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

REDSIDE RESTORATION PROJECT ONE, LLC,
Petitioner,

and

LORI ANDERSON JOHNSON, RICHARD DEL JOHNSON,
KELSEY NONELLA, PAMELA MAYO PHILLIPS, TIM W. PHILLIPS,
WILLIAM BUCHANAN, ELIZABETH BUCHANAN,
KEYSTONE CATTLE & PERFORMANCE HORSES, LLC, and
PAUL LIPSCOMB,
Intervenors-Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

710 PROPERTIES, LLC, CHARLES THOMAS, and
ROBERT TURNER,
Intervenors-Respondents.

LUBA No. 2024-082

1000 FRIENDS OF OREGON,
Petitioner,

and

WILLIAM BUCHANAN, ELIZABETH BUCHANAN, and
KEYSTONE CATTLE & PERFORMANCE HORSES, LLC,
Intervenors-Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

710 PROPERTIES, LLC, CHARLES THOMAS, and
ROBERT TURNER,
Intervenors-Respondents.

LUBA No. 2024-083

CENTRAL OREGON LANDWATCH,
Petitioner,

and

WILLIAM BUCHANAN, ELIZABETH BUCHANAN, and
KEYSTONE CATTLE & PERFORMANCE HORSES, LLC,
Intervenors-Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

710 PROPERTIES, LLC, CHARLES THOMAS, and
ROBERT TURNER,
Intervenors-Respondents.

LUBA No. 2024-085

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

James D. Howsley filed a petition for review and reply brief and argued on behalf of petitioner Redside Restoration Project One, LLC. Also on the brief were Ezra L. Hammer and Jordan Ramis PC.

F. Blair Batson filed a petition for review and reply brief and argued on behalf of petitioner 1000 Friends of Oregon.

Carol E. Macbeth filed a petition for review and reply brief and argued on behalf of petitioner Central Oregon Landwatch.

Jeffrey L. Kleinman filed the intervenor-petitioner's brief and reply brief and argued on behalf of intervenors-petitioners William Buchanan, Elizabeth Buchanan, and Keystone Cattle & Performance Horses, LLC.

Intervenors-petitioners Lori Anderson Johnson, Richard Del Johnson, Kelsey Nonella, Pamela Mayo Phillips, Tim W. Phillips, and Paul J. Lipscomb, represented themselves.

David Doyle filed the respondent's brief and argued on behalf of respondent.

J. Kenneth Katzaroff filed the intervenors-respondents' briefs and argued on behalf of intervenors-respondents. Also on the briefs was Schwabe, Williamson & Wyatt, P.C.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

AFFIRMED 05/16/2025

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

Petitioners appeal a county Board of Commissioners' decision redesignating a 710-acre tract from Agricultural to Rural Residential Exception Area, and rezoning it from exclusive farm use (EFU) to rural residential use.

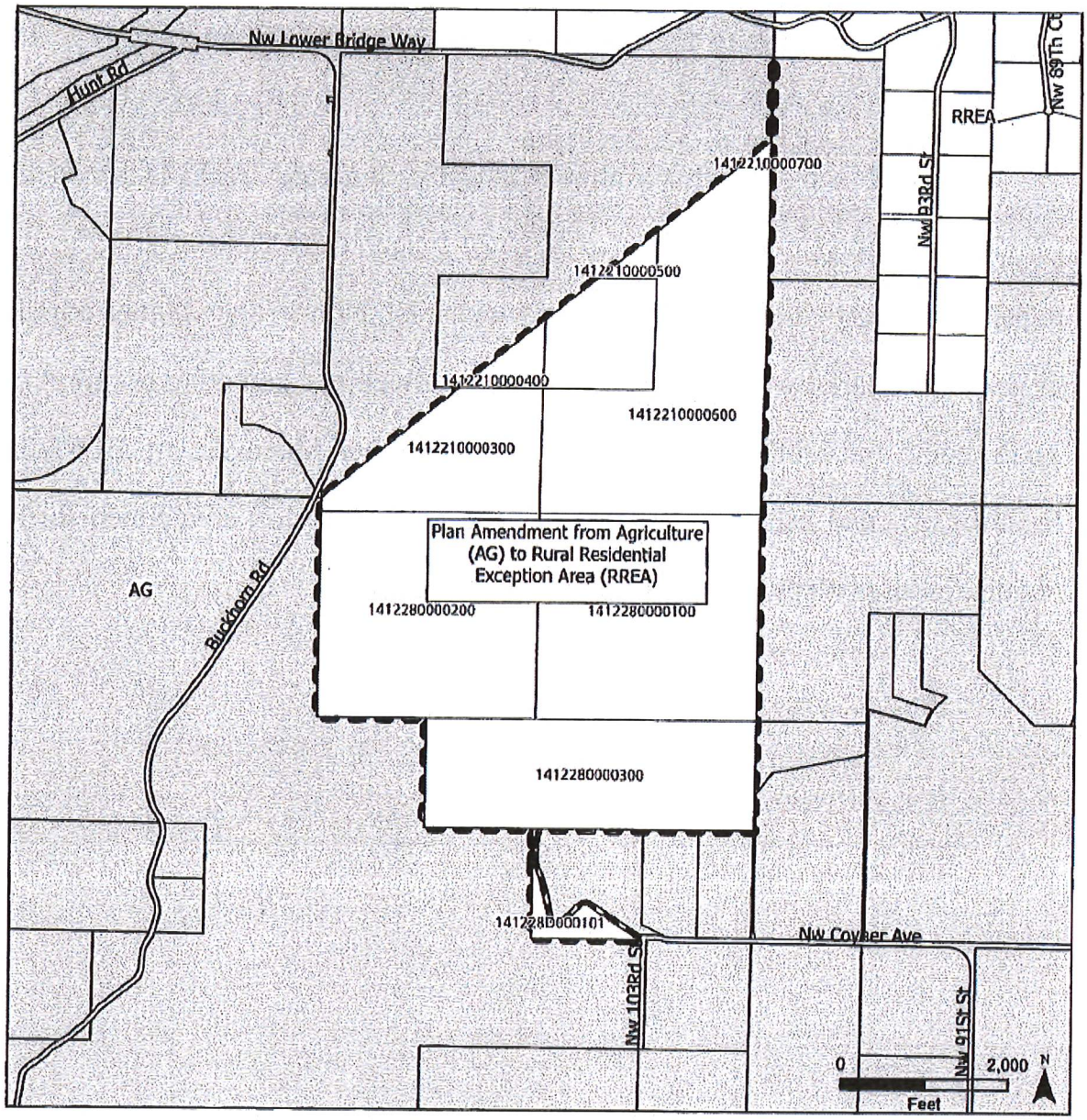
FACTS

The challenged decision is on remand from LUBA. *Central Oregon Landwatch v. Deschutes County*, LUBA Nos 2023-006/009 (Jul 28, 2023) (*Landwatch I*), *aff'd*, 330 Or App 321, 543 P3d 736 (2024) (*Landwatch II*). As described in our decision in *Landwatch I*, the subject property is a 710-acre tract comprised of nine lots of record. The property is undeveloped except for one tax lot, which is developed with a nonfarm dwelling. Two other lots of record have valid nonfarm dwelling approvals. A portion of the property is within an area identified by the county as suitable for a destination resort.

Soils on the subject property are predominantly non-agricultural (Class 7 or 8) soils, under the U.S. Natural Resources Conservation Service (NRCS) classification scheme, although approximately 200 acres or 29 percent of the tract consists of agricultural Class 6 soils. The property is vegetated with typical high desert flora, including juniper trees, sage brush, rabbit brush, and bunch grasses. The property has no irrigation rights, and no history of agricultural use. Most of the property sits on a rocky plateau above nearby irrigated farms. The property's

only existing access is to the south from NW Coyner Avenue and NW 103rd Avenue.

The subject property is almost entirely bordered by EFU-zoned lands (depicted in grey tone on the map below). Irrigated hay and alfalfa farms are adjacent or nearby to the northwest and southeast. Non-irrigated lands adjoining or nearby are largely developed with nonfarm dwellings and other nonfarm uses. To the south and southwest are federal Bureau of Land Management (BLM) lands used for off-road vehicle recreation. To the northeast is an area zoned for rural residential uses, depicted in white tone on the map.



LUBA No 2023-006/009 Record 6.

In 2022, intervenor-respondent 710 Properties, LLC (710), applied for a post-acknowledgment plan amendment to change the plan designation of the subject property from Agriculture to Rural Residential Exception Area and the zoning from Exclusive Farm Use—Terrebonne Subzone (EFUTE) to Rural

Residential, 10-acre minimum (RR-10). Under the proposed rezoning, the subject property could be subdivided into 71 10-acre parcels and developed with housing.

On December 14, 2022, the board of commissioners approved the application, by a vote of 2-1, with Commissioner DeBone in the majority. The Department of Land Conservation and Development (DLCD), among others, appealed the county's December 14, 2022 decision to LUBA.

On January 26, 2023, the Land Conservation and Development Commission (LCDC) held a hearing to approve DLCD's request to proceed with its appeal of the county decision to LUBA. Commissioner DeBone appeared at the LCDC hearing, and spoke in opposition to DLCD's request.

On July 28, 2023, LUBA remanded the county's decision, requiring adoption of new findings based on a correct understanding of the applicable law. After the Court of Appeals affirmed LUBA's decision, the matter returned to the county. On remand, the Board of Commissioners held a hearing on July 24, 2024, and re-opened the record to accept new evidence and argument on the remand issues. Subsequently, at a September 4, 2024 meeting, the Board deliberated and voted to again approve the application. These appeals followed.

INTRODUCTION

The key questions underlying the county's decision on remand, and all the remaining assignments of error in this appeal, are whether the county's determination that the subject property is not "agricultural land" under Statewide Planning Goal 3 (Agricultural Land) is supported by substantial evidence and

adequate findings, and consistent with the terms of LUBA's remand in *Landwatch I*.

In relevant part, OAR 660-033-0020(1)(a) defines agricultural land for purposes of Goal 3 to include (1) land with non-agricultural soils that nonetheless is "suitable for farm use" based on a number of listed considerations, and (2) land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.[1] OAR 660-033-0030(1)(a)(B) and (C).

OAR 660-033-0030(3) specifies additional considerations for identifying agricultural land under OAR 660-033-0030(1)(a)(B) and (C), providing:

> "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either 'suitable for farm use' or 'necessary to permit

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[1] OAR 660-033-0020(1)(a) provides:

> "'Agricultural Land' as defined in Goal 3 includes:
>
> "(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;
>
> "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and
>
> "(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

farm practices to be undertaken on adjacent or nearby lands' outside the lot or parcel."

Thus, both the "suitable for farm use" and "necessary to permit farm practices" elements of the agricultural lands definition require that the county evaluate the relationship between the subject property and adjacent and nearby agricultural lands.

On review of the county's initial decision, we concluded that the county erred in certain respects in applying OAR 660-033-0030(1)(a)(B) and (C), mainly by focusing on whether the subject property in isolation qualifies as agricultural land, and failing to properly consider its relationship with adjacent and nearby farm lands. *Landwatch I*, LUBA Nos 2023-006/007 (slip op at 46-62).

With respect to the OAR 660-033-0020(1)(a)(B) "suitable for farm use" test, we held that the county erred in failing to consider whether the subject property was suitable for farm use under the listed considerations, assuming the property were used in conjunction with adjacent or nearby agricultural lands. ORS 215.203(2)(a) defines "farm use" to mean the "current employment of land for the primary purpose of obtaining a profit in money" by pursuing a number of listed activities.[2] In its initial decision, the county focused on evidence and

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[2] ORS 215. 203(2)(a) provides:

> "As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-

argument that the subject property, in isolation, could not be put to farm use with any reasonable expectation of obtaining a profit in money. However, we held that OAR 660-033-0020(1)(a)(B), read together with OAR 660-033-0030(3), requires any evaluation of "profitability" to include consideration of using the subject property in conjunction with adjacent and nearby farm lands. *Landwatch I*, LUBA Nos 2023-006/007 (slip op at 36, 47).

Similarly, we held that the county erred in failing to consider conjoined use of the subject property, with respect to seasonal grazing, a feedlot operation using feed from nearby irrigated farms, and construction or maintenance of equipment and facilities used to support farm operations on adjacent or nearby farm lands. *Id.* at (slip op at 37-46).

> bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. * * *"

With respect to OAR 660-033-0020(1)(a)(C), the "necessary to permit farm practices to be undertaken on adjacent or nearby lands" test, we held that the rule

> "asks not only whether the land itself is necessary to permit farm practices on adjacent or nearby lands but, also, whether the land's resource designation and zoning, and the presumed lack of impacts or conflicts with farming on adjacent or nearby lands, are necessary to permit farm practices on adjacent or nearby lands." *Id.* at (slip op at 59).

As applied here, our ruling meant that on remand the county must evaluate whether retaining the subject property's resource designation and zoning is necessary to allow farm practices to be undertaken on adjacent or nearby farm lands, considering the impacts of developing the subject property on those practices, specifically the impacts of increased residential traffic on cattle transport, impacts to irrigation wells, and nuisance and trespass impacts. The Court of Appeals agreed that OAR 660-033-0020(1)(a)(C) requires "consideration of whether the land's resource designation and zoning is 'necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.'" *Landwatch II*, 330 Or App at 333.

On remand, the county adopted additional findings addressing OAR 660-033-0020(1)(a)(B) and (C). On appeal, petitioners challenge those findings across multiple overlapping assignments of error. However, we first address petitioner Redside Restoration Project One, LLC's (Redside's) first and second assignments of error, which allege that the county committed procedural errors

with respect to *ex parte* communications and bias. If we sustain those procedural assignments of error, we would remand for further proceedings and adoption of a new decision, and accordingly would not address the assignments of error that challenge the merits of the county's remand decision.

FIRST ASSIGNMENT OF ERROR (Redside)

Redside argues that the county's decision on remand is invalid due to Commissioner DeBone's failure to disclose the substance of *ex parte* communications, and the county's failure to comply with ORS 215.422(3):

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

See also Deschutes County Code (DCC) 22.24.100 (Disclosure of Ex Parte Contacts).[3]

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[3] DCC 22.24.100 provides:

> "Prior to making a decision, the Hearings Body or any member thereof shall not communicate directly or indirectly with any party or his representative in connection with any issue involved in a

The terms "*ex parte* contact" and "*ex parte* communication" are not defined in ORS 215.422 or its companion statute applicable to cities at ORS 227.180. We have explained that "[a]n *ex parte* communication is a communication between a party and a decision-maker, made outside the hearing process, concerning a decision or action before the decision-maker." *Oregon Shores Conservation Coalition v. Coos County*, 81 Or LUBA 839, 846 (2020). The statutes requiring disclosure of *ex parte* communication are remedial and their purpose "is to protect the substantive rights of the parties to know the evidence that the deciding body may consider and to present and respond to evidence." *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 253, 834 P2d 523 (1992). The statutes "prohibit[] undisclosed *ex parte* communications, *whether or not those communications in fact influence the [local government's] original decision*." *Opp v. City of Portland*, 38 Or LUBA 251, 264-65, *aff'd*, 171 Or App 417, 16 P3d 520 (2000), *rev den*, 332 Or 239

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pending hearing except upon notice and opportunity for all parties to participate. Should such communication - whether written or oral - occur, the Hearings Body member shall:

"A. Publicly announce for the record the substance of such communication; and

"B. Announce the parties' right to rebut the substance of the ex parte communication during the hearing."

"Communication between County staff and the Hearings Body shall not be considered to be an ex parte contact."

(2001) (emphasis added). According to Redside, during Commissioner DeBone's appearance at the LCDC hearing, the Commissioner witnessed and participated in wide-ranging discussions with DLCD staff, intervenors-respondents' attorney, and the LCDC Commissioners regarding the merits of the application and the county's initial decision to approve redesignation of the subject property.[4] Redside argues that many of the issues discussed in detail at the LCDC hearing, including impacts on irrigation wells, remain live issues in this appeal of the county's decision on remand. Redside contends that Commissioner DeBone received multiple *ex parte* communications at the LCDC hearing, and was therefore obligated to disclose the substance of the communications to the parties at the next public county hearing on this matter, the July 24, 2024 hearing before the County Board of Commissioners. Instead, Redside argues, Commissioner DeBone failed to disclose that he had participated in the LCDC hearing, much less disclose the substance of any communications received at the LCDC hearing, and failed to offer the parties the opportunity to rebut the same. According to the petitioner, it was not until the September 4, 2024 meeting at which the board

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[4] The existence and content of most of the relevant communications at the LCDC hearing are not in dispute, as the hearing was videotaped and transcribed. In an order dated April 17, 2025, LUBA granted Redside's motion to take the videotape and transcript into evidence pursuant to OAR 661-010-0045, for purposes of resolving Redside's First and Second Assignments of Error. We also granted respondents' unopposed motion to take into evidence Commissioner DeBone's affidavit, which describes the Commissioner's recollection of a conversation with DLCD staff that was visible on the videotape, but not audible.

deliberated and voted to approve the application that Commissioner DeBone announced that he had participated in the January 26, 2023 LCDC hearing. However, the Commissioner did not indicate that he had received *ex parte* communications at the hearing, disclose the substance thereof, or offer the parties a rebuttal opportunity.

Respondents agree that at the September 4, 2024 meeting the Commissioner disclosed that he had participated at the LCDC meeting on January 26, 2023. Respondent's Brief 6; Turner's Response Brief 49. However, respondents dispute that any communications received at the LCDC hearing were *ex parte* communications that required disclosure under ORS 215.422(3) and DCC 22.24.100. According to respondents, the statute and code do not apply to communications received after the county commissioners have rendered the county's final decision, and that decision is on appeal. Respondents argue that, at time of the LCDC hearing, there was no land use hearing on the application pending before the county and Commissioner DeBone was no longer a decision-maker.

Respondents also argue that the issues discussed at the LCDC hearing were not the same issues that the county addressed in its decision on remand, which was limited to the bases for remand identified in LUBA's *Landwatch I* decision. As such, respondents argue, any communications received at the LCDC hearing did not "concern" the decision that the county would make on remand.

Finally, respondents argue that even assuming the Commissioner violated the statute and code, any error provides no basis for reversal or remand, because Redside had a full opportunity to object to the lack of disclosure or inadequate disclosure at the September 4, 2024 meeting, and in fact failed to raise any objection for more than two months following the September 4, 2024 meeting.[5] Respondents contend that Redside's untimely objection waives its right to assign error on appeal to any violation of ORS 215.422(3).

Turning to the waiver issue first, we disagree with respondents that Redside waived their right to assign error to the alleged failure to disclose by failing to raise an objection at the September 4, 2024 meeting at which the Commissioners deliberated. *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 523 (1992) (no waiver due to failure to timely object to disclosure, where the disclosure occurred after the close of the evidentiary record, during deliberations when there was at most an ephemeral opportunity for public input). Assuming for the moment that Commissioner DeBone had an obligation under ORS 215.422(3) and DCC 22.24.100 to disclose communications received at the LCDC hearing, that obligation was to disclose at the next public hearing following receipt of the communications, in this case, the July 24, 2024 public hearing. At that hearing public testimony was accepted and the parties had a full

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[5] Redside first raised the issue of *ex parte* communications arising from the LCDC hearing in a letter to county counsel dated November 15, 2024.

opportunity to raise any procedural objections at the hearing or before the close of the evidentiary record.[6] The September 4, 2025 meeting, however, was not a public hearing, and the county offered no opportunity for public testimony of any kind. In addition, Commissioner DeBone's announcement that he had participated in the LCDC hearing is not reflected in the minutes of the September 4, 2025 proceeding. Apparently, that announcement was not framed as a disclosure of *ex parte* communications or accompanied by the usual indicia of a disclosure, and no one, including staff taking the minutes, recognized that the announcement might be understood as a disclosure of *ex parte* communications.

Consequently, that Redside did not lodge an objection to the lack of disclosure or adequate disclosure until two months after the September 4, 2024 meeting does not mean that Redside waived its right to assign error on appeal based on the alleged violations of ORS 215.422(3). *Horizon Construction, Inc.*, 114 Or App at 253-54.

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[6] We understand respondents to argue that Redside should have known that Commissioner DeBone might appear at the LCDC hearing and might become exposed to *ex parte* communications, and thus should have raised an objection to the lack of any disclosure at the July 24, 2024 public hearing. Respondents contend that Redside's failure to raise objections at the July 24, 2024 hearing waives its right to assign error to that lack of disclosure. We disagree. Under ORS 197.090(2), the county and the applicant received notice of the LCDC hearing and were invited to testify. No other parties to the county proceedings were entitled to notice, and apparently no other parties besides DLCD attended the LCDC hearing. Respondents identify no basis to conclude that Redside had actual knowledge of the LCDC hearing or of the Commissioner's participation prior to the September 4, 2024 deliberations.

Respondents argue that *Horizon Construction* is inapposite because that case did not involve proceedings on remand. We understand respondents to argue that obligations under ORS 215.422(3) adhere only during those periods of time when the land use matter is actively pending before the county. Any *ex parte* communications received by decision-makers at other times, when for example the county decision is on appeal to LUBA, need not be disclosed even if the appealed decision subsequently returns to the decision-makers for additional proceedings.

Resolving the parties' dispute over the requirements of ORS 215.422(3) require that we interpret the statute. To interpret the statute, we examine the statutory text, context, and any legislative history with the goal of discerning the enacting legislature's intent. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).

The text of ORS 215.422(3) does not specify any temporal limitations or exclusions on the receipt of *ex parte* communications. The statute imposes obligations that must be fulfilled at the "first hearing following the communication," which presupposes a process culminating in one or more hearings. But the text does not limit its obligations to a county's initial proceedings on a land use application, and we do not understand respondents to dispute that the statute and DCC 22.24.100 also apply to proceedings on remand

that involve a hearing.[7] We understand respondents to argue that the code and statute "switch on" only when the county is actively processing the initial application or subsequent remand, and "switch off" during periods when the decision is on appeal to LUBA or the appellate courts. Under this view, *ex parte* communications received at a time when the decision is on appeal need never be disclosed, even if those communications are intended to, and have the effect of, influencing the county's decision on remand.[8] However, nothing in the text or context of ORS 215.422(3) cited to us supports that view.

No party cites us to any relevant context or legislative history for ORS 215.422(3), or its cognate applicable to cities, ORS 227.180(3). Under *Gaines*, if

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[7] DCC 22.24.100 is worded somewhat differently than ORS 215.422(3), but we do not understand respondents to argue that it imposes lesser obligations than the statute. But to the extent DCC 22.24.100 can be read to impose a lesser obligation than the statute, the statute would control. *See* ORS 197.829(1)(d) (LUBA must affirm a local government's interpretation of its land use regulations unless the interpretation is contrary to a statute that the regulation implements).

[8] A hypothetical horrible illustrates the potential problems with respondents' view. Suppose that after a county decision is appealed to LUBA a decision-maker engages in communications with a party that convince the decision-maker that the original decision was erroneous and the county should withdraw the decision for reconsideration pursuant to ORS 197.830(13)(b), or seek voluntary remand from LUBA. Under respondents' view, the decision-maker would be under no obligation to disclose those communications during the hearing on reconsideration or voluntary remand, or offer any opportunity for rebuttal, because the decision-maker received the communications during a time period when the original decision was on appeal. That would be the case even if those communications profoundly influenced the county's decision on remand.

the statute remains ambiguous after evaluating text, context, and legislative history, we may consider general maxims of statutory construction. One such maxim is that a court should attempt to construe the statute consistent with its purposes. On this point, the respondents' restrictive view of the statute seems inconsistent with the evident purpose of ORS 215.422(3), to ensure that land use decisions subject to a hearings process are rendered based solely on arguments and evidence presented in that public hearing process. Interpreting ORS 215.422(3) to switch on or off depending on what phase the case is in would undercut that purpose.

We note that, at least for some purposes, a county's initial proceedings on a land use application, appeals of the resulting decision, subsequent proceedings on remand, and any further proceedings on appeal, are all regarded as different phases of the same case. *See Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (law of the case waiver applies to subsequent appeals to limit issues on review). Similarly, for purposes of obligations imposed under ORS 215.422(3) a county's initial decision, appeal of that decision, and any proceedings on remand, are different phases of the same case. Remand is always a foreseeable result of appellate review, and a decision-maker should be prepared to conduct hearings on remand consistent with ORS 215.422(3), including disclosure of *ex parte* communications received during the appellate phase of the case.

Accordingly, we reject respondents' restrictive view of the statute, and conclude that obligations imposed under ORS 215.422(3) continue after the

county issues a decision on a land use application. If *ex parte* communications occur while the county's decision or action is pending review in another forum, then the county decision maker who received the *ex parte* communication must make a timely disclosure "at the first hearing following the communication where action will be considered or taken on the subject to which the communication related." ORS 215.422(3)(b).

Finally, we turn to respondents' argument that none of the communications received at the LCDC hearing have any bearing on the narrow range of issues remaining after LUBA's remand in *Landwatch I*, and thus, those communications are not *ex parte* because they do not concern the county's action in the proceeding on remand. We generally agree with respondents' premise that, whether ORS 215.422(3) obliges disclosure of an *ex parte* communication during a hearing on remand depends on its relationship to the issues within the scope of remand. *See Opp*, 171 Or App at 423 (the remedy for nondisclosure of an *ex parte* communication "should be tailored to rectify the evil at which it is directed, in the light of the particular circumstances of the case"). ORS 215.422(3) imposes obligations only at a hearing where "action will be considered or taken on the subject to which the communication related[.]" A remand hearing will not (or at least should not) take action with respect to resolved issues or issues outside the scope of remand. Accordingly, in such circumstances the statute would not

necessarily oblige a decision-maker to disclose a communication on remand that concerns a non-issue or a resolved issue, rather than a live issue.[9]

LUBA's decision in *Landwatch I* resolved a number of issues adversely to the petitioners, but sustained some assignments of error, and remanded for additional analysis and adoption of adequate findings on a specific range of issues. Specifically, we directed:

> "[T]he board of commissioners must consider the ability to use the subject property for farm use in conjunction with other property, including the Keystone property, and may not limit its review to the profitability of farm use of the subject property as an isolated unit. The board of commissioners must consider the ability to import feed for animals and may not limit its consideration to the raising of animals where adequate food may be grown on the subject property. The board of commissioners must also consider whether the subject property is suitable for farm use as a site for construction and maintenance of farm equipment. Furthermore, the board of commissioners must consider the evidence and adopt findings addressing the impacts of redesignation of the property related to water, wastewater, and traffic and whether retaining the property's agricultural designation is necessary to permit farm practices on adjacent or nearby lands." *Landwatch I*, LUBA Nos 2023-006/009 (slip op at 85).

Thus, the question on review is whether the substance of any communications Commissioner DeBone received at the LCDC hearing has a bearing on the remand issues. We turn to the parties' arguments on that question.

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[9] In practice, it may be difficult for a decision-maker at a remand hearing to determine whether or not a particular communication is related to a live issue on remand. In such cases, it would be prudent to err on the side of disclosure.

As noted, the LCDC hearing was initiated by DLCD's request for authorization to appeal the county's initial decision to LUBA. The focus of DLCD's request, and much of the discussion at the hearing, was on the criteria for such authorization at OAR 660-001-0230(3), specifically whether the case will require interpretation of a statewide planning statute, goal or rule, or clarify state law. The legal issues that animated DLCD's request to appeal were resolved largely in DLCD's favor in *Landwatch I*.

Redside first cites portions of the LCDC hearing transcript where DLCD staff and then applicant's attorney discuss those legal issues, and argues that that debate, conducted in Commissioner DeBone's presence, constituted an *ex parte* communication that should have been disclosed during the county remand proceedings. Redside Petition for Review 12. However, we agree with respondents that the legal issues debated in the cited portions of the transcript concerned only a resolved issue that, by the time of remand, was no longer a live issue. Accordingly, ORS 215.422(3) did not obligate disclosure of the legal debate that Commissioner DeBone witnessed.

Redside next cites to a portion of the transcript where Commissioner DeBone testified in opposition to the DLCD request. LCDC Commissioner Boyle asked him questions regarding impacts on adjoining farm practices, and whether

wells could be dug on the property, and Commissioner DeBone answered.[10] Redside argues that their colloquy constitutes *ex parte* communication that

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[10] Redside cites to the following portion of the transcript, which we quote from page 13 of its petition for review (reformatted slightly):

> "Boyle (4:36:22): Has there been a farm impact study done?
>
> "DeBone: Uh, uh, terminology maybe because part of the record is the fact that they showed that they could put like three or six, depending — you put six cows out there for like three or four or five/six months and three cows for a year or whatever so yeah I think that was in the record of, of our —
>
> "Boyer: So this is the surrounding areas? Um about the impacts of a development with the surrounding agricultural areas. Thank you.
>
> "DeBone (4:36:55): Uh it's different uses, as in this rocky outcropping. It's not even — uh you know, it's not - it doesn't have a lot of AMUs (animal month units) or Ums, and a field is grown to cut and bail and remove to deliver, so they would be kind of just separate uses if it was grazing on this property and cut and bail on the other property.
>
> "Boyer (4:37:13) Well, and you know to me farming is not just soils, there's – there's other parts of farming. Um you know, rangeland is important for grazing um so that's why I was asking some of those questions. And then I know you can dig - you say the wells could be dug and this could be dug in this area?
>
> "DeBone (4:37:32): Okay, yeah. Uh yeah, I mean there's some depth to groundwater, yeah.
>
> "Boyer: Okay.

touched on issues relevant to remand, including impacts on adjacent farm practices, and the feasibility and expense of digging wells in the area.

Also with respect to water, Redside argues that Commissioner DeBone stated:

> "As Commissioners we are not in the domain of making decisions based on waters, this is not a decision point during this process. * * * We take water seriously in the basin and it comes, when it comes to land use and it's not a mechanism to deny." Redside Reply Brief to Turner Response Brief 2.

Redside argues that LUBA ruled to the contrary that the county must consider impacts on irrigation wells, and therefore that issue was within the scope of remand. Consequently, Redside argues, Commissioner DeBone's erroneous views regarding consideration of impacts on water supplies were an *ex parte* communication that should have been disclosed at the remand hearing.

However, ORS 215.422(3) requires disclosure only of certain communications "received" by the decision-maker. Accordingly, a decision-maker's own statements are not generally considered *ex parte* communications. *See Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346, 372 (2017), *aff'd*, 291 Or App 251, 416 P3d 1110, *rev den*, 363 Or 481 (2018) (a letter from a decision-maker to a federal agency is not an *ex parte* communication). Thus, Commissioner DeBone's answers to Commissioner Boyles' questions do not constitute *ex parte* communications in themselves.

"DeBone: They may be expensive[.]"

Commissioner Boyles' questions also would not qualify as *ex parte* communications for purposes of ORS 215.422(3) because they are not assertions of fact or argument, but instead questions posed to DeBone. Embedded in Commissioner Boyles' line of questions are a few background or framing statements, *e.g.*, "rangeland is important for grazing * * * so that's why I was asking some of those questions." However, in this context such a framing statement cannot be reasonably understood as an attempt to impart facts or arguments to Commissioner DeBone that he might use to render a decision on the application, if remanded to the county.

Redside next cites to portions of the testimony of the applicant's attorney, answering the same question posed to DeBone regarding surrounding land uses:

> "I'm going to try to answer one of the questions that was just asked around what was kind of the surrounding land uses. Um — and this property is actually — I don't want to use the word 'unique,' but it is unique. It is on a very steep elevated plateau and there is some irrigated agriculture uh to the northwest, but that is uh quite some distance off and an elevation change of something like 300 feet on pretty sheer cliff walls. * * * And then on kind of the southeastern side, there are other properties that are in fact zoned EFU also. But almost every single one of them have received a non-farm dwelling approval and so they've actually been taken out of agricultural because the soils are so bad here." Redside Petition for Review 14.

Redside argues that in this quote the applicant's counsel asserts facts about the property and surrounding EFU-zoned properties, facts that are pertinent to

whether the subject property qualifies as agricultural land under OAR 660-033-0020(1)(a)(B) and (C).[11]

The above-quoted statement presents a closer question. In describing the subject property and surrounding lands the applicant's attorney makes several factual assertions, including that the subject property is on a steep elevated plateau, that there is irrigated agriculture at some distance to the northwest, some 300 feet below the subject property by elevation, and that to the southeast there are an unspecified number of EFU-zoned properties almost all of which have non-farm dwelling approvals due to bad soils. The question before us is whether Commissioner DeBone, on remand from *Landwatch I*, was required to disclose having heard the foregoing statements and offer the parties an opportunity to rebut them.

Although it is a close question, we conclude that the answer is no. The above-quoted statements are consistent with various descriptions of the subject property and surrounding properties included in the county's original decision. The county's fact-finding on these points was not disturbed on appeal. Nothing in our remand required the county to reevaluate unchallenged fact-finding about the subject property's topographic relationship to irrigated lands to the northwest,

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[11] As noted, the issues on remand turn almost exclusively on OAR 660-033-0020(1)(a)(B) and (C), which define "Agricultural Land" to include land that is suitable for farm use, considering a set of listed factors, as well as land that is "necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

or the soil characteristics of lands to the southeast approved for non-farm dwellings. Redside does not dispute the cited facts, argue that they constitute new evidence, or explain what relevance the cited facts have to any remand issue. Petitioner cites OAR 660-033-0020(1)(a)(B) and (C), and it is true that our remand required that the county address discrete issues with respect to those standards. But Redside has not established that the above-quoted statements have a bearing on any of the discrete remand issues.

As explained, to constitute an *ex parte* communication under ORS 215.422(3), the communication must "concern[] the decision or action" by the decision-makers, in this case, the decision on remand from LUBA. The scope of that remand was limited. Communications that do not concern matters within the scope of remand are therefore not subject to the obligations of ORS 215.422(3).

Under these circumstances, Redside must do more than merely establish that a decision-maker overheard a party make statements describing the subject property and some surrounding properties. Absent some showing that those statements have some bearing on the narrow scope of issues on remand, petitioner's arguments do not provide a basis for remand under ORS 215.422(3).

Next, Redside quotes another statement by the applicant's attorney, a legal argument regarding the role of profitability in determining whether land is agricultural land under the Goal 3 definition:

> "So I want to talk really quickly about this issue of farm use and as far as we understand, if the agency uh took a little bit of issue on this

> idea of primary purpose of profit. Uh and that in our opinion is something that is kind of black letter law.
>
> "The *Wetherell* case - *Wetherell v. Douglas County* [342 Or 666, 160 P3d 614 (2007)], which the Supreme Court decided in 2007 * * * uh pretty clearly tells you what you can do. And pretty clearly tells you that profitability is one of the main factors, and that indeed it is the land itself, the particular property that has to be able to support the agricultural use and that's important because it's different when you start to get into some issues about having a farm tract, which is not something that is at issue in this case. You do look at how you can put it into conjunction with other properties. That's a completely different issue than what we have today[.]" Redside Petition for Review 15.

Redside argues that, in this quoted argument, the attorney insists that the subject property's capability for farm use must be viewed in isolation, which is contrary to LUBA's later ruling in *Landwatch I*, where we held in relevant part that the county erred in considering the profitability of farm use based solely on the subject property, without also considering farm use in combination with or in relation to farm activities on nearby or adjacent land. LUBA Nos 2023-006/009 at (slip op at 36).

Redside is correct that the quoted argument, in suggesting that profitability should be evaluated based solely on farm use of the subject property, is contrary to our subsequent holding in *Landwatch I*. That argument therefore concerns a resolved legal issue that is outside the scope of remand. Our remand required the county to reevaluate the profitability factor based on more than farming the subject property, and we address below the parties' challenges to the county's remand findings on that point. However, for purposes of ORS 215.422(3), the

question is whether the statute obligates remand to require the Commissioner to "disclose" overhearing an erroneous statement of the law that is a resolved issue and hence outside the scope of remand. We conclude that the answer is no. A legal argument that is outside the scope of remand does not "concern" the county's decision on remand, for purposes of ORS 215.422(3).

Finally, we understand Redside to argue that the unrecorded conversation between Commissioner DeBone and DLCD staff included *ex parte* communications. As noted, LUBA took as evidence outside the record Commissioner DeBone's affidavit, which states his recollections of that conversation. The affidavit states in relevant part that DLCD staff

> "stated that the agency had technical assistance dollars available to Deschutes County if the County wanted to study the issue in more detail. I understood this statement to convey the message that the agency believed it was correct, and that Deschutes County should use public dollars to 'learn more' so that the Board of Commissioners could get to an understanding that matched the position of the agency in that appeal." Affidavit of Commissioner DeBone 2.

DLCD technical assistance dollars are typically used for comprehensive plan or land use code updates. It is not clear what "issue" DLCD staff was suggesting the county spend technical assistance dollars on, and no party sought to place before us an affidavit or statement of the DLCD staff member with his recollections of the conversation. Nonetheless, the information available to us does not suggest that DLCD staff imparted anything to Commissioner DeBone that concerned

issues within the scope of remand from *Landwatch I*. Accordingly, that conversation did not constitute an *ex parte* communication.

Redside's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (Redside)

Redside argues that at the LCDC hearing and the county proceedings on remand Commissioner DeBone made statements demonstrating that, due to bias and prejudgment, he was incapable of rendering a decision on the application based on the evidence and arguments presented and the applicable legal standards.

Generally, participants to a quasi-judicial land use proceeding are entitled to an "impartial tribunal." *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). However, at least with respect to elected officials acting as land use decision-makers, more recent cases recognize a high threshold for establishing bias and prejudgment. An elected official is expected to be intensely involved in community affairs, and a political predisposition on land use policy matters is not sufficient grounds for disqualification. *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014) (summarizing case law). Accordingly, the standard for disqualification is actual bias, not a mere appearance of bias. *Id.* at 602. That is, the party challenging the impartiality of the elected official must show that the decision maker "has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented." *Id.* (citing *Beck v. City of Tillamook*, 113 Or

App 660, 662-63, 833 P2d 1327 (1992)). An additional restriction on bias claims is that the scope of the matter or question at issue is narrowly limited to the specific decision that is before the tribunal. *See Columbia Riverkeeper*, 267 Or App at 609 (statements made during election campaigns generally opposing liquified natural gas terminals are not germane to whether the official was biased in voting to reject a specific application for a terminal).

In the present case, Redside cites to selected statements in Commissioner DeBone's testimony at the LCDC hearing, which can be read to suggest that the Commissioner believes that an irrigation water supply is necessary to make a profit in farming, that water supply availability is not an issue in approving the application or a mechanism to deny the application, and that denial of this application would threaten the owner's property rights.[12] Redside contends that

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[12] Redside quotes the following from the transcript of the LCDC hearing:

> "Lower Bridge is the area where farming for a profit is done in Deschutes County. The elevation is lower than Bend * * * and the soils are better with flat ground and irrigation water. **If you have flat ground and irrigation water, profit in money can be created.**
>
> "Now for the 710 Eden Crossing properties, 710 acres they are located on rocky outcropping above the Lower Bridge farming parcels. There may have been some historical grazing but the applicant has shown in the record that there is no opportunity for profit in money. **** One of these items was discussed and mentioned as a reason to deny this was water, uh 710 acres could be divided into 71, 10 acre parcels rural residential lots that would qualify for an exempt domestic well. **As Commissioners we are not**

these statements reflect views that were rejected by LUBA in *Landwatch I*. Further, Redside argues, the statements reflect considerations that are unrelated to the actual approval criteria, and a willingness to base the land use decision on those considerations rather than the approval criteria.

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in the domain of making decisions based on waters, this is not a decision point during this process.

"**** Either you have irrigation rights if you're going to use it for farming or you're allowed to put in a domestic well because we have no water limiting areas that the Oregon Water Resources would say yeah that's a[n] area of concern let's not allow new wells there. We don't have that, **we take water seriously in the basin and it comes, when it comes to land use and it's not a mechanism to deny**." Redside Petition for Review 22 (bold added by Redside).

"If the intention is to have rural open space this is another topic, if the intention is to have open rural space then maybe there's a different zoning called open space with a lower tax burden." *Id.* at 23-24.

"This is privately owned land that we're talking about. Private property owner—uh is zoned EFU should have the opportunity to farm for a profit." *Id.* at 24.

"So if the intention of the state land use system is to say well, we want that private property to be you know, low density, no development, maybe one house per 180 acres or whatever, some scenario maybe that's a change in our land use system. So that's a big one. That's a—you know, big home run type thing we're talking about here, but it's private property and if the intention is to leave that person's private property that they pay taxes on, open space, you know, it puts us in this spot." *Id.*

Redside also cites to comments made at the September 4, 2024 remand deliberations, when the Commissioner reflected on prior efforts to "work around" the one-size-fits-all nature of the statewide land use program.[13]

Redside contends that an impartial quasi-judicial decision-maker would not promote efforts to "work around" the statewide land use program in explaining why he is voting to approve a land use application. According to Redside, the quoted statements, taken together, demonstrate that Commissioner DeBone prejudged the application, and was unable to render a decision based on the evidence and arguments presented and the applicable land use standards.

Respondents argue, and we agree, that the statements Redside has cited fall short of demonstrating the "actual bias" that is required to disqualify an elected decision-maker. While some of Commissioner DeBone's statements at the LCDC hearing were based on defenses of the county's initial decision that did not fare well on appeal, the mere fact that the Commissioner expressed those

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[13] Redside quotes the following statement made at the September 4, 2024 proceedings:

> "[W]e tried to do a non-prime farmland effort. We've talked about if it should be open space. Maybe that's a new designation is it and this runs right into that same situation. A state land use system: one size fits all; the answer is this. We can't vary and now people are scared to even open it up because there's such high consequences and this puts us in this spot. Because we've tried to work around this but oh no, we're not going to have that discussion[.]" Redside Petition for Review, 24-25.

positions prior to LUBA's decision does not mean that, on remand, the Commissioner was unable to decide the matter based on the evidence in the record and a correct application of the law.

Similarly, that the Commissioner expressed frustration at the relative inflexibility of the land use program does not mean that he was unable to make a decision based on the evidence and arguments presented, under a correct understanding of the law. As the last sentence of the quote suggests, the Commissioner seemed to recognize that a discussion of prior attempts at a "work around" is not relevant to the task before him. In any case, as an elected official, the Commissioner is expected to have opinions regarding policy. That the Commissioner described a different policy and a different legal framework that he would prefer is not sufficient to demonstrate that he was actually biased, or unable to reach a decision based on the evidence and a correct application of the law as it exists.

Redside's second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (1000 Friends)

As noted, OAR 660-033-0020(1)(a)(C) defines "Agricultural Land" to include "[l]and that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." We held in *Landwatch I* that the county misconstrued OAR 660-033-0020(1)(a)(C) to limit its inquiry to whether the subject property "contributes" to farm practices on adjacent and nearby lands, or whether such practices "depend on the use of" the subject property. We

concluded that the "necessary" test also requires inquiry into whether it is necessary to retain the land's agricultural designation and zoning, in order to permit farm practices on adjacent or nearby lands to be undertaken. Accordingly, we remanded for the county to reconsider under a correct understanding of the law the evidence regarding the impacts of the proposed residential use on farm practices.

On remand, the county adopted additional findings, labeled "Remand Issue 4: Is the Property's existing designation 'necessary' to permit the continuance of farm practices on nearby and adjacent lands." Record 57. The findings then identify existing farm practices on adjacent and nearby lands zoned EFU, and evaluate whether residential use of the subject property if rezoned to RR-10 would prevent the continuation of those identified farm practices, considering impacts with respect to traffic and water, nuisance and trespassing. Record 57-83.

On appeal, petitioner 1000 Friends of Oregon (1000 Friends) argues that the county again misconstrued and misapplied OAR 660-033-0020(1)(a)(C). 1000 Friends first argues that the county erred in again asking the wrong question: whether adjoining and nearby farms require the *use* of the subject property in order to conduct farm practices. According to 1000 Friends, the county failed to ask the question posed by the rule as interpreted by LUBA and the Court of Appeals: whether it is necessary to retain the protective resource

designation and zoning in order to permit farm practices to be undertaken on adjoining and nearby farm lands.

1000 Friends are correct that some of the county's findings on remand focus on whether adjoining or nearby farms require the use of the subject property in order to conduct farm practices. However, we did not hold in *Landwatch I* that that question was incorrect, only that it was insufficient. We held that OAR 660-033-0020(1)(a)(C) *also* requires consideration of whether the land's resource designation and zoning must be retained, in order to permit farm practices on adjacent and nearby lands.[14] The findings at Record 67-83 address the latter question at some length, considering four types of impacts—traffic, water, nuisance and trespass. Accordingly, that the remand findings address both questions posed by the rule is not a basis for reversal or remand.

1000 Friends next argues that on remand the county erred in focusing on whether removing the land's resource designation and zoning would prevent the *continuation* of *existing* farm practices. According to 1000 Friends, the relevant

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[14] We held in *Landwatch I*:

> "[W]e agree with 1000 Friends that OAR 660-033-0020(l)(a)(C) asks not *only* whether the land itself is necessary to permit farm practices on adjacent or nearby lands but, *also,* whether the land's resource designation and zoning, and the presumed lack of impacts or conflicts with farming on adjacent or nearby lands, are necessary to permit farm practices on adjacent or nearby lands." LUBA No 2023-006/009 at (slip op at 59) (emphases added).

question posed by the text of OAR 660-033-0020(1)(a)(C) is whether retaining the resource designation and zoning is necessary *to permit farm practices to be undertaken*. We understand 1000 Friends to argue that the phrase "to be undertaken" is forward-looking, and encompasses not only the continuation of existing farm practices but also the establishment of new farm practices that potentially *could be* undertaken on adjacent and nearby lands.

Intervenor-respondent Turner responds, initially, that the issue of whether OAR 660-033-0020(1)(a)(C) requires evaluation of impacts on hypothetical or potential farm practices was not raised during either of the proceedings below, and thus is waived pursuant to ORS 197.797(1) and ORS 197.835(3).[15] Further, Turner argues that that issue could have been, but was not, raised on appeal either before LUBA or the Court of Appeals, and failure to raise that issue on appeal means that the issue is barred in this second round of appeals by the doctrine of

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[15] ORS 197.797(1) provides:

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

ORS 197.835(3) provides, in relevant part:

> "[LUBA] may only review issues raised by any participant before the local hearings body as provided by * * * ORS 197.797 * * *.

law of the case. *See Devin Oil Co. v. Morrow County*, 252 Or App 101, 111-13, 286 P3d 925 (2012) (*Beck* law of the case doctrine bars judicial review of issues that could have been, but were not, raised in previous appeals of the same case).

With respect to waiver under ORS 197.797(1), 1000 Friends replies that during the initial proceedings DLCD argued to the county that OAR 660-033-0020(1)(a)(C) requires an evaluation of "farming and ranching practices that are associated with *existing and potential* farm uses in the surrounding area." LUBA No 2023-006/009 Record 464, 1432 (emphasis added). We agree with 1000 Friends that, so far as ORS 197.797(1) is concerned, the DLCD letter adequately preserved the issue presented in 1000 Friends' assignment of error for the first stage of appeal to LUBA.

However, it appears that that issue was not pressed thereafter at every stage of this appeal. On appeal to LUBA, 1000 Friends' brief argued in relevant part only that the county must evaluate whether EFU zoning is necessary to permit farm practices to "continue." 1000 Friends Petition for Review, LUBA No. 2023-006/009 18; Turner Response Brief App-1. 1000 Friends did argue, generally, that the initial findings are inadequate to address the "issues of compliance with OAR 660-033-0020(1)(a)(C) raised by" the DLCD letter, but 1000 Friends' brief did not advance any argument that the county's initial decision was defective for failure to address impacts on *potential* farm practices in the surrounding area. LUBA's decision in *Landwatch I* quotes the pertinent portion of the DLCD letter,

(slip op at 52-53), but did not address the question of hypothetical or potential farm practices, because no party asked us to resolve that question.

An argument could be made that the issue of whether the county must evaluate both existing and potential farm practices was not yet ripe at that point, given the county's complete failure to consider impacts on any farm practices under the rule. However, even if so, the issue was certainly ripe when the matter was returned to the county on remand.

On remand, no party apparently argued to the county that OAR 660-033-0020(1)(a)(C) requires the county to consider the impacts of rezoning on both existing and potential farm practices. 1000 Friends cites us to only one place in the remand record where a party raised issues on this point, but even then the party argued only that the rezoning must "permit the *continuation* of customary farm practices on adjacent and nearby agricultural land." Record 957 (emphasis added).

Nonetheless, 1000 Friends argues that it could not reasonably anticipate that the county's remand findings would expressly adopt, for the first time, an interpretation that OAR 660-033-0020(1)(a)(C) is limited to considering the impacts of rezoning on *existing* farm practices. However, as Turner points out, the county's original decision compiled an inventory of farm uses and farm practices on surrounding lands, for purposes of OAR 660-033-0020(1)(a)(C), that inventoried only *existing* uses and practices. No party successfully challenged the adequacy of that inventory before LUBA or the Court of Appeals, or argued that

the inventory was inadequate for failure to include potential uses. The adequacy of that inventory was thus a resolved issue. On remand, it was entirely foreseeable that the county would use that inventory of existing uses and practices to address the remand issues under OAR 660-033-0020(1)(a)(C), *i.e.*, that the county would evaluate only impacts on *existing* farm practices. Even then, 1000 Friends failed to raise any issues at all on remand regarding impacts on potential farm practices.

Currie v. Douglas County, 308 Or App 235, 481 P3d 427 (2020), addressed a similar failure to press issues at all stages of an appeal. In the LUBA decision preceding *Currie*, we remanded to the county to identify "surrounding uses," expressly noting our understanding that the petitioner limited their assignment of error to existing surrounding uses, not potential ones. *Currie v. Douglas County*, 79 Or. LUBA 585, 609 (2019). The petitioner did not appeal our decision to the court, but instead on remand attempted to raise the issue it had failed to press before LUBA, that the approval criterion required identifying and evaluating impacts on potential uses in the surrounding area. The Court of Appeals rejected that argument as waived under *Beck* and *Devon Oil*. The present case offers a similar failure to press issues at all stages of appeal.

Accordingly, we agree with Turner that the misconstruction of law argument raised in 1000 Friends assignment of error is waived, under the law of the case doctrine described in *Beck*, *Devon Oil*, and *Currie.*

1000 Friends' first assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (Buchanans)
FIRST ASSIGNMENT OF ERROR (Landwatch)

The Buchanans own a 37.51-acre parcel adjoining the subject property. They operate, among other businesses, Keystone Cattle & Performance Horses, LLC (Keystone), which involves grazing cattle on irrigated pastureland near Powell Butte, approximately 20 miles from the subject property, with winter grazing on their 37.51-acre irrigated parcel. During the initial county proceedings, the Buchanans submitted a business plan proposing use of the subject property for seasonal dryland grazing of their herd as an expansion of their existing Keystone operation. Specifically, the Buchanans proposed to graze an unspecified number of cows for several months in the spring and early summer, with the number of cows and the duration of grazing to be determined based on the forage available each year. The Buchanans stated that the proposed expansion of their existing cattle operation would benefit the operation and increase their profits. The Buchanans argued that their proposal to use the subject property for seasonal grazing in conjunction with their own property demonstrated that the subject property was "suitable for farm use" under OAR 660-033-0020(1)(a)(B).

As noted, OAR 660-033-0020(1)(a)(B) defines "agricultural land" to include "[l]and in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration * * * suitability for grazing[.]" Relatedly, OAR 660-033-0030(3) provides that "[n]earby or adjacent land,

regardless of ownership, shall be examined" to determine whether a lot or parcel is "suitable for farm use" under OAR 660-033-0020(1)(a)(B).

The county's initial decision did not address the Buchanans' testimony, under the mistaken view that OAR 660-033-0020(1)(a)(B) does not require the county to consider whether the property is suitable for farm use if used in conjunction with adjacent or nearby lands. As noted, in *Landwatch I*, we held in relevant part that the rule requires the county to consider conjoined use and remanded to the county to consider that question in the first instance, including with respect to the Buchanans' proposal.[16]

We also held that the county erred in placing "undue weight on the profitability of farm use on the subject property," and remanded for the county to address the "ability to use the subject property with a primary purpose of obtaining a profit in money in conjunction with other property." *Landwatch I*, LUBA Nos 2023-006/009 (slip op at 35-36). As noted, the ORS 215.203(2)(a) definition of "farm use" lists a number of activities that constitute farm use when

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[16] We directed the county:

> "On remand, the board of commissioners must consider the ability to use the subject property for farm use in conjunction with other property, including the Keystone property, and may not limit its review to the profitability of farm use of the subject property as an isolated unit. The board of commissioners must consider the ability to import feed for animals and may not limit its consideration to the raising of animals where adequate food may be grown on the subject property." *Landwatch I*, LUBA Nos 2023-006/009 (slip op at 85).

engaged "for the primary purpose of obtaining a profit in money[.]"[17] Thus, even though "profitability" is not a listed factor in OAR 660-033-0020(1)(a)(B), because some notion of "profitability" is part of the statutory definition of "farm use," and "farm use" is referenced in OAR 660-033-0020(1)(a)(B), profitability is one of the considerations in determining whether land is "suitable for farm use" under the rule. *See Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007) (invalidating an LCDC rule that prohibited consideration of profitability in determining whether land is agricultural land under OAR 660-033-0020(1)(a)).[18]

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[17] The phrase "primary purpose of obtaining a profit in money" is a term of art, with a specialized meaning in both tax law and land use law. We address below the parties' arguments regarding the meaning of that phrase. In the meantime, for convenience we follow the parties in using shorthand terms such as "profitable" or "profitability," cautioning only that those shorthand terms do not necessarily correspond to their ordinary usage.

[18] In *Wetherell*, the Supreme Court cautioned against assigning "profitability" an overly determinative role in the calculus under OAR 660-033-0020(1)(a)(B), at the expense of the considerations listed in the rule:

> "Although profitability and gross farm income—both actual and potential—may be considered in determining whether land is suitable for farm use, we do not address the weight to be given to those considerations in any particular land use decision. In their arguments before LUBA, the Court of Appeals, and this court, the parties and *amici* appear to assume, at times, that, if particular land currently is 'profitable' or produces 'gross farm income,' then that land necessarily meets the 'farm use' test and is properly classified as agricultural land under Goal 3, whereas if the land is "unprofitable" for farming or produces no "gross farm income," then it necessarily is not agricultural land under Goal 3. The case

On remand, the applicants submitted evidence in the form of testimony from several persons with ranching or agricultural experience around the state, opining that the subject property is not suitable for grazing, even in conjunction with the Buchanans' adjoining 37.51-acre parcel. Based on these opinions, the applicant argued that no rancher whose primary purpose is to obtain a profit in money would attempt to graze cattle seasonally on the subject property together with the adjoining 37.51-acre Buchanan parcel. The county chose to rely on the applicant's testimony, over the testimony of the Buchanans.

Over two sub-assignments of error, intervenors-petitioners William Buchanan, Elizabeth Buchanan, and Keystone (the Buchanans) challenge the county's findings that the subject property is not suitable for grazing in conjunction with their adjoining parcel. In its first assignment of error, petitioner Central Oregon Landwatch (Landwatch) also challenges those findings.

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before us, in its particular posture, does not present those issues. The determination that a particular parcel of land is 'agricultural land' turns instead on the local government's conclusion, subject to review by LUBA and the courts, that the land is '*suitable* for farm use,' taking into consideration the factors identified in Goal 3. The only issue that we decide today is whether 'profitability' or 'gross farm income' can be *considered* by the local government in making its land use decision, and our decision is limited to holding that the rule prohibiting the local government even from considering such evidence is invalid." 342 Or at 683 (emphases in original).

A. First Sub-Assignment of Error (Buchanans)

Under the first sub-assignment of error, the Buchanans argue that on remand the county again misconstrued the applicable law by overemphasizing "profitability," while giving short shrift to the other considerations listed in OAR 660-033-0020(1)(a)(B). The Buchanans note that, following the Supreme Court's *Wetherell* decision, LUBA addressed the role of profitability in applying OAR 660-033-0020(1)(a)(B), commenting that profitability is a "relatively minor consideration, and one that has a large potential for distracting the decisionmaker and the parties from the primary considerations listed in the rule definition." *Wetherell v. Douglas County*, 58 Or LUBA 638, 657 (2009). In the present case, the Buchanans argue that the county again became distracted by profitability, and treated it as the lodestone of the inquiry under the rule, rather than a relatively minor consideration subordinate to more primary considerations.

Intervenor-respondent Thomas responds that the flaw in the county's initial finding was not that it over-emphasized profitability vis-à-vis the other rule considerations, but that, as LUBA held, it placed "undue weight on the profitability of farm use *on the subject property*." *Landwatch I*, LUBA Nos 2023-006/009 (slip op at 35) (emphasis added). Thomas argues that, on remand, the county appropriately adopted extensive findings addressing conjoined use with the Buchanan property, and those findings evaluate each of the considerations listed in OAR 660-033-0020(1)(a)(B), including the substantial volume of evidence submitted concerning the profitability of a conjoined grazing operation.

We agree with Thomas that our "undue weight" basis for remand was directed at the county's exclusive focus on the subject property, rather than the appropriate weight given to consideration of profitability compared to the weight given other considerations. While the county's findings on remand address profitability at length, and those findings are more extensive than those addressing other considerations, that differential presumably correlates to the relative volume of evidence submitted and issues raised regarding each consideration. Petitioners have not established that the county erred in giving short shrift to other considerations, or otherwise elevated considerations of profitability over considerations listed in the rule.

The Buchanans next argue that the "profitability" aspect of the farm use definition at ORS 215.203(2)(a) focuses on intent, *i.e.*, whether a farmer is motivated to employ land "for the primary purpose" of obtaining a profit in money by engaging in one or more of the listed activities. Because the definition turns on purpose or intent, petitioners argue that it is immaterial whether the end result is profitable or not. Petitioners concede that the farm operator's intent must be reasonable, that the operator must identify a potentially plausible means of achieving a profit. But we understand petitioners to argue that it is unnecessary to support that intent with detailed financial explanations demonstrating that a proposed conjoined farm use would likely result in profit of some kind. We understand petitioners to contend that if an adjoining farm operator declares interest in conjoined use of the subject property, that expression of intent is

sufficient, without more, to demonstrate that the subject property is "suitable for farm use" under the rule. Petitioners argue that the Buchanans' expressed intent to graze the subject property as part of their existing profitable beef business is a strong, if not compelling, basis to conclude that the property is suitable for farm use.

We disagree with petitioners that subjective intent is the hallmark of what constitutes a "farm use" for purposes of the definition of Agricultural Land at OAR 660-033-0020(1)(a)(B). That test is better understood as an objective test: whether a reasonable farmer would be motivated to put the land to agricultural use, for the primary purpose of obtaining a profit in money (*i.e.*, not as a hobby), given the considerations listed in the rule. *Central Oregon Landwatch v. Deschutes County*, LUBA No 2023-49 (Feb 15, 2024) (slip op at 7) (citing *Landwatch Lane County v. Lane County*, 77 Or LUBA 368, 371 (2018) and *Doherty v. Wheeler County*, 56 Or LUBA 465, 472 (2008)). We discuss below under the Buchanans' second sub-assignment of error what kind of evidence is material under OAR 660-033-0020(1)(a)(B). However, for present purposes, we disagree with petitioners that their expressed intent to graze the subject property as part of their beef business is a conclusive basis, without more, to find that the subject property is suitable for farm use, as it regards profitability.

The Buchanans' first sub-assignment of error is denied.

B. Second Sub-Assignment of Error (Buchanans); First Assignment of Error (Landwatch)

The Buchanans and Landwatch both argue from different perspectives that the county's findings regarding profitability of conjoined use with the Buchanan parcel are not supported by adequate findings and substantial evidence. These arguments generally take two forms: (1) challenging the evidence the county relied upon, and (2) arguing that the county erred in rejecting the evidence the Buchanans submitted regarding their proposal for conjoined use.

Substantial evidence is evidence that a reasonable person would rely upon in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179 (1993). The applicant bears the ultimate burden of proof of providing evidence that the approval criterion is met. As applied in the present case, that requires essentially proving a negative: that the subject property is *not* suitable for farm use, including grazing in conjunction with adjacent or nearby lands, considering the factors listed in OAR 660-033-0020(1)(a)(B). If, as happened here, a nearby rancher testifies that they are interested in conjoined farm use, the applicant has the additional burden of addressing that testimony. *See Ploeg v. Tillamook County*, 50 Or LUBA 608, 633 (2005) (county erred in rejecting adjoining farmers' proposals for conjoined use, where the applicant provided no contrary evidence).

To meet that added burden, on remand the applicants submitted in response to the Buchanans' original business plan letters from a number of ranchers and agricultural experts, generally averring that the subject property, even considering conjoined use with the Buchanan parcel, is not suitable for grazing.

The most detailed letter is from rancher and real estate development lawyer Rand Campbell, which critiques the Buchanan offer and provides an analysis of presumed income and expenses to demonstrate that the proposed conjoined use would not be profitable, *i.e.* that a reasonable rancher would not be motivated to employ the subject property with the Buchanan parcel with the primary purpose of obtaining a profit in money. Record 611-16. That analysis was based on a number of assumptions about how such a conjoined use would operate.

In response, on remand the Buchanans offered critiques of the Campbell letter, and offered some additional details about their Keystone operation. Record 951-52. In its remand decision, the county chose to rely on the Campbell letter and the other letters applicants submitted with respect to the issue of conjoined use, and rejected the Buchanans' testimony.

On review, the Buchanans and Landwatch argue that the Campbell letter and other evidence the county relied upon do not constitute "substantial evidence," *i.e.* evidence a reasonable person would rely upon. Petitioners acknowledge that where the record includes substantial evidence supporting a finding of compliance with an approval criterion, as well as substantial evidence supporting a finding of noncompliance, the decision-maker is entitled to choose which evidence to believe. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). LUBA's role in that circumstance is not to reweigh the evidence, or substitute its judgment for the decision-maker, but rather only to determine whether the evidence relied upon constitutes substantial evidence in the whole

record. *Wilson Park Neighborhood Assoc. v. City of Portland*, 27 Or LUBA 106, 113 (1994). However, petitioners contend that no reasonable person could conclude, as the county did, based on the whole record that the applicants met their burden of proving that the subject property is not suitable for grazing in conjunction with the Buchanan parcel.

Relatedly, in its first assignment of error Landwatch offers several critiques of the Campbell letter. First, Landwatch disputes a portion of the Campbell letter estimating that the carrying capacity of the Buchanan parcel is 1.0 animal unit per month (AUM) per acre. The Campbell letter uses this estimate to evaluate the productive capacity of conjoined use in various ways. The estimate was based on information from the Oregon State University Extension Service: that irrigated land in central Oregon typically supports 1.0 AUM per acre depending on the condition of the pasture. Landwatch objects that this evidence of "typical" carrying capacity is not a basis to draw any conclusions about the actual carrying capacity of the Buchanan parcel. Landwatch argues that the record lacks any evidence of the parcel's actual carrying capacity, and therefore the Campbell letter lacks any evidence supporting the critical estimate.

However, as intervenors argue, the only possible source of more accurate estimates of the carrying capacity of the Buchanan parcel would be the Buchanans, who chose not to provide any information regarding the actual carrying capacity of their land. In the absence of any site-specific information,

the county did not err in relying on the estimates of typical capacity provided by the OSU Extension Service.

Landwatch next argues that the Campbell letter and county findings conclude that conjoined use would be unprofitable based largely on the unfounded assumption that the Buchanans' entire herd would reside most of the year on the subject property, and thus would have to be fed imported feed for eight months or more at significant expense.[19] Landwatch notes that the Buchanans proposed to graze some of their herd on the subject property for only 2-4 months, in spring and early summer when forage is most abundant, and that the Buchanans did not propose to leave the herd on the property the remainder of the year, or to conduct supplemental feeding on the subject property. Instead, Landwatch argues, it is clear under the Buchanan proposal that their herd would graze much of the year on their irrigated parcel near Powell Butte. However, Landwatch argues, the Campbell letter ignored this part of the proposal, and pretended that the herd would reside most of the year on the subject property, and either starve or require more than eight months of expensive supplemental feeding. By erroneously assuming that the proposal required supplemental

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[19] The Campbell letter estimated that supplemental feed for approximately eight months would cost between $21,260 and $43,204 per year, depending on the size of the herd and other variables, and that that supplemental feed cost alone would exceed the expected revenue from the grazing operation. Record 614-15.

feeding, Landwatch argues, the Campbell letter vastly over-estimated the costs of the proposed conjoined use.

Our remand in *Landwatch I* required the county to consider a scenario where the subject property is used essentially as a feedlot, with supplemental feed imported from elsewhere. Hence, it was not error for the county to consider the expense and feasibility of providing supplemental feed. However, we separately remanded for the county to evaluate the Buchanans' proposal for conjoined grazing use, which was limited to 2-4 months of grazing on the subject property and did not propose or require supplemental feed on the property. As we understand their proposal, for the remainder of the year their herd would be located on either their adjoining parcel or their Powell Butte irrigated pasture.

Intervenor 710 responds that because the Powell Butte pasture is located 20 miles away from the subject property and is neither adjacent nor nearby, the Campbell letter and the county properly ignored the Powell Butte pasture for purposes of analyzing the profitability of conjoined use with the adjacent Buchanan parcel. It is true that our remand did not require the county to consider conjoined use between the subject property and the Powell Butte pasture itself.[20]

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[20] The Powell Butte pasture is not adjacent or nearby the subject property, and so would not require independent analysis of conjoined use for purposes of OAR 660-033-0020(1)(a)(B). But our understanding is that it is commonplace for cattle ranches in central Oregon to use noncontiguous parcels that are owned or leased, and to periodically transport cattle between the different units of the overall ranch operation. If an adjacent or nearby parcel is part of a larger

However, we did remand for the county to evaluate the Buchanan proposal for conjoined use of the subject property with the Buchanan parcel, and that proposal did not include leaving the Buchanan herd on the subject property for more than a few months, or for any period of time that would require supplemental feeding.

In essence, the Campbell letter evaluated the profitability of a significantly *different* proposal than the one proposed by the Buchanans. That erroneous focus on a different proposal significantly undermines the letter's conclusions regarding the profitability of conjoined use under the Buchanan proposal. The estimated cost of supplemental feed on the subject property is by far the largest single cost assumed by the Campbell letter. So large is that assumed cost for feed that, if it were subtracted, the Campbell letter could be read to indicate that the Buchanan proposal for conjoined use might be profitable, depending on what other variables and assumptions are employed.

Nonetheless, petitioners have not demonstrated that the county's choice to rely on the applicants' evidence regarding the profitability of conjoined use is not supported by substantial evidence, or that, as a matter of law, a reasonable decision-maker could only rely on the Buchanans' testimony. Despite some erroneous assumptions in the Campbell letter, the letter identifies a number of ongoing expenses that any conjoined grazing use of the subject property would

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noncontiguous ranch operation, an accurate evaluation of conjoined use with that adjacent or nearby parcel might well require some consideration of the role that parcel plays, and the subject property would play, in the larger ranch operation.

likely incur, and attempts to assign numbers to at least some of those expenses. For example, there is no dispute that the subject property lacks facilities for watering cattle. The Campbell letter notes the expense of digging new wells or hauling water to the subject property. Either method would require some means of distributing water to different sub-areas, and installing troughs of some kind. The Buchanans replied that digging a new well would be unnecessary, that a supply for 70 head of cattle—approximately 1,400 gallons—could be hauled to the subject property every two days. The Buchanans also suggested that the domestic well on the property could supply sufficient water, rather than hauling water from an offsite source. However, all water-hauling methods cited by the Buchanans would incur some unknown level of expense. Unlike the Campbell letter, the Buchanans made no effort to estimate any of the typical or likely expenses that their proposed conjoined grazing operation would incur.

In the face of the Campbell letter's attempt to estimate typical expenses and compare them to gross revenue, the Buchanans' generalized assertion that conjoined use could be profitable is not sufficient to compel the county to rely on the Buchanans' testimony. A more persuasive approach might have offered at least a pro forma budget for the proposed conjoined grazing operation, which

would identify the assumptions employed, attempt to quantify typical or likely expenses, and provide some estimate of revenue.[21]

The Campbell letter aside, the county's conclusions regarding conjoined use are also supported by several other letters from area ranchers and others with relevant experience. While those letters largely do not explain or quantify their conclusions that conjoined grazing use with the subject property would be unprofitable, in this respect they are no worse than the Buchanans' largely unexplained and certainly unquantified assertion that conjoined use with their adjoining parcel could increase their profits. As explained above, an adjoining rancher's mere *intent* or purpose to employ the subject property in an attempt to obtain a profit in money is not a sufficient basis on which to conclude that the subject property is suitable for grazing, in conjunction with adjacent or nearby ranch lands.

In this respect, the state of the evidentiary record resembles that in *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009) in which an adjoining rancher proposed a conjoined grazing operation. In response, the applicant

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[21] Respondents criticize the Buchanans for failure to submit tax or financial records of their Keystone operation. We disagree with respondents that submittal of such confidential information is necessary to support a proposal for conjoined use for purposes of OAR 660-033-0020(1)(a)(B). That said, there is no doubt that such a proposal would warrant more serious consideration if it were accompanied by a pro forma analysis of reasonably anticipated annual and amortized expenses and an estimate of anticipated revenue.

submitted an economic analysis of expenses and revenues that, like the Campbell letter, employed some questionable assumptions. Despite those flaws, we upheld the county's finding that the subject property was not suitable for grazing considering conjoined use, because the portions of the economic analysis untainted by questionable assumptions supported that finding, and no party provided comparable information regarding likely expenses or revenue. *See also Wetherell v. Douglas County*, 60 Or LUBA 131, 148 (2009), *aff'd* 235 Or App 246, 230 P3d 976 (2010) (addressing a similar flawed economic analysis of conjoined use and absence of comparable evidence).

In sum, petitioners have not demonstrated that the county could not rely on the Campbell letter and other evidence in the whole record to conclude that a reasonable rancher would not undertake seasonal grazing of the subject property in conjunction with the Keystone operation with the primary purpose of obtaining a profit in money. The county found that the other OAR 660-033-0020(1)(a)(B) considerations also fail to support a conclusion that the subject property is suitable for farm use, and those findings are either unchallenged in this appeal or any challenges were resolved in *Landwatch I*. Accordingly, petitioners' arguments under these assignments of error do not provide a basis for reversal or remand.

The Buchanans' second sub-assignment of error is denied.

The Buchanans' and Landwatch's first assignments of error are denied.

SECOND ASSIGNMENT OF ERROR (Landwatch)

Landwatch argues that the county erred in failing to address conjoined use with adjacent or nearby properties other than the Buchanan parcel. Landwatch identifies two groups of properties that, it argues, the county failed to adequately evaluate for conjoined use with the subject property.

The first is the Johnson ranch, located approximately one mile from the subject property, outside the Study Area identified by the county. We understand petitioner to argue that the county should have evaluated the possibility of conjoined grazing use with the Johnson ranch. Intervenor 710 responds that any challenge to the adequacy of the Study Area identified by the county is foreclosed by petitioners' failure to challenge on appeal the Study Area adopted in the county's initial decision. In addition, 710 argues that a property located approximately one mile from the subject property is neither adjacent nor nearby, and thus need not be evaluated for conjoined use under OAR 660-033-0020(1)(a)(B).

We agree with 710 that all potential challenges to the Study Area or which lands should be studied for conjoined use were resolved or could have been resolved in *Landwatch I*, and that petitioner's arguments that the county should have evaluated conjoined use with the Johnson parcel outside the Study Area is waived, under the reasoning in *Beck*. In any case, we also agree with 710 that, while the geographic scope of "nearby" is somewhat elastic, petitioner has not established that property one mile away from the subject property is "nearby"

under the circumstances of this case, for purposes of OAR 660-033-0020(1)(a)(B). *See Wetherell*, 60 Or LUBA at 147 (parcel located two miles away is not "nearby").

The second group of properties consists of adjacent and nearby irrigated farms within the Study Area, located to the northwest and the southeast, which grow crops such as alfalfa, orchard grass and timothy grass.[22] The county generally dismissed the notion of conjoined use with these irrigated properties, noting lack of interest by the owners, the steep topography separating the subject property from irrigated farms to the northwest, lack of irrigation on the subject property for cultivation of crops, and the other limitations discussed above with respect to the Buchanan proposal. However, Landwatch argues that the county failed to evaluate whether the irrigated farms could be used in conjunction with a grazing operation on the subject property. Landwatch disputes the county's finding that it would be impracticable to move cattle back and forth between the subject property and irrigated parcels to the northwest, given the steep topography. Landwatch notes that the Buchanans proposed to walk cattle directly

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[22] Landwatch also cites to maps showing irrigated parcels that are beyond the Study Area identified by the county, located within about a 5-mile radius of the subject property. On this scale, Landwatch argues, the subject property seems almost surrounded by thousands of acres of irrigated parcels growing forage crops. However, as explained above, petitioner has not demonstrated that these parcels, most located miles away from the subject property, are "nearby" for purposes of OAR 660-033-0020(1)(a)(B).

to the subject property from their irrigated parcel to the southeast, where terrain is less steep. Landwatch also argues that parcels to the northwest could avoid steep slopes by trucking cattle along county roads to the southeast access point.

710 responds, and we agree, that petitioner has not demonstrated that the county erred in rejecting conjoined grazing use with irrigated parcels other than the Buchanan parcel. The same reasons discussed above that the county found militate against conjoined grazing use with the Buchanan parcel would presumably also apply to other adjacent irrigated parcels. In addition, such conjoined use would labor under the additional expense of trucking cattle back and forth, as well as the need to construct corrals and loading chutes on the subject property. Finally, we note that the scenario petitioner contemplates is that the irrigated parcels would convert their cropland to irrigated pasture, and convert their business model from growing crops for sale to a cattle grazing operation. It is doubtful that in considering conjoined use under OAR 660-033-0020(1)(a)(B) and OAR 660-033-0030(3), a county must consider scenarios requiring wholesale changes to farming practices on existing adjacent or nearby farm operations. OAR 660-033-0020(1)(a)(C) is concerned in part to *protect* existing farm practices. Reading OAR 660-033-0020(1)(a)(B) to require the county to consider scenarios where adjoining and nearby farm operations make fundamental changes in their farm practices and business models would put the two rules into conflict. Accordingly, we reject that argument.

Landwatch's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (Landwatch)

The definition of "farm use" at ORS 215.203(2)(a) encompasses a wide array of activities, including "the feeding, breeding, management and sale of, or the produce of, livestock, poultry, * * * [and] any other agricultural or horticultural use or animal husbandry or any combination thereof." *See* n 2. In addition, ORS 215.203(2)(a) includes in the definition the profit-motivated "stabling or training [of] equines including but not limited to providing riding lessons, training clinics and schooling shows."

Under the third assignment of error, Landwatch argues that the county erred in rejecting arguments that the subject property, in conjunction with adjacent or nearby parcels, could not be used to raise chickens, goats and pigs, produce eggs, grow plants in greenhouses, conduct feedlots, or operate a horse boarding or training facility, or a riding school.

The county rejected those arguments below, noting that all of the cited farm activities would require a water source, and citing the cost of purchasing water rights, drilling a well, installing a pump, irrigation system, etc. Addressing chicken-raising, the county further found that free-range chicken farms in Central Oregon require irrigated pasture. The county also found that all the cited activities would require establishing electrical service to the subject property, noting the need to cool animals and plants during summer months. The county found that establishing electrical service would be cost-prohibitive.

Landwatch challenges these findings, disputing that free-range chickens require irrigated pastures, and arguing that no new wells are needed, as the domestic well serving the non-farm dwelling on the property might provide all the water needed. Landwatch argues that a domestic or exempt well can be used for watering livestock, citing ORS 537.545.[23] With respect to electricity, petitioner argues that there is no evidence in the record that establishing electrical service would be cost-prohibitive, and in any case the operator could simply install solar panels and storage batteries.

710 responds by citing to expert testimony that chicken farms require irrigated pastures and significant water and electrical infrastructure. Record 980-83. We agree with 710 that the county's findings regarding chickens are supported by substantial evidence. Even if a single domestic well could legally and functionally supply all the water needed to support a chicken farm on the subject property, something petitioner does not attempt to establish, there is no doubt that installation of a water distribution system would represent significant expense.

With respect to electrical service, 710 cites to evidence that, due to various constraints upon the two electric utilities that serve the area, providing electricity to the property would cost $365,000 from one utility and $570,000 from the other,

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[23] ORS 537.545 provides in relevant part that certain uses of groundwater, including "stockwatering," are exempt from requirements to have a legally recognized water right.

and that extensions from both utilities would be needed to serve full development of the subject property. Record 891. Landwatch replies that these figures are based on estimates to extend power to supply a 71-lot subdivision, and argues that the record includes no estimate of cost to extend power to serve a chicken farm or similar farm facility. However, the cited evidence provides some support for the county's finding that providing electricity to service a chicken farm or other farm facility on the property would be a significant capital expense. Petitioner does not dispute that extending electrical service to farm uses would be relatively costly.

With respect to petitioner's suggestion that solar power could supply all electrical needs, 710 argues that this issue was not raised in any earlier phase of this appeal and is waived under *Beck*. We agree with 710. In any case, petitioner cites no basis to support its apparent presumption that installing solar panels and storage capacity necessary to serve chicken coops or similar farm facilities would cost less than extending power from the utilities.

For similar reasons, petitioner's arguments regarding goats, pigs, feedlots and greenhouses also provide no basis for reversal or remand. The county found that all such proposals would require installation of significant water and/or electrical infrastructure, at significant expense.

Finally, Landwatch argues that the findings concluding that the subject property is not suitable for horse boarding, riding and training facilities are not supported by substantial evidence. Landwatch cites the testimony of an equine

nutritionist stating that the subject property could be suitable for a boarding, riding and training facility, similar to four other horse facilities in the region, located near the cities of Bend and Redmond. The equine nutritionist also stated that many horses do not do well on irrigated pasture and require dry acreage. To counter, the applicants submitted statements from the operator of a horse boarding, training and riding facility, opining that such a facility requires a mix of dry and irrigated pasture, as well as level ground with a minimum of rocks, noting that all four of the facilities cited have those qualities, unlike the dry, steep, rocky terrain of the subject property. The operator also noted that all four facilities are located near urban areas, with good road access, and proximity to a large concentration of customers for horse facilities, unlike the subject property. The county chose to rely on the testimony of the facility operator over the equine nutritionist, adopting findings that the subject property lacks many of the qualities needed for a horse boarding, training and riding facility.

Landwatch argues that no reasonable decision-maker would rely on the testimony of a mere facility operator over a credentialed equine nutritionist, on the suitability of the subject property for a horse facility. However, we agree with 710 that both sets of testimony constitute substantial evidence on that point. Accordingly, LUBA must defer to the county's choice of which substantial evidence to rely upon. *Younger*, 305 Or at 360.

Landwatch's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (Landwatch)

Landwatch argues that the county misconstrued the applicable law in rejecting arguments that the subject property could be profitably leased to adjoining property owners such as the Buchanans.

The county found that no reasonable rancher would lease the subject property for cattle grazing in conjunction with their own land, based on lack of forage and other reasons discussed elsewhere in this opinion.[24] However, the county also evaluated profitability with respect to the property owner acting as lessor, finding that lease revenue to the owner would not cover the cost of property taxes, even with farm tax deferral, or cover the cost of necessary improvements for grazing, such as the cost of installing perimeter fencing and water stations. Record 93, 113-14.

On appeal, Landwatch challenges those findings, arguing that the county misconstrued ORS 215.203(2)(a) by evaluating the profitability of a conjoined grazing use based on a lease from the lessor's perspective rather than the tenant's. According to Landwatch, the property owner in that circumstance is acting not

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[24] We note that the Campbell letter appears to include lease payments for the subject property as an expense to the farm operator, for purposes of evaluating profitability. Record 614. *But see Wetherell*, 60 Or LUBA at 156 (Ryan, Board Member, concurring, opining that lease payments should not be included as an expense in evaluating profitability under OAR 660-033-0020(1)(a)(B)). No party raises any issue on this point in this appeal, however, so we do not consider it further.

as a farmer but as a person engaged in a real estate business. Landwatch argues that the proper focus of any evaluation of profitability under ORS 215.203(2)(a) with respect to a proposal to lease the subject property as part of a conjoined grazing operation is on the tenant's grazing enterprise. Under that focus, we understand petitioner to argue, expenses incurred by the property owner as a property owner or land investor, for example property taxes and any capital improvements unrelated to a farm use, are not part of the profitability calculus.

710 responds that the county properly considered evidence that potential lease revenue from leasing the subject property for a conjoined grazing operation would not cover the expenses of land ownership, including property taxes and capital improvements that might be required to attract a tenant. 710 argues that it would be nonsensical to ignore evidence that fair market lease rates for grazing use would not cover the typical expenses of the property owner.

We generally agree with petitioner that the definition of "farm use" at ORS 215.203(2)(a) is concerned with whether a reasonable farmer would be motivated to undertake farming activities listed in the rule, for the primary purpose of obtaining a profit in money from those activities, not whether a landowner would be motivated to lease the land for farming activities, with the primary purpose of obtaining a profit in rental income. In evaluating profitability as part of determining whether property is "suitable for farm use" considering conjoined use with adjacent or nearby farm parcels, the appropriate focus is on the potential revenues and expenses of the farm operator, not the property owner. The property

owner may well be holding the land based solely on investment-backed expectations, or as part of a tax strategy to generate a paper business loss, rather than because of its potential to generate income from farming activities.

That said, petitioner's argument on this point does not provide a basis for reversal or remand. As we understand the county's findings regarding landowner expenses in a lease scenario, such findings were alternatives to the county's primary analysis focused on whether a reasonable neighboring rancher would expand their grazing operation to include the subject property, with the primary purpose of obtaining a profit in money. The county answered that question in the negative, for a number of reasons discussed elsewhere in this opinion. We have affirmed the county's findings under that primary analysis. Accordingly, any error in the county's alternative findings regarding whether it would be profitable for the property owner to lease the subject property is not a basis for reversal or remand.

Landwatch's fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (Redside)

As noted, OAR 660-033-0020(1)(a)(C) requires the county to evaluate whether the subject property must remain designated and zoned for agriculture to permit farm practices to be undertaken on adjacent or nearby agricultural lands. Redside argued below that digging 71 exempt domestic wells would impact the groundwater aquifer that underlies all of the irrigation wells in the area, and potentially require that irrigation wells be deepened, at considerable expense.

Redside submitted testimony from a water expert that the cost of deepening an irrigation well could range from $60,000 to over $150,000. Record 1702. Redside argued that such expenses could negatively impact farm practices on adjoining and nearby irrigated farmlands.

The county rejected that argument, citing a study submitted by the applicants, that groundwater is declining generally in the area due to a multitude of causes, including climactic factors, and that the expected rate of withdrawal from the proposed 71 wells would be miniscule, a tiny fraction of the annual recharge rate for the aquifer.[25] Given the *de minimis* impact of the proposed domestic wells, the applicant's expert opined that there is no evidence that the wells would hasten the day when neighboring irrigation wells must be deepened, in any event, due to climactic and other factors that are occurring regardless of whether the domestic wells are dug. The findings also note that exempt wells to support farm use, or to support destination resort uses, could impact the aquifer to a similar or greater extent than the proposed domestic wells. Record 71.

On review, Redside first argues that the county excluded the adjoining Redside farm, with its four irrigation wells, from the Study Area, and thus failed to evaluate any impacts to the Redside wells at all. Thomas responds that the county's findings identify what petitioner refers to as the Redside property as the

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[25] According to the applicants' water expert, the 71 exempt wells would draw at most 51 acre feet of water per year, which is 0.0000182 percent of the annual recharge rate of the aquifer. Record 72.

Volwood Farms property, which is included in the Study Area, and which was evaluated along with all other adjoining or nearby irrigated farms for impacts on irrigation wells. As far as we can tell, Thomas is correct on this point.

Redside next argues that groundwater loss is a zero-sum game, and that any reduced water supply to irrigation wells, no matter how small or de minimis, or how overshadowed by groundwater loss caused by other factors, may impact farm practices on adjacent or nearby irrigated farmlands. Relatedly, Redside disputes that it is appropriate to compare the groundwater loss from the 71 proposed wells with hypothetical groundwater loss that might occur from exempt wells for farm use of the property, or from wells supplying a hypothetical destination resort.

We tend to agree with Redside that a comparison with the groundwater loss that might occur assuming hypothetical development of the subject property with exempt farm uses or destination resort uses does not assist the county's evaluation of impacts under OAR 660-033-0020(1)(a)(C). Nothing in the rule suggests that impacts to farm practices from proposed development can be ignored if other types of land uses potentially allowed on the property could have similar impacts. However, that comparison with the impacts of other uses appears in the findings as an aside. Record 72 ("Putting comparison aside…"). The county's primary rationale for finding no impact on irrigation wells is its conclusion that the impact of 71 domestic wells on the aquifer would be so small compared to the annual recharge rate, that it would not "hasten the day" when

area farmers must deepen their wells in any event, due to general aquifer decline. If that conclusion is supported by the record, then any error in comparing impacts of hypothetical wells serving different potential uses is not a basis for remand.

We conclude that the water study submitted by applicants is substantial evidence supporting the county's primary conclusion on this point. For purposes of OAR 660-033-0020(1)(a)(C) the applicable test is not "no impact," but whether the impacts would not permit farm practices to be undertaken on adjoining and nearby agricultural land. A reasonable fact-finder could conclude from the record that the impact of 71 domestic wells on the aquifer would not significantly hasten the day when irrigation wells must be deepened in any event. In addition, to reduce any impact, the county imposed a condition limiting irrigation per domestic well to one-quarter acre, rather than the half-acre figure allowed under state law. This condition goes some way toward ensuring that any impact is not inconsistent with OAR 660-033-0020(1)(a)(C).

Finally, Redside argues that the county erred in minimizing the financial impact to farmers to deepen their irrigation wells, based on evidence that deepening a domestic well in the area costs only $6,537. Record 75. As noted, Redside's expert testified that typical costs for deepening an irrigation well can range between $60,000 and $150,000. Redside contends that no reasonable fact-finder would rely on evidence regarding the costs of deepening a domestic well to draw any conclusions regarding the costs of deepening an irrigation well.

However, the county cited the cost of deepening a domestic well in the context of addressing an argument about impacts to *domestic* wells. Record 74-75. The passage cited by petitioner did not address impacts on irrigation wells, and as far as petitioner has established, the county did not draw any conclusions regarding the cost of deepening irrigation wells from the testimony regarding the cost of deepening a domestic well.

Redside's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (Redside)

As noted, the only access to the property is from the southeast, off NW Coyner Avenue. The challenged decision requires a second access road for emergency vehicle access, connecting to NW 93rd Street north of the property. The required emergency access would require an easement from the BLM.

Redside argues that there is no evidence in the record that BLM will grant the easement, or where secondary access would go if BLM declines to grant an easement. Redside notes that farms to the north of the property use county roads to transport cattle in a circulation route. Redside speculates that if an alternative emergency access point is approved, then it may not be limited to emergency access, and it is possible that traffic from the 71-lot subdivision would take access using the county roads to the north, thus interfering with cattle circulation. Redside argues that the county erred in assuming that all resident traffic would access the property via NW Coyner Avenue, and thus avoid conflicts with the cattle circulation route to the north.

Thomas responds that binding conditions of approval prohibit the creation of new points of access to the property for use by residential traffic. Record 138. We agree with Thomas that that condition ensures that the traffic impacts Redside speculates might occur will not occur.

Redside's fourth assignment of error is denied.

The county's decision is affirmed.