BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOOD RIVER VALLEY PARKS
AND RECREATION DRISTIRCT,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

FRITZ VON LUBKEN and JOANN VON LUBKEN,
Intervenors-Respondents.

LUBA No. 2012-073

FINAL OPINION
AND ORDER

Appeal from City of Hood River.

Michael C. Robinson, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Seth J. King and Perkins Coie LLP.

Wilford K. Carey, Hood River, filed a response brief and argued on behalf of respondent. With him on the brief was Annala, Carey, Baker, Thompson and VanKoten PC.

William K. Kabeiseman, Portland, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief was Garvey Schubert Barer PC.

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

REMANDED 05/14/2013

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 denying a conditional use permit application to site a public park on a 31-acre parcel zoned for exclusive farm use.

REPLY BRIEF

Petitioner moves to file a reply brief to address a waiver challenge. The reply brief is allowed.

FACTS

The subject 31-acre parcel is zoned exclusive farm use/high value farmland (EFU-HVF), and is improved with a dwelling and agricultural building. Most of the soils on the property are Class II agricultural soils rated high value. Until 2011 a commercial orchard was located on 28 acres of the parcel.

Indian Creek runs along the northern and western boundary, while two county roads form the southern and eastern boundaries. East and west of the subject property lie parcels zoned and developed with rural residential uses. North and south of the subject property are parcels zoned EFU and planted with commercial orchards.

In 2007, petitioner purchased the parcel, after conducting a search to locate property to ameliorate a need for a public park in the area. Funding for the purchase came from a $325,800 grant from the Oregon Parks and Recreation Department (OPRD). In 2009, the county granted petitioner a conditional use permit to construct a recreational trail on the property, along Indian Creek, and petitioner subsequently did so. In 2011, petitioner removed the existing commercial orchard on the property, pursuant to a condition imposed by OPRD.

In 2012, petitioner applied to the county to develop the entire parcel as a public park. The application was accompanied by a number of letters in support of the park from nearby property owners, including the adjacent commercial orchardists. The proposed park would

include large open play fields, an off-leash dog area, a community garden, bocce ball courts, a remote control aircraft field, mountain bike skill development area, playground, picnic shelters, restrooms, an extension of the Indian Creek trail, and three parking lots. The application proposed to level three playing fields by cutting and filling eight feet of soil at each site, for a total of 21,300 cubic yards of cut and fill. The removed topsoil would be stored on-site, and then redistributed back onto the graded areas for replanting.

The staff report recommended approval. The county planning commission approved the conditional use application, with 35 conditions, adopting the staff report as additional findings. Intervenors-respondents (intervenors) appealed the planning commission decision to the board of county commissioners, arguing that the proposed park does not comply with ORS 215.296, which requires that non-farm conditional uses in an EFU zone not significantly impact or significantly increase the cost of farm practices on surrounding lands. The commissioners held a hearing limited to the evidentiary record before the planning commission. On September 4, 2012, the commissioners issued the challenged decision reversing the planning commission decision, and denying the conditional use application for noncompliance with ORS 215.296. This appeal followed.

FIRST ASSIGNMENTS OF ERROR

A public park is allowed in the EFU zone as a conditional use under ORS 215.213(2)(e) and ORS 215.283(2)(d). Hood River Zoning Ordinance (HRZO) 7.40(F) implements ORS 215.283(2)(d), and allows in the EFU zone parks owned and operated by a governmental agency or non-profit community organization, subject to the standards at ORS 215.296. ORS 215.296 provides in relevant part:

> "(1) A use allowed under ORS 215.213(2) or (11) or 215.283(2) or (4) may be approved only where the local governing body or its designee finds that the use will not:
>
> > "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "(2) An applicant for a use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective."

As shorthand, we refer to this standard as the "significant change/increase" standard.

HRZO 61.10(F) provides that if the appeal hearing is not a *de novo* hearing, the board of commissioners "shall not substitute its judgment for that of the initial hearings body as to any issue of fact, and no additional evidence shall be received."[1] HRZO 61.10(G) provides that the board may affirm, reverse or remand the order on review, and that the board may

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[1] HRZO 61.10 provides, in relevant part:

> "E. The Board's review of the Planning Commission's order shall be confined to the record unless the Board elects at its option to hear the application de novo and allow testimony and other evidence in addition to that received upon initial action. If the Board elects to hear the application de novo this fact shall be included in the notice of the hearing.
>
> "F. If the review of the initial hearings body's order is a review on the record and not a de novo hearing the Board shall not substitute its judgment for that of the initial hearings body as to any issue of fact, and no additional evidence shall be received. * * *.
>
> "G. The Board may affirm, reverse or remand the order. The Board shall reverse or remand the initial hearings body's order only if it finds:
>
> "1. The order to be unlawful in substance or procedure,* * *; or
>
> "2. The rule or order to be unconstitutional; or
>
> "3. The order is not supported by reliable, probative and substantial evidence on the whole record.
>
> "4. The order is not supported by sufficient probative and substantial findings of fact.
>
> "H. In the case of reversal, the Board shall make special findings of facts based upon evidence in the record and conclusions of law indication clearly all respects in which the initial hearings body's order is erroneous. If the Board's decision upholds the decision of the initial hearings body, the Board shall make special findings substantiating their decision."

reverse or remand the order only if, in relevant part, the board finds that the order is "unlawful in substance," the order is not "supported by reliable, probative and substantial evidence in the whole record," or is not "supported by sufficient probative and substantial findings of fact." In case of reversal, HRZO 61.10(G) requires the board of commissioners to make special findings of fact based upon evidence in the record and conclusions of law indicating clearly all respects in which the initial hearings body's order is erroneous. This scope of review is rather unusual. Where the appeal is not *de novo*, the board of commissioners conducts a limited review of the planning commission's decision, much in the same limited manner that LUBA conducts its review of the county's final decision, and the commissioners do not, at least directly, approve or deny the underlying application.

In the challenged decision, the board of commissioners reversed the planning commission's decision approving the permit, for three reasons. First, the board concluded that the planning commission erred in applying the "significant change/increase" standard only to lands adjacent to the subject property. According to the board, the "surrounding area" for purposes of applying the significant change/increase standard is "the entirety of the EFU land in the County." Record 8.

Second, the board of commissioners concluded that the planning commission erred in failing to apply the significant change/increase standard to evaluate the impacts of the proposed park on farm practices on the subject property itself. The board concluded that the proposed cut and fill would prevent the property from ever being used again as high-value farmland and thus would commit the property to non-agricultural use.

Third, the board found that, if the surrounding lands do not include the entirety of the EFU lands in the county and are limited to adjacent lands, the applicant failed to submit sufficient evidence regarding the farm practices on adjacent properties, and thus the record before the planning commission was insufficient to apply the significant change/increase standard to surrounding lands.

In several sub-assignments of error, petitioner challenges each basis for reversing the planning commission's decision.

A. Surrounding Lands

Determination of the scope of "surrounding lands" is the first step in applying ORS 215.296(1), and a critical step, since that determination circumscribes the universe of potential farm practices to which the significant change/increase standard will be applied. The statute does not define the term "surrounding lands." Generally, a local government has significant discretion in determining the scope of surrounding lands. *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992). However, limiting the scope of analysis to the notice area or another arbitrary distance may be insufficient, if that results in failure to consider substantial evidence of significant impacts to accepted farm practices on lands beyond that arbitrary distance. *Wilbur Residents for a Clean Neighborhood v. Douglas County*, 37 Or LUBA 156 (1999), *aff'd* 166 Or App 540, 998 P2d 794 (2000). On the other hand, the local government is not required to define the precise extent or outer boundaries of the study area, if the surrounding agricultural area is homogenous, and the record reflects that there are no significant impacts to farm practices on adjacent or more proximate parcels. *Sisters Forest Planning Committee v. Deschutes County*, 48 Or LUBA 78, 84 (2004).

Petitioner contends, and we agree, that the board erred in concluding that the proper scope of "surrounding lands" in the present case consists of all EFU-zoned lands in the county, which totals up to 29,000 acres, or 45 square miles. The board's basis for determining that the proper study area consists of all EFU-zoned parcels in the county is its conclusion that the proposed public park will eliminate the subject property from the county's land base of high-value farmland, and that "loss of farm land" would financially affect farm operations in the entire county. Record 8. The board cited testimony from the Columbia Gorge Fruit Growers that shrinking the potential land base for commercial

orchards in the county means that fixed costs in the farm economy, *e.g.*, for packing houses, must be shared among fewer growers, increasing costs for remaining orchardists.

However, ORS 215.296(1) is not particularly concerned with the fate of the soils occupied by a conditional use on EFU land, or with generalized impacts to the local farm economy from displaced agricultural production such as those cited by the county. Many of the conditional uses allowed on EFU land under ORS 215.213(2) and ORS 215.283(2) and implementing county regulations are uses that effectively result in the permanent or semi-permanent conversion of some acreage of land from farm use to non-farm use. If "loss of farm land" from the county's land base resulting from authorization of a conditional use on a parcel is a sufficient basis to expand the study area to the entire EFU-land base in the county, then many if not all conditional uses authorized by ORS 215.213(2) and ORS 215.283(2) would require a county-wide analysis. That would render it extremely difficult to approve a conditional use in the EFU zone, given the evidentiary burden such a county-wide analysis would impose on the applicant, of identifying the farm practices on potentially hundreds of farms, some many miles distant, and analyzing whether the proposed conditional use will cause significant change to farm practices, or significantly increase the cost of farm practices, on those farms. While the county has significant discretion in determining the scope of the study area, that study area must be based on evidence of the likely impacts of the *proposed conditional use* on farm practices on surrounding agricultural lands that are close enough to be subject to those impacts. In our view, the study area cannot be based on the mere fact that farm soil occupied by the conditional use is taken out of agricultural production, and the attenuated or cumulative impacts of that conversion on the county's supply of agricultural land or the indirect impacts of such conversion on the entire county's agricultural economy.

Stated differently, "surrounding lands" for purposes of ORS 215.296(1) are those lands in such proximity to the proposed ORS 215.213(2) and ORS 215.283(2) conditional use that the externalities or sensitivities of the proposed use could potentially cause

significant changes in or significantly increase the cost of accepted farm practices on nearby lands. Nothing in the record cited to us remotely suggests that the externalities or sensitivities of the proposed public park could potentially cause significant changes in or significantly increase the cost of accepted farm practices on EFU-zoned lands located many miles away on the other side of the county.

In sum, we agree with petitioner that the county commissioners erred in concluding that the "surrounding lands" for purposes of applying ORS 215.296(1) are all EFU-zoned lands in the county, and in reversing the planning commission decision based on failure to evaluate impacts on farm practices on all EFU-zoned lands in the county.

B. Adjacent Lands

The commissioners also found the applicant and planning commission erred by limiting the scope of the "surrounding lands" analysis to *adjacent* properties. According to the findings, limiting the evaluation of impacts to adjacent properties is little different than the arbitrary distance that LUBA rejected in *Wilbur Residents*. As noted, in *Wilbur Residents*, LUBA held that the county erred in that case by limiting the significant change/increase analysis to the 750-foot notice area, where the record included substantial evidence that the proposed septic treatment plant would impact farm practices on parcels located beyond the notice area.

In the present case, petitioner disputes that its application and the planning commission's analysis was limited to adjacent properties. Petitioner argues that the application applied the analysis to "area farmers," and that nothing in the application, staff report, or planning commission decision suggested that the analysis was limited to the adjacent orchards to the north and south. Record 353.

The commissioners' findings at Record 8 cite two sources for their conclusion that the applicant and planning commission limited the analysis to adjacent lands: (1) a health impact analysis (HIA) intended to demonstrate the benefits of the proposed park and (2) the

verbal statements of the applicant's representative at the appeal hearing, which referred to "adjacent lands" rather than "surrounding lands." However, petitioner contends that the HIA was not prepared for the significant change/increase analysis, and was not intended to evaluate impacts on surrounding farm parcels. Further, petitioner argues that a misstatement at the appeal hearing does not support the commissioners' conclusion that the analysis was limited to adjacent lands.

In any case, petitioner argues that, unlike *Wilbur Residents*, there is no substantial evidence in the record indicating that the proposed park would cause significant impacts on any parcels beyond the "surrounding lands" that the planning commission analyzed, other than the Columbia Gorge Fruit Growers' testimony that the loss of agricultural land from approving the proposed park would impact the county's larger agricultural economy. However, petitioner argues that that testimony is insufficient to show that the proposed park will significantly impact any farm parcels beyond those analyzed by the planning commission.

Respondents argue that the application and the planning commission decision failed to identify the scope and outer limits of the "surrounding lands," which meant that the county had no choice but to look elsewhere in the record to determine what the applicant and the planning commission believed constituted the surrounding lands. According to respondents, the county reasonably inferred from the HIA and the applicant's statements that the significant change/increase analysis had been applied only to adjacent lands.

Petitioners are correct that nothing in the application, the staff report or the planning commission decision purports to limit the analysis to adjacent lands. On the other hand, respondents are correct that nothing in the record describes the total number or location of farm parcels analyzed, and it is not clear from the record that the analysis was in fact applied to farm parcels beyond the two adjoining orchards to the north and south. We assume for purposes of analysis that the study area was limited to adjacent lands.

Nonetheless, petitioner argues correctly that ORS 215.296(1) does not require that the precise extent or outer boundaries of the study area be defined, if the surrounding agricultural area is homogenous, and the record reflects that there are no significant impacts to farm practices on adjacent or more proximate parcels. *Sisters Forest Planning Committee*, 48 Or LUBA at 84 (2004). Intervenors respond that in the present case the land use pattern is not homogenous, because it consists of a mix of rural residential areas and commercial orchards. However, the focus of the significant change/increase standard is on lands devoted to farm use, not non-farm rural residential uses, and there is no dispute that the only farm uses in the vicinity are commercial orchards. Accordingly, we agree with petitioner that failure to explicitly consider impacts on non-adjacent orchards is not necessarily a basis to find that the significant change/increase standard is not met. If the record reflects no significant impacts to farm practices on the adjacent orchards, absent some indication that non-adjacent orchards are dissimilar or engage in different farm practices than adjacent orchards, the county *could* conclude that a study area limited to adjacent lands is sufficient to apply the significant change/increase standard.

In sum, contrary to the commissioners' finding, even if the planning commission limited the analysis to adjacent farm parcels, that does not necessarily constitute legal error under ORS 215.296(1) and the above cases. Because the commissioners misconstrued ORS 215.296(1), remand is warranted for the county to correctly apply ORS 215.296(1). In doing so, the county should determine whether the scope of the study area identified by the planning commission is sufficient to apply the significant change/increase standard under *Sisters Forest Planning Committee, i.e.*, if the surrounding agricultural area is homogenous, and the record reflects that there are no significant impacts to farm practices on adjacent or more proximate parcels. As explained below, if the commissioners determine that the study area must be expanded beyond adjacent parcels in order to correctly apply the significant change/increase standard, for example, because there is evidence of potential significant

impacts to farm practices on non-adjacent parcels not within the study area, the commissioners should consider whether the error is one that warrants remand to the planning commission rather than reversal under HRZO 61.10(G).

C. Impact on Farm Practices on the Subject Property

The board of commissioners also reversed the planning commission decision and denied the application because petitioner failed to evaluate the impact of the proposed park on farm practices on the subject property. Specifically, the board found:

> "* * * LUBA has held that, in making the determination required by ORS 215.296(1), the impacts on the subject property must be considered. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006). In this case, [petitioner] argued that conversion from an orchard to a park will not foreclose future agricultural use of the property. * * *
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> "* * * * *
>
> "The Board disagrees. The applicant proposed to cut over 21,000 cubic yards from the site, including most of the topsoil on the site. The applicant suggests that this will not be an issue because the soil will not be removed from the site, but simply cut and then redistributed on the site. The Board finds, based on testimony from [intervenors], as well as the Board's own knowledge, that 'dirt is not dirt.' The removal of the topsoil and eventual replacement will ensure that this land will never again be high-value farmland and this activity will commit this property to non-agricultural use. Accordingly, the County finds that the applicant has not adequately evaluated the proposal's impact on this site and, accordingly, rejects the application on that basis as well." Record 9.

Petitioner argues, and we agree, that neither ORS 215.296(1) nor *Wetherell* requires the applicant for a conditional use in the EFU zone to address impacts of the proposed use on farm practices on the subject property, or to demonstrate that the proposed use will not irrevocably commit the subject property to non-agricultural use.

ORS 215.296(1) requires the applicant to address impacts on "surrounding lands." In the particular circumstances presented in *Wetherell*, we held that a similar statute, ORS 215.284(2), required the county to address impacts on agricultural use of the *remainder* of a

parcel that would be partially developed with a non-farm use. At issue in *Wetherell* was a proposal to site a non-farm dwelling on 0.3 acres of a three-acre parcel, the remainder of which was planted in a vineyard, and which would continue to be used as a vineyard. We held that the remainder of the parcel constituted "nearby lands" devoted to farm use for purposes of ORS 215.284(2)(a), and the county must address the impacts of the non-farm dwelling on the vineyard. In the present case, we understand respondents to argue that the reasoning in *Wetherell* should be extended to ORS 215.296(1) and applied to the present circumstances.

However, even if we interpreted ORS 215.296(1), like ORS 215.284(2), to require evaluation of the impacts of the proposed non-farm use on the remainder of a parcel that will remain in farm use, the subject 31-acre parcel would not require evaluation under ORS 215.296(1). The subject property is not currently in farm use and is not proposed for future farm use; instead, the proposed park use will occupy almost all of the subject 31-acre parcel. Respondents argue nonetheless that ORS 215.296(1) should be interpreted to require the applicant for a conditional use in the EFU zone to demonstrate that the proposed use will not irrevocably commit the subject parcel to non-agricultural use. However, the express language of ORS 215.296(1) imposes no such requirement, and we are aware of no basis to infer such a requirement. We note that several of the non-farm conditional uses allowed in the EFU zone under ORS 215.213(2) and ORS 215.283(2) and implementing county regulations—for example, mining and solid waste disposal facilities—involve removal or loss of topsoil on the property in a manner that could easily render property incapable of future agricultural use. Interpreting ORS 215.296(1) to require that the applicant demonstrate that the property can be returned to agricultural use if the conditional use is ever removed would effectively prohibit uses otherwise allowed under ORS 215.283(2) and implementing county regulations. We decline to interpret ORS 215.296(1) in that manner.

D. Failure to Identify Farm Practices on Surrounding Lands

Finally, the commissioners concluded that, even assuming that the "surrounding lands" were properly identified, the planning commission decision was unlawful in substance, and not supported by substantial evidence and findings of fact, because the applicant and planning commission failed to identify the specific farming practices on surrounding lands devoted to farm use.

> "* * * Even if the County were to use the definition of the surrounding lands used by the applicant, the record does not contain sufficient information to identify the farming practices used in that area. The discussion of the farming practices used on the surrounding lands appears to be based on a survey that provides 'questions for surrounding land owners' that is included with the application materials. However, the documents do not identify the farming practices on the surrounding lands. One farmer, Jim Trammell, appears to have provided some information regarding his current farming practices, but most of the returned surveys do not identify the farming practices on the adjacent lands, but only the final page(s) of the survey that addresses potential mitigation. Regardless of what the individual property owners might want, the County is responsible to ensure that accepted farming practices are protected and, without the information regarding those practices, the County cannot evaluate whether they are properly protected. * * *" Record 10.

Petitioner argues that the planning commission findings and record adequately identify the farm practices on surrounding lands, noting findings at Record 267 that describe farm practices on surrounding land to include pesticide spraying.[2]

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[2] The staff findings incorporated into the planning commission decision state, in relevant part:

> "Aerial photographs indicate that the subject parcel is located in an area with a mixture of residential and farm uses. Residential uses are predominantly found to the east and west of the parcel, while farm uses (*orchard land*) are found predominantly to the north and south.
>
> "Overall, staff finds that the subject parcel is generally isolated from adjacent commercial farm operations by existing riparian vegetation within Indian Creek corridor, which abuts the property to the north and west. The property is also isolated from commercial farms to the south and east by Barrett Drive and Alameda Road.
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> "* * * * *
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> "* * * Based on [testimony submitted as part of the conditional use permit application for the recreational trail], staff finds that significant impacts should not occur between the park and

Respondents argue, and we agree, that the commissioners did not err in concluding that the planning commission findings and the evidentiary record insufficiently identify the farm practices on surrounding lands. The planning commission's findings appear to rely heavily on the fact that the commercial orchardists from which they received comments did not oppose the park, and did not believe the park would affect farm practices on their lands. However, the application and staff report identify only "pesticide spraying" as farm practices, and the comments in the record do not describe any farm practices other than pesticide spraying. Record 267. It may be that pesticide spraying is the only serious farm practice that caused concern during the proceedings below, and that other, less sensitive, farm practices are unlikely to be affected by the proposed park, given the natural and artificial buffers around the property. However, without *some* description of farm practices on surrounding lands, or at least a general description of farm practices on commercial orchards of the type near the subject property, we cannot say that the board of commissioners erred in concluding that the planning commission decision was not supported by substantial evidence and findings of fact, for purposes of the commissioners' review under HRZO 61.10(G). *See* n 1.

That said, we note that the commissioners' ultimate disposition was to *reverse* the planning commission decision. HRZO 61.10(G) provides that the commissioners shall reverse the planning commission decision or remand to the planning commission, only if one

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> adjacent farms to the north and west given the location of the creek, the presence of mature riparian vegetation, and laws concerning spray application adjacent to such natural features.
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> "As for other commercial farms in the area, comments were received from orchardists to the south of the park property * * * indicating that they generally supported the proposed park and did not feel that its location would significantly impact them from conducting normal farming practices on their adjacent property. * * *
>
> "Besides the comments received and the suggested conditions, staff finds that the presence of Barrett Drive and Alameda Road, which are frequently used County roads, provide a built in buffer that, similar to the riparian vegetation to the north and west of the parcel, will help separate the proposed park and adjacent farm uses occurring on orchards to the south. It is felt that the presence of these roadways already affects how spray is applied in the area adjacent to the proposed park and, therefore, should not significantly change how these farmers conduct their farming activities should this application be approved." Record 267-68.

of four specified errors are identified. The county's code does not specify the circumstances under which the commissioners may choose to reverse rather than remand the planning commission decision. Presumably the commissioners have considerable discretion in making that choice, or could interpret HRZO 61.10(G) to articulate the circumstances under which reversal rather than remand is the appropriate disposition. But reversal appears to be the more serious disposition, as it ends all further proceedings on the application and any chance that the application may be approved. Remand to the planning commission, on the other hand, suggests that the decision suffers from one or more errors that the planning commission may correct on remand, such as adopting more adequate findings or accepting additional evidence necessary to support approval.

In the present case, the commissioners' choice to reverse rather than remand the planning commission's decision appears to have been driven by the commissioners' conclusion, which we rejected above, that the proposed park cannot satisfy ORS 215.296(1), because the grading, cut and fill necessary to level the proposed playing fields will permanently render the property unfit for future farm use. By contrast, the error identified under this subassignment of error—failure to adopt adequate findings, supported by substantial evidence, which describe the farm practices on surrounding lands devoted to farm use—is the kind of error that seems correctable on remand to the planning commission. It is quite possible that, had the commissioners not misconstrued ORS 215.296(1) to essentially prohibit the proposed park, they would have concluded that the appropriate disposition of the appeal under HRZO 61.10(G) would have been to remand the decision to the planning commission to correct the insufficient findings and evidence describing farm practices.

We are aware that we have held many times that we will affirm a decision denying an application as long as there is one valid basis for denial, notwithstanding that the local government may have committed error with respect to other, alternative or independent bases for denial. *Wilson v. Washington County*, 63 Or LUBA 314 (2011); *Johns v. City of Lincoln*

City, 34 Or LUBA 594 (1998). However, in the case of a denial, the grounds for denial must be sufficiently explained to inform the applicant what steps are necessary to gain approval or that it is unlikely that the application will be approved. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 394 (2008) (the findings must provide a coherent explanation for why the local government believes the proposal does not comply with the criteria). The present case differs from the typical denial in two respects.

First, the on-the-record review scheme embodied in HRZO 61.10 is unusual, resembling the kind of limited review conducted by LUBA rather a more open-ended review. Like LUBA's review, HRZO 61.10(G) requires the board of commissioners to review the underlying decision for legal error, rather than review the application directly or render a new decision on the merits of the application. Similarly, HRZO 61.10(G) limits the scope of review to four specific types of errors, and allows reversal or remand only if one of those errors is found. Finally, like LUBA's limited review, HRZO 61.10(G) limits the potential dispositions to reversing, remanding, or affirming the underlying decision. Notably, when conducting an on-the-record review the commissioners appear to lack explicit authority to *modify* the decision on review. Again, in this respect, the commissioners' review under HRZO 61.10(G) seems similar to LUBA's limited role in reviewing a local government's decision, or the Court of Appeals in reviewing an appeal of a LUBA decision. As explained above, the commissioners' dispositional choice may well have been erroneous under a correct application of ORS 215.296(1). Under these circumstances, we do not believe that the proper disposition of *this* appeal is to perfunctorily affirm the county's decision to reverse the planning commission decision, where the only sustainable ground for denial arguably warrants only remand under HRZO 61.10(G).

Second, as far as we can tell, there was no argument or even discussion before the planning commission or board of commissioners regarding the sufficiency of the findings or

evidence describing farm practices on surrounding lands. Intervenors, the appellants below, did not specify any such insufficiency as a basis for appeal. In fact, intervenor Fritz Lubken appeared to disclaim any concern with impacts of the park on farm practices on surrounding lands. Record 23 ("His concern is not around the property but what is happening to this piece of property"). As explained under the third assignment of error, intervenors focused the appeal solely on the loss of farmland issue. As far as we can tell, the concern with insufficient findings or evidence describing farm practices on surrounding lands surfaced for the first time in the commissioners' final decision. The county's code apparently does not expressly limit the commissioners' review to the issues identified in the local appeal. Nonetheless, we are reluctant to ignore the several substantial legal errors described above and affirm the commissioners' decision based solely on an issue—insufficiency of the findings and evidence to describe farm practices on surrounding lands—that appears to have been raised for the first time in the county's final decision.

Accordingly, we decline to affirm the commissioners' decision on the basis that the commissioners correctly concluded that the evidentiary record and findings do not adequately describe farm practices on surrounding farm parcels. Given the substantial errors identified above, we believe the appropriate disposition is to remand under the first assignment of error. In addition to the other corrective actions described above, on remand the commissioners should consider whether under HRZO 61.10(G) the insufficiency of the planning commission's findings and the evidence in the record to describe farm practices on surrounding lands warrants remand to the planning commission, rather than reversal of the planning commission decision.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

As noted above, the board of commissioners' review was conducted on the record of the planning commission, and pursuant to HRZC 61.10(E) and (F) in such circumstances no

additional evidence may be received. As explained above, a disputed issue arose below regarding whether the proposed cut and fill would render the subject property incapable of future agricultural use. The commissioners' decision states:

> "The Board finds, based on testimony from [intervenors], *as well as the Board's own knowledge*, that 'dirt is not dirt.' The removal of the topsoil and eventual replacement will ensure that this land will never again be high-value farmland and this activity will commit this property to non-agricultural use." Record 9 (emphasis added).

Petitioner argues that the county committed procedural error by relying upon evidence outside the record, *viz*. the commissioners' personal knowledge of agricultural soils, to resolve the disputed issue, and as a partial basis to reverse the planning commission approval and deny the application.

The county responds that Hood River is a rural county, several of the commissioners are farmers, and all of the commissioners know, as a matter of common sense, that undisturbed topsoil is necessary to grow agricultural crops. The county argues that it is not error for the commissioners who are also farmers to employ their understanding of soils to conclude that the proposed topsoil removal and replacement would commit the property to non-agricultural use.

We agree with petitioner that the commissioners erred to the extent they relied in part upon evidence outside the record, specifically on the farmer-commissioners' personal knowledge of whether the proposed topsoil removal and replacement would render the property unfit for future agricultural use. The effect of topsoil removal and replacement on future agricultural productivity is an arcane subject to most laypersons, and evidence on that subject is often provided by a soil scientist. Even if the commissioners' familiarity with soil and farming makes the effect a matter of "common knowledge" to farmers, that knowledge is nonetheless evidence outside the record that the commissioners expressly relied upon in part to reverse the planning commission decision and deny the application. HRZC 61.10(E) and (F) limit the commissioners' review to the evidence in the planning commission record.

The real question is whether the commissioners' procedural error warrants corrective action on remand. We held above, under the first assignment of error, that ORS 215.296(1) is not concerned with whether the proposed conditional use would render the property unfit for future agricultural use, and that issue is not a basis to deny the application under ORS 215.296(1). Thus, the commissioners' procedural error goes to an issue that will likely play no role in the proceedings on remand, as far as we can tell. If that is the case, we see no point in remanding the decision under the second assignment of error to re-open the record to allow petitioner the opportunity to rebut or present additional evidence on that issue, which is the typical remedy when a final decision maker erroneously considers evidence outside the record. As long as the commissioners' personal knowledge of matters outside the record plays no role in the issues decided on remand, the commissioners' procedural error in the initial proceeding does not appear to warrant any corrective action on remand.

With that caveat, the second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that intervenors appealed the planning commission decision on two distinct issues, but that the board of commissioners erred in addressing only one appeal issue. The alleged second appeal issue is whether the proposed park activities are permitted on EFU land as a conditional use public park, without taking an exception to Statewide Planning Goal 3.

Respondents argue, and we agree, that intervenors did not raise the alleged second appeal issue below. Petitioner cites a staff report to the board of commissioners, which recites that the planning commission considered both issues, but the staff report does not state that intervenors appealed both issues, and in fact indicates that intervenors appealed only the first issue, compliance with ORS 215.296(1). Record 41-42. Equally important, intervenors' appeal document does not identify the second issue as a basis for appeal. While the county's code does not require that appeal documents identify specific bases for appeal,

the county correctly understood that only one appeal issue was before it, the issue of compliance with ORS 215.296(1).

In any case, even if the second appeal issue had been presented to the board of commissioners, petitioner identifies no code provision or other authority that would obligate the commissioners to resolve both appeal issues, if resolution of the first appeal issue results in a complete disposition of the appeal.

The third assignment of error is denied.

The county's decision is remanded.