

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 LANDWATCH LANE COUNTY,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 NATHAN LARGE,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2020-104

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 Charles W. Woodward IV filed the petition for review and reply brief and
25 argued on behalf of petitioner.

26
27 No appearance by Lane County.

28
29 Bill Kloos filed a response brief and argued on behalf of intervenor-
30 respondent.

31
32 RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
33 Member, participated in the decision.

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35 REMANDED 03/19/2021

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

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NATURE OF THE DECISION

Petitioner appeals a county hearings officer’s approval of a primary farm dwelling on property zoned Exclusive Farm Use (EFU) and Natural Resource (NR).

MOTION TO INTERVENE

Nathan Large (intervenor), the applicant below, moves to intervene on the side of the county. The motion is unopposed and is granted.

FACTS

Intervenor’s 249-acre property is one legal parcel. Record 502-03. Located approximately two miles southeast of the city of Florence, it “is mostly grassland and low vegetation with some areas of trees on the fringes” but also contains a mapped Class I stream, wetland, and special flood hazard areas. Record 3. Of the subject 249 acres, 189 are zoned EFU and 60 are zoned NR. Surrounding properties are generally forested and in forest use.

Intervenor owns and leases a combined total of 1166 acres within the county. Intervenor owns 613 acres and leases the remaining 553 acres. As we understand intervenor’s farm operation within the county, intervenor buys 300 to 600 head of cattle from local ranchers and markets each year and then sells the cattle at local markets, from which the cattle ultimately go to meat processing plants. Intervenor also performs agricultural machine work.

1 On January 28, 2020, intervenor applied to place a dwelling on the 249
2 acres. On June 11, 2020, the planning director issued a decision approving the
3 placement of a primary farm dwelling on the 249 acres. On June 23, 2020,
4 petitioner appealed the planning director’s decision to the hearings officer. On
5 July 16, 2020, the hearings officer held a public hearing on the appeal. On
6 September 8, 2020, the hearings officer denied the appeal and approved the
7 primary farm dwelling.

8 This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Statewide Planning Goal 3 (Agricultural Lands) is “[t]o preserve and
11 maintain agricultural lands.” In furtherance of that goal, ORS 215.203 provides
12 that counties may adopt ordinances zoning land for exclusive farm use and that
13 “[l]and within such zones shall be used exclusively for farm use except as
14 otherwise provided in ORS 215.213, 215.283 or 215.284.” ORS 215.283(1)(e)
15 provides that, subject to ORS 215.279, primary dwellings customarily provided
16 in conjunction with farm use may be established on land zoned EFU.¹

¹ ORS 215.279 provides:

“In any rule adopted by the Land Conservation and Development Commission that establishes a farm income standard to determine whether a dwelling is customarily provided in conjunction with farm use on a tract, the commission shall allow a farm operator to satisfy the income standard by earning the required amount or more of farm income on the tract:

1 The purpose of OAR chapter 660, division 33, is “to preserve and maintain
2 agricultural lands as defined by Goal 3 for farm use, and to implement” the
3 agricultural land protection statutes, including ORS 215.283. OAR 660-033-
4 0010. OAR 660-033-0135 sets out paths for approval of dwellings proposed in
5 conjunction with farm use. That rule is implemented by Lane Code (LC)
6 16.212(7). One path is based on minimum acreage and the other is based on
7 minimum gross farm income.

8 The hearings officer approved intervenor’s proposed residence as a
9 primary farm dwelling under LC 16.212(7)(a), the minimum acreage path for
10 parcels that are at least 160 acres in size and not designated as rangeland. The
11 version of that provision applicable to intervenor’s application requires, in part,
12 that the dwelling

13 “be occupied by a person or persons who will be principally engaged
14 in the farm use of *the land*, such as planting, harvesting, marketing
15 or caring for livestock, at a commercial scale.” LC 16.212(7)(a)(iv)
16 (Feb 15, 2016) (emphasis added).²

“(1) In at least three of the last five years;

“(2) In each of the last two years; or

“(3) Based on the average farm income earned on the tract in the
best three of the last five years.”

² The county has been engaged in an extended project updating sections of its code. *See Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019) (remanding 2018 updates); *Landwatch Lane County v. Lane County*, ___ Or

1 We will reverse or remand a local government decision applying a land
2 use regulation where the local government misconstrued the law or made a
3 decision not supported by substantial evidence in the whole record or where the
4 decision does not comply with applicable provisions of land use regulations. ORS
5 197.835(9)(a)(C), (9)(a)(D), (8). Petitioner’s first assignment of error is that the
6 hearings officer misconstrued LC 16.212(7)(a)(iv) (Feb 15, 2016) and made
7 inadequate findings not based on substantial evidence. Petition for Review 5. We
8 agree with petitioner that the hearings officer erred.

9 “‘Tract’ means one or more contiguous lots or parcels under the same
10 ownership.” ORS 215.010(2). A “parcel” includes a unit of land created (1) by a
11 partition as defined in ORS 92.010, (2) in compliance with all applicable
12 planning, zoning, and partitioning ordinances and regulations or, (3) if there were
13 no applicable planning, zoning, or partitioning ordinances or regulations, by deed
14 or land sales contract. ORS 215.010(1). The parties do not dispute that the 249
15 acres is a tract owned by intervenor. As discussed above, intervenor owns and
16 leases additional property within the county. When evaluating the application’s
17 compliance with LC 16.212(7)(a)(iv) (Feb 15, 2016), the hearings officer
18 concluded:

19 “‘This approval criterion does not involve determining farm use at a
20 commercial scale on the ‘tract’ or ‘parcel.’ It requires that the

LUBA ___ (LUBA No 2019-024, Aug 15, 2019) (remanding 2019 updates). The
2020 update to LC 16.212(7)(a)(iv) replaced the word “land” with “subject tract.”

1 occupant of the proposed dwelling be principally engaged in ‘the
2 farm use of the land’ at a commercial scale. The Hearings Official
3 believes that the wording of this sentence allows the applicant to
4 consider the entire farm operation.” Record 7 (underscoring in
5 original; footnote omitted).

6 Petitioner argues, and we agree, that the hearings officer was required to
7 consider whether the dwelling would be occupied by a person principally
8 engaged in the farm use of the subject tract at a commercial scale. The hearings
9 officer erred by evaluating intervenor’s farm operation as a whole.

10 The county may not “enact or apply legislative criteria of its own that
11 supplement those found in ORS 215.213(1) and 215.283(1).” *Brentmar v.*
12 *Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). Furthermore, “a
13 county’s authority both to designate EFU land and to allow certain non-farm uses
14 on that land” is not “superior to [the Land Conservation and Development
15 Commission’s (LCDC’s)] authority to protect the state’s most valuable
16 resources, including agricultural resources.” *Lane County v. LCDC*, 325 Or 569,
17 582, 942 P2d 278 (1997). LC 16.212(7)(a) implements OAR 660-033-0135(1).
18 OAR 660-033-0135(1)(c) (Mar 16, 2011) used the term “land” in the same way
19 as LC 16.212(7)(a)(iv) (Feb 15, 2016). However, in *Oregon Natural Desert*
20 *Assoc. v. Harney County*, we held that “land” was properly interpreted to mean
21 “subject tract.” 65 Or LUBA 246, 257-58 (2012). Subsequent to our decision in
22 that case, in 2016, LCDC amended OAR 660-033-0135(1)(c) to replace “land”

1 with “subject tract.”³ ORS 197.646(1) requires, in part, that local governments
2 amend their land use regulations implementing their acknowledged
3 comprehensive plans “to comply with a new requirement in * * * rules
4 implementing the statutes or the goals.” When a local government does not do
5 so, the new requirements apply directly to the local government’s land use
6 decisions. ORS 197.646(3). Although LC 16.212(7)(a)(iv) (Feb 15, 2016)
7 references “the land,” intervenor concedes that state law controls and that, under
8 OAR 660-033-0135(1)(c), the subject tract is the appropriate area of study.
9 Response Brief 8. The hearings officer misconstrued the law by interpreting
10 “land” to apply to intervenor’s non-subject-tract activity.

11 Intervenor’s concession notwithstanding, intervenor argues that, although
12 the hearings officer misstated the standard, they made the requisite finding and
13 that finding is sufficient to support the decision. The hearings officer’s analysis
14 misconstrues the applicable law because it does not determine whether the

³ OAR 660-033-0135(1) now provides:

“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:

“* * * * *

“(c) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the *subject tract*, such as planting, harvesting, marketing or caring for livestock, at a commercial scale.” (Emphasis added.)

1 proposed dwelling will be occupied by a person or persons who will be
2 principally engaged in the farm use of *the subject tract*. Intervenor's farm
3 operations within the county include the use of approximately 613 acres owned
4 and approximately 553 acres leased by intervenor. The hearings officer described
5 intervenor's farm operation as follows:

6 "[Intervenor] buys 300-600 head of cattle from local ranchers and
7 markets each year. This equates to roughly \$357,000 in agricultural
8 income to local and regional ranchers and farmers, which are
9 established farm markets. He then sells cattle at local markets
10 including the Eugene Livestock auction, each getting a cut of the
11 sales. Sales equate to roughly \$513,000. These businesses are
12 established farm markets. Further, [intervenor] buys feed, materials,
13 fencing, medicine, and gas at local agricultural businesses. He also
14 does agricultural machine work. At [a] minimum, [intervenor]
15 pumps close to a million dollars into the local agricultural economy
16 by either buying, selling for processing or providing services. The
17 cattle purchased go to meat processing plants and provide food both
18 locally and nationally. [Intervenor] is a fully functioning part of the
19 agricultural economy of the state and one of the three largest cattle
20 producers in the valley." Record 8.

21 The hearings officer then concluded that LC 16.212(7)(a)(iv) (Feb 15, 2016) is
22 met:

23 "When evidence in the record is weighed as a whole, there is ample
24 support, based on scale (200-300 head of cattle on 249 acres), sales
25 (\$250,000 in sales and gross profit), management (loan amounts and
26 loan insurances, Federal programs and inspections), and reach (local
27 and state business profiting from the operation) that this operation
28 is something more than a hobby farm and rises to the level of
29 'commercial.' The bank considers it a commercial operation.
30 [Intervenor] is running the operation at a commercial scale in order
31 to maximize profit." *Id.*

1 Adequate findings identify the criterion and the facts and evidence believed and
2 relied upon and explain why the evidence leads to the conclusion. *Heiller v.*
3 *Josephine County*, 23 Or LUBA 551, 556 (1992). We agree with petitioner that
4 the county's findings are inadequate.

5 In *Oregon Natural Desert Assoc.*, we concluded that the county's findings
6 of compliance with OAR 660-033-0135(1)(c) improperly focused on the
7 applicant's 17,000-acre ranching operation and did not analyze whether the
8 dwelling occupants would be principally engaged in the farm use of the 3,400-
9 acre subject tract at a commercial scale. 65 Or LUBA at 259-60. We explained
10 that the county's findings were inadequate because they did not mention a map
11 that staff submitted during the proceedings showing that the parcel on which the
12 dwelling would be sited was part of a tract used in the applicant's ranching
13 operation or purport to analyze that tract by itself to determine whether the
14 dwelling occupants would be principally engaged in its farm use at a commercial
15 scale. *Id.* Rather, the county's findings focused on the applicant's broader farm
16 operation. *Id.*

17 Here, intervenor focuses on the hearings officer's finding that 200 to 300
18 head of cattle are pastured on 249 acres and the fact that the subject tract is also
19 249 acres and argues that this finding establishes that intervenor conducts a
20 commercial farm use on the subject tract. The finding does not explain that the
21 referenced 249 acres is the subject tract but, assuming that to be the case, the
22 finding does not explain how the occupant of the dwelling will be principally

1 engaged in the commercial farm operation of the subject tract as opposed to being
2 principally engaged in the broader farm operation. The approval is conditioned
3 on intervenor occupying the dwelling, but the decision does not explain why this
4 condition ensures that the dwelling will be occupied by someone principally
5 engaged in the farm use of the subject tract.

6 Petitioner also argues that the findings are not supported by substantial
7 evidence of the commercial scale of the operation on the subject tract because the
8 evidence reflects intervenor’s broader farm operation. Intervenor points to
9 evidence in the record which allegedly shows

10 “that [intervenor] plants pasture, harvests hay, and markets, sells,
11 and cares for roughly 200-300 head of cattle annually. Bank
12 evidence substantiates this.” Record 21 (citations omitted).

13 Substantial evidence is evidence a reasonable person would rely upon to reach a
14 decision. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). On
15 remand, the findings should identify evidence in the record which is specific to
16 the commercial scale of the farm use *on the subject tract*.

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 LC 16.212(7)(a)(iii) (Feb 15, 2016) requires the county to find, in
20 approving a primary farm dwelling, that “[t]he subject tract is currently employed
21 for farm use as defined in LC 16.090.”⁴ Petitioner’s second assignment of error

⁴ LC 16.090(83) defines “farm use” as follows:

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- “(a) The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, furbearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof;
 - “(b) The preparation, storage and disposal by marketing or otherwise of the products or byproducts raised on such land for human use and animal use;
 - “(c) The current employment of land for the primary purpose of making a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows; or
 - “(d) The propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the State Fish and Wildlife Commission;
 - “(e) The on-site construction and maintenance of equipment and facilities used for the activities described in this definition; or
 - “(f) Not including the use of land subject to the provisions of ORS Chapter 321, except land used exclusively for growing cultured Christmas trees as defined in LC 16.090 above or land described in ORS 321.267(3) or 321.824(3);
 - “(g) As used in this definition:
 - “‘Preparation’ of products or by-products includes but is not limited to the cleaning, treatment, sorting, or packaging of the products or by-products; and
 - “‘Products or by-products raised on such land’ means that those products or by-products are raised on the farm operation

1 is that the hearings officer's decision is not based on substantial evidence in the
2 whole record because the evidence that the hearings officer relied upon fails to
3 distinguish the operation on the subject tract from the larger farm operation.
4 Petition for Review 19-20. Petitioner also argues that the hearings officer failed
5 to address conflicting evidence. We deny this assignment of error.

6 In *Pekarek v. Wallowa County*, we explained:

7 "In reviewing the evidence, we may not substitute our judgment for
8 that of the local decision maker. Rather, we must consider and weigh
9 all the evidence in the record to which we are directed, and
10 determine whether, based on that evidence, the local decision
11 maker's conclusion is supported by substantial evidence. If there is
12 substantial evidence in the whole record to support the county's
13 decision, [we] will defer to it, notwithstanding that reasonable
14 people could draw different conclusions from the evidence.
15 However, in deciding whether a challenged decision is supported by
16 substantial evidence in the whole record, we must consider whether
17 supporting evidence is refuted or undermined by other evidence in
18 the record." 33 Or LUBA 225, 227 (1997) (citations omitted).

19 The hearings officer found:

20 "[Intervenor] has submitted reams of evidence, including tax filings,
21 aerial photos, and testimony regarding the existence of a cattle
22 operation on the subject tract. The Hearings Official determines that
23 the opponent's assertions that a farm use does not exist on the tract
24 are outweighed by the evidence supplied by the application. This
25 approval criterion is satisfied." Record 6.

where the preparation occurs or on other farm land provided
the preparation is occurring only on land being used for the
primary purpose of obtaining a profit in money from the farm
use of the land."

1 We agree with petitioner that the aerial photos would not be, without more,
2 evidence a reasonable person would rely upon to make a decision. LC
3 16.212(7)(a)(iii) (Feb 15, 2016) requires consideration of the *current* use of the
4 subject tract. The aerial photos that intervenor placed into the record and that the
5 hearings officer referenced in their decision are subject-tract-specific, but the
6 circled areas on the 2017 aerial photos do not offer a clear depiction of cattle.
7 Moreover, the 2017 aerial photos are three years old and therefore not a
8 contemporaneous representation of the use of the subject tract. By contrast, the
9 2020 photo placed into the record by petitioner is “current” and does not contain
10 the blurry images which intervenor argued depicted cattle in the 2017 photos.
11 Intervenor argued to the city that the 2020 photo was taken at a misleading angle,
12 but the hearings officer does not explain whether they found that to be the case.

13 However, intervenor also points to the staff report, which in turn relies on
14 a commodities report in the record to conclude that 232.24 acres of the subject
15 tract were used for grazing in 2020. *Chilla v. City of North Bend*, 39 Or LUBA
16 121, 127 (2000) (explaining that a staff report may contain evidence). The tax
17 filings, the staff report, and the commodities report are substantial evidence—
18 that is, evidence a reasonable person would rely upon to reach a decision—of the
19 current farm use of the tract.

20 The second assignment of error is denied.

21 The county’s decision is remanded.