *
>
> "* * * * *
>
> "(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.
>
> "(d) * * * [T]here is no other dwelling on the subject tract."

a 840-acre parcel to be created later, and which was in fact created in a subsequent February 2011 partition. That same February 2011 partition also created the subject 480-acre parcel. [6]

ORS 215.705(1)(g) requires that "[w]hen the lot or parcel on which the [lot of record] dwelling will be sited is part of a tract, the remaining portions of the tract are consolidated into a single lot or parcel when the dwelling is allowed." To comply with ORS 215.705(1)(g), the 2010 lot of record approval includes a condition requiring consolidation of "any property which is part of a tract on which the dwelling will be sited prior to the issuance of the building permit." Record 224. Shortly after the 2011 partition, intervenor sold the 840-acre parcel to a third party. The parties agree that no building permit has yet been issued for the lot of record dwelling on the 840-acre parcel that was approved in 2010.

Petitioner argues the county erred in approving a farm dwelling on the subject 480-acre parcel, because as a matter of law that parcel is or was "consolidated" by the 2010 lot of record decision in a manner that precludes the approval of any additional dwellings on any lands that were subject to the 2010 lot of record decision. Petitioner argues that "[t]he obvious purpose of the consolidation requirement [of ORS 215.705(10(g)] is that one cannot subsequently partition property and apply for more dwellings on the land which was consolidated." Petition for Review 10. That purpose is thwarted, petitioner contends, if the farm dwelling can be allowed on a parcel that was part of a tract on which a lot of record dwelling has been approved, or if the required consolidation can be easily avoided by a delayed building permit and subsequent partition of the parent parcel and transfer of property.

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[6] There is apparently reason to doubt that the entire 4,855-acre area that was the unit of analysis for the 2010 lot of record decision actually constituted a "parcel" or even a "tract" as those terms are used in OAR 660-033-0010(13) and ORS 215.010(1), because it apparently consisted of multiple noncontiguous units of land. However, as explained below, any improprieties committed in the 2010 or the 2011 partition decision that followed that 2010 decision cannot be challenged in the present appeal of the 2011 farm dwelling approval decision.

The county rejected that argument below:

> "We find the previous Lot of Record approvals which building permits have not been issued do not constitute dwellings for purposes of this criterion [the code provision implementing OAR 660-033-0135(1)(d)]. We make no decision about whether the present approval would violate any consolidation provisions in any prior Lot of Record decisions but find that issue is not relevant to the applicable approval criteria for the present decision." Record 5.

Petitioner argues to the contrary that the lot of record dwelling approval itself constitutes a "dwelling" for purposes of OAR 660-033-0135(1)(d), regardless of whether the tract has actually been consolidated into a single parcel or whether a building permit for the lot of record dwelling has been issued. Petitioner also disputes the county's suggestion that the "applicable approval criteria" for the farm dwelling decision do not require consideration of this issue.

The 2010 lot of record dwelling approval is not before us. Petitioner argue at several points in the petition for review that the 2010 lot of record dwelling approval, the 2011 partition, and earlier county decisions creating the "parcel" used as the unit of analysis for the 2010 and 2011 decisions were erroneous, for various reasons. For example, petitioner argues that the condition in the 2010 lot of record dwelling approval delaying consolidation until the building permit is issued is inconsistent with ORS 215.705(1)(g). Intervenor responds, and we generally agree, that petitioner cannot challenge alleged errors in those unappealed decisions in the context of the present appeal. Therefore, even if the condition in the 2010 lot of record dwelling decision requiring consolidation at the time the building permit issued was inconsistent with ORS 215.705(1)(g), as petitioner argues, any such error cannot be challenged in the present appeal.

In this appeal, petitioner can challenge only the farm dwelling approval for the 480-acre parcel . We understand petitioner to argue, as a variation on the above argument, that a decision granting lot of record dwelling approval under ORS 215.705(1)(g) *automatically*

consolidates all units of land in the tract as of the date the lot of record dwelling approval is issued, for purposes of all future development proposals involving the consolidated units of land. If that is petitioner's position, we disagree. Intervenor observes, correctly, that consolidation of separate discrete lots or parcels is accomplished by means of a property line adjustment or another formal process that has the legal effect of extinguishing or vacating property lines. That requires execution and recording of a document of some type, such as a survey, legal description or deed. ORS 92.017 (lots or parcels shall remain discrete, unless lot or parcel lines are vacated or further divided); ORS 92.010(12) (defining property line adjustment to include the elimination of common property lines between abutting properties). The county can require consolidation as a condition of approval, as it did in the 2010 lot of record decision, but a lot of record dwelling approval under ORS 215.705(1)(g), in and of itself, does not consolidate an affected tract into a single parcel automatically or as a matter of law.[7]

We next understand petitioner to argue that because OAR 660-033-0135(1) authorizes a farm dwelling on a "parcel," the county is thereby obligated to inquire into whether the subject 480-acre parcel is a "lawfully created" parcel, including inquiries into whether the county made errors in approving the 2011 partition. However, in *Brodersen v. City of Ashland*, 62 Or LUBA 329, 339-43 (2010), *aff'd* 241 Or App 723, 250 P3d 992 (2011), we rejected a similar argument, concluding that where applicable legislation allows development on a "lot" or "parcel," in approving such development the local government must, at most, confirm that the subject property *is* a lot or parcel, *i.e.*, a unit of land created in one of several ways described in ORS chapter 92, ORS 215.010 or local legislation, and is

[7] Like the county, we do not speculate on whether, if a building permit is eventually sought for the lot of record dwelling on the 840-acre parcel, the current owner of that parcel can satisfy the condition of approval based on the ORS 215.705(1)(g) requirement that "remaining portions of the tract are consolidated into a single lot or parcel when the dwelling is allowed," now that "the tract" used as the unit of analysis for the lot of record approval no longer exists.

not a unit of land created in some other way. In such circumstances, the local government is not required to determine whether the land use decision or process that created the subject property was *correct* in the sense that all applicable standards were properly applied and satisfied. If the applicable standards required local government approval, as with a partition, the local government need only determine that the local government approved the partition and the subject property is therefore a "parcel." Any legal errors in the decision that creates a parcel could be raised in an appeal of the decision to LUBA at the time the decision becomes final. If no such appeal is filed, the decision is not subject to collateral attack in an appeal of a subsequent land use decision.

In the present case, there is no dispute that the county approved the 2011 partition that created the subject 480-acre parcel, pursuant to the partitioning procedures in ORS chapter 92, and therefore that the 480-acre parcel is a "parcel" as defined at ORS 215.010(1). That 2011 partition was not appealed and is a final decision. Any substantive errors the county may have made in approving that partition cannot be challenged now, in an appeal of a decision approving development of the subject property.

We turn to petitioner's specific arguments under OAR 660-033-0135(1)(d), which as noted allows a farm dwelling on a parcel only if "there is no other dwelling on the subject tract." At the time the county approved the farm dwelling application, the subject 480-acre parcel was no longer part of the same "tract" with the 840-acre parcel on which the lot of record dwelling had been approved, because at that time the two parcels were not in common ownership. We understand petitioner to argue that even if the 2010 lot of record approval did not automatically consolidate the entire 4,855-acre "parcel" that was the unit of analysis for that decision, it is inconsistent with OAR 660-033-0135(1)(d) to approve a farm dwelling on a parcel that once was part of the same tract as another parcel on which a dwelling exists or has been approved. However, OAR 660-033-0135(1)(d) is framed in the present tense, and its focus is on the "subject tract" as it exists at the time the farm dwelling application is

considered, not differently configured tracts that may have existed in the past. At the time the county considered the application, the "subject tract"—contiguous parcels in common ownership—that included the 480-acre parcel did not include the 840-acre parcel, or any parcel on which a dwelling exists or has been approved.

Finally, petitioner challenges the county's finding that because no building permit has yet been issued under the 2010 lot of record dwelling approval, there is no other "dwelling" on the subject tract. Petitioner contends that the 2010 lot of record dwelling approval constitutes a "dwelling" for purposes of OAR 660-033-0135(1)(d), even if that approval has not yet been acted upon. Intervenor responds that a dwelling approval is clearly not a "dwelling." Although we tend to agree with intervenor, because we have concluded that the 840-acre parcel is not part of the "subject tract" in any case, we need not and do not resolve this argument.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

OAR 660-033-0135(1)(c) requires that the 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*." (Emphasis added.) *See* n 5.

Petitioner contends that the proper unit of analysis for determining "commercial scale" is either (1) the subject 480-acre parcel itself, or (2) the same "subject tract" that is evaluated under OAR 660-033-0135(1)(b) and (d). *See* n 5. According to petitioner, the county erred in evaluating commercial scale based on the 17,000 acres that intervenor owns throughout the county, which make up a number of noncontiguous tracts of lands that are not identified in the record and that collectively do not constitute either a parcel or tract. To the extent it is permissible to evaluate the OAR 660-033-0135(1)(c) "commercial scale" requirement based on lands beyond the subject parcel or the tract, petitioners argue, the

county's findings are inadequate and not supported by substantial evidence. Finally, petitioner argues that the county erred in failing to impose conditions of approval to ensure that the parcel will be used for farm use "at a commercial scale" and that use of the dwelling as a farm dwelling ceases if due to future partitions or transactions the parcel is no longer part of a "commercial scale" farm use.

A. Commercial Scale Unit of Analysis

As noted, petitioner contends that the proper unit of analysis for purposes of OAR 660-033-0135(1)(c) is either the "parcel" on which the farm dwelling will be located or, if the parcel is part of a tract consisting of additional contiguous parcels in common ownership, the "tract" that includes the parcel. Intervenor disputes that the proper unit of analysis is the subject parcel, but agrees with petitioner that the "subject tract" is the correct unit of analysis for purposes of OAR 660-033-0135(1)(c).

We agree with the parties that OAR 660-033-0135(1)(c) requires the county to apply the commercial scale analysis to the "subject tract." The phrase "at a commercial scale" in OAR 660-033-0135(1)(c) modifies the earlier phrase "principally engaged in the farm use of the land[.]" Thus, OAR 660-033-0135(1)(c) requires the county to evaluate whether "the land" will be used for "the farm use" "at a commercial scale." Unfortunately, the rule does clarify what it means by "the land." The immediate context of OAR 660-033-0135(1)(c) provides some definition, however. OAR 660-033-0135(1) generally allows a farm dwelling on "land not identified as high-value farm land pursuant to OAR 660-033-0020(8)," which rule identifies high value farmland based on the composition of soils within a "tract." That carries the suggestion that when the general term "land" is used elsewhere in OAR 660-033-0135(1), it is referring to "tract." More significantly, OAR 660-033-0135(1)(b) requires the county to evaluate whether the "subject tract" is currently employed for "farm use." The "farm use" that is evaluated under OAR 660-033-0135(1)(b) is clearly the same as "the farm use" evaluated under OAR 660-033-0135(1)(c), as the definitive article indicates. That

context strongly suggests that the same unit of analysis is used for both OAR 660-033-0135(1)(b) and (c).[8] We therefore interpret "the land" as used in OAR 660-033-0135(1)(c) to refer to the "subject tract" used as the unit of analysis in other provisions of OAR 660-033-0135(1). We apply that understanding of OAR 660-033-0135(1)(c) in resolving petitioner's remaining challenges under this assignment of error.

B. Findings on Commercial Scale

The county's findings regarding OAR 660-033-0135(1)(c) state, in relevant part:

> "We find the Applicant has demonstrated the person residing in the dwelling will be engaged in farm use at a commercial scale. We find Diamond Valley Ranch has been operating one of the County's largest ranching operations for over 20 years. We find the evidence supports the Applicant's request to locate a dwelling in the high ground area to allow cowboys to reside there seasonally to manage and protect cow herds and care for the land." Record 4-5.

> "* * * Diamond Valley Ranch, Inc., is engaged in farm use because the evidence in the record shows it conducts a cow/calf operation for profit on approximately 17,000 acres in Harney County." Record 60.

> "* * * Diamond Valley Ranch, Inc., is engaged in farm use at a commercial scale based on the nature, size and income produced from its operation including the testimony that the income produced by Diamond Valley Ranch, Inc. and its subsidiaries supports three Otley families living in Harney County." Record 60.

Thus, the county's findings evaluate whether the dwelling occupants will be principally engaged in farm use of the land "at a commercial scale" based on intervenor's entire 17,000-acre ranching operation. Petitioner argues that the county erred in failing to evaluate

[8] In addition, we note that under the alternative "gross income" provisions for a farm dwelling in OAR 660-033-0135(3), (4) and (5), OAR 660-033-00135(5)(a) expressly authorizes consideration of "noncontiguous lots or parcels" to satisfy the gross income standard, and has special provisions for "farm or ranch operations" that are spread across multiple noncontiguous parcels. No similar provisions are found in OAR 660-033-0135(1). While caution is necessary in comparing the two different farm dwelling approval schemes, the fact that the "gross income" farm dwelling provisions expressly allow consideration of noncontiguous parcels to satisfy the gross income standard, while OAR 660-033-0135(1) includes no similar authorization with respect to any standard, suggests that under the latter rule noncontiguous parcels that may be part of a larger farm or ranch operation are not part of the unit of analysis for any OAR 660-033-0135(1) standard.

"commercial scale" based on the tract of contiguous, commonly owned parcels that includes the subject 480-acre parcel.

Intervenor responds that county staff submitted during the proceedings before the County Court a map showing that the subject parcel is part of a 4,300-acre tract consisting of a number of contiguous parcels owned by intervenor that, like the subject 480-acre parcel, are high-elevation pasture lands used as part of intervenor's larger ranching operation. Record 21. According to intervenor, the County Court considered that map in concluding that dwelling occupants will be principally engaged in farm use of the land "at a commercial scale." Intervenor argues that the map and the county's above-quoted findings are adequate to demonstrate that the 3,400-acre tract will be used for "caring of livestock, at a commercial scale," within the meaning of OAR 660-033-0135(1)(c).

The county's findings regarding OAR 660-033-0135(1)(c) do not mention the map at Record 21 or purport to analyze the 3,400-acre tract that includes the 480-acre subject parcel to determine if the dwelling occupants will be principally engaged in the farm use of that tract "at a commercial scale." Instead, the findings focus exclusively on intervenor's 17,000-acre ranching operation. The county's findings regarding the OAR 660-033-0135(1)(d) requirement that there be no other dwelling on the "subject tract" *do* refer to a map showing a tract, which is presumably the same map intervenor identifies as showing the 3,400-acre tract. Record 5. As discussed above, the "commercial scale" analysis under OAR 660-033-0135(1)(c) uses the "tract" as the unit of analysis, the same unit of analysis used for OAR 660-033-0135(1)(b) and (d). That is significant, because the record includes almost no information about the parcels that make up intervenor's 17,000-acre ranch operation. It is possible that that 17,000-acre ranch operation already includes one or more primary farm dwellings. Under the county's approach in using different units of analysis for OAR 660-033-0135(1)(b)-(d), the county could potentially use the same commercial scale analysis of the same set of lands to approve multiple primary farm dwellings, which seems inconsistent

with the intent, at least, of OAR 660-033-0135(1)(d). Further, although in the present case the "farm use" of the 3,400-acre "subject tract" and the "farm use" of the larger 17,000-acre operation are apparently elements of the same cow-calf operation, that need not be the case. If a county can use *different* units of analysis for OAR 660-033-0135(1)(b) and (c), then a farm dwelling could be approved on a tract based on a commercial scale analysis of a different farm use than the farm use that is used to qualify the dwelling under subsection (b). That approach would be inconsistent with the text of the rule, which clearly contemplates that the same "farm use" is evaluated under both subsections (b) and (c). For these reasons, we believe that it is inconsistent with OAR 660-033-0135(1) to use one set of lands to qualify a primary farm dwelling under OAR 660-033-0135(1)(b) and (d), and a different set of lands to qualify the same primary farm dwelling under OAR 660-033-0135(1)(c).

Accordingly, we agree with petitioner that remand is necessary for the county to conduct a "commercial scale" analysis of the farm use on the 3,400-acre subject tract.

C. Conditions of Approval

Finally, petitioner argues that the county erred in failing to impose conditions of approval to ensure that the dwelling continues to be used as part of a "commercial scale" farm use. Petitioner argues that such conditions of approval are necessary to "require that the parcel/tract on which the farm dwelling is located is in farm use at a commercial scale and that use of the dwelling must cease when the conditions are changed or otherwise violated." Petition for Review 20. Further, petitioner argues that the parcel/tract must not "be allowed to be partitioned where that would affect the commercial scale condition of approval," nor "should the farm dwelling be allowed to be separated off onto a smaller parcel on which there would no longer be farm use at a commercial scale." *Id*. at 20-21.

Intervenor responds that no such condition of approval is necessary or appropriate in the present case to require that the tract of land on which a farm dwelling is approved under the "commercial scale" standard remains in farm use "at a commercial scale," or that requires

that use of the dwelling ceases if the tract is reduced in size or for some reason is no longer used for farm use "at a commercial scale."

We generally agree with intervenor. Petitioner cites no cases suggesting that a farm dwelling approval under OAR 660-033-0135(1) must be conditioned on freezing the existing factual circumstances or property relationships that the county concluded demonstrated compliance with a standard such as the "commercial scale" criterion at OAR 660-033-0135(1)(c). The only case petitioner cites, *Neste Resins Corporation v. City of Eugene*, 23 Or LUBA 55 (1992), is distinguishable. In *Neste Resins*, the city relied upon particular development limitations proposed by the applicant and not otherwise required by the city's code to find that public facilities are adequate for purposes of demonstrating that a proposed comprehensive plan amendment complies with Statewide Planning Goal 11 (Public Facilities), but the city failed to adopt any condition requiring that such limitations be applied to development allowed under the plan amendment. We held in that circumstance that "more than an expression of current intentions by the applicant for a plan amendment is required." *Id*. at 67. In the present case, the county relied upon the existing circumstances required by the applicable code provisions to find compliance with those code provisions, not on the stated intentions of the applicant to undertake actions not otherwise required by the approval criteria. Petitioner has not demonstrated that a condition of approval is necessary to require the applicant to do what is already required by the code and the decision itself.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Petitioner's arguments under the fourth assignment of error are similar to those under the third assignment of error, but are focused on the requirement in OAR 660-033-0135(1)(C) that the dwelling will be occupied by persons who will be "principally engaged" in the farm use of the land. Petitioner's principal contention is that, because the proposed dwelling will be occupied at most five months of the year due to seasonal access restrictions,

the county restrictions, the county cannot make a finding that persons occupying the dwelling will be "principally engaged" in the farm use of the land.

Petitioner cites in support of that proposition the only known case to address the meaning of the "principally engaged" language, *ONDA v. Harney County*, 42 Or LUBA 149 (2002). In *ONDA*, we held that the "principally engaged" language imposes "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 [of the property]." *Id.* at 167. However, we did not address whether the rule requires the occupant to be principally engaged in the farm use of the property as opposed to income-generating activity off the property, nor did we have occasion to address whether the rule requires the occupant to be engaged in farm use of the property for any particular period or length of time each year.

Intervenor argues, and we agree, that seasonal occupation of the dwelling in the manner proposed here is not necessarily inconsistent with a finding that the dwelling will be occupied by persons principally engaged in farm use of the land. The parties agree that due to seasonal weather and access restrictions all farm use of the property is limited to five months of the year. The dwelling will be occupied only during those five months and during that period the property will be used exclusively for farm use. The fact that the occupants will be engaged in other farm work off the property during the remainder of the year when the dwelling cannot be accessed does not detract from the county's finding that the dwelling will be occupied, when it is occupied at all, by persons principally engaged in farm use of the land.

Petitioner's remaining arguments under this assignment of error add nothing to those set out in the third assignment of error, and do not provide an independent basis for reversal or remand.

The fourth assignment of error is denied.

The county's decision is remanded.