

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

3
4 JERRY APLIN,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

12
13
14 STEVE SIMPSON and KATHY SIMPSON,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2013-055

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Lisa D. T. Klemp, Redmond, filed the petition for review. Jerry Aplin
25 argued on his own behalf.

26
27 No appearance by Deschutes County.

28
29 Liz Fancher, Bend, filed the response brief and argued on behalf of
30 intervenors-respondents.

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

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35 REMANDED 03/12/2014

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

NATURE OF THE DECISION

Petitioner appeals a decision by the county board of commissioners approving (1) an accessory farm dwelling and (2) a relative farm assistance dwelling, on a parcel zoned for exclusive farm use (EFU).

FACTS

Intervenors-respondents (intervenors) own and operate a ranching operation on an 834-acre parcel with 189 irrigated acres, used for hay production and raising cattle and elk. The ranch runs 35 to 75 head of cattle, and an average of 200 to 275 elk. The property is developed with three existing homes. The first is a site constructed dwelling that was built in 1932 (the 1932 dwelling). The second is a manufactured dwelling referred to in the record and in this opinion as the North dwelling. The third is a manufactured dwelling referred to in the record and in this opinion as the South dwelling. The North and South dwellings were placed on the property sometime in the 1990s, apparently as replacements for earlier dwellings, but without obtaining required county land use approvals.

In response to a code enforcement action, intervenors applied to the county to approve one of the manufactured dwellings as a relative farm assistance dwelling, to allow Kathy Simpson’s parents, Eldon Tobiasson and Marilyn Tobiasson, to continue to occupy the dwelling. Deschutes County Code (DCC) 18.16.025(B) implements ORS 215.283(1)(d) in providing for a “relative farm assistance dwelling,” where the farm operator does or will require the assistance of the relative in the management of the farm use. The application included a list of farm duties the Tobiassons would perform on the ranch.

1 Later the application was modified to request approval of the 1932
2 dwelling as the relative farm assistance dwelling. The application proposed
3 that intervenors, the farm operators, would dwell in the North manufactured
4 dwelling, and the North dwelling would thus become the primary farm
5 dwelling for the property, while the Tobiassons would live in the 1932
6 dwelling.

7 In addition, the modified application sought approval of the South
8 manufactured dwelling as an “accessory” farm dwelling under DCC
9 18.16.050(C) and OAR 660-033-0130(24), which require in relevant part that
10 the occupants of the dwelling be “principally engaged” in the farm use and the
11 accessory dwelling be located on the same lot as the “primary farm dwelling.”
12 The South dwelling is occupied by Dave Page and Terri Page, and the modified
13 application identified various tasks the Pages would perform on the ranch.

14 On December 12, 2012, a county planner issued a decision approving the
15 modified application. The decision approved the use of the North dwelling as
16 the primary farm dwelling, the 1932 dwelling as a relative farm dwelling, and
17 the South dwelling as an accessory farm dwelling. Petitioner appealed the
18 planner’s decision to the county board of commissioners. The commissioners,
19 however, initiated a review on their own motion, and conducted a *de novo*
20 hearing and review. On May 29, 2013, the commissioners issued a final
21 decision that largely adopts the planning department’s findings, and approves
22 the proposed use of the three dwellings. This appeal followed.

23 **INTRODUCTION**

24 The petition for review does not designate any assignments of error as
25 such, although there are eight separate sub-headings or arguments. *See* OAR
26 661-010-0030(4)(d)(2010) (“[t]he petition for review shall * * * [s]et forth

1 each assignment of error under a separate heading”). As far as we can tell, the
2 first argument challenges approval of the North dwelling as the primary farm
3 dwelling. We refer to this argument as the first assignment of error. The
4 second through seventh arguments appear to challenge the approval of the
5 South dwelling as an accessory farm dwelling and/or the approval of the 1932
6 dwelling as a relative farm dwelling, under some of the standards that apply to
7 those two approvals. Arguments directed at the South dwelling as an accessory
8 farm dwelling are addressed under what we refer to as the second assignment
9 of error. Arguments directed at the 1932 dwelling as the relative farm dwelling
10 are addressed under what we refer to as the third assignment of error. The
11 eighth argument appears to pose a general challenge to the credibility of the
12 applicants. We refer to this latter argument as the fourth assignment of error.

13 **FIRST ASSIGNMENT OF ERROR**

14 The county’s decision concludes that the 1932 dwelling was lawfully
15 established, requires the North dwelling to obtain a placement permit and other
16 required permits, and essentially approves use of the North dwelling as the
17 “dwelling of the farm operator” and the “primary farm dwelling,” in lieu of the
18 1932 dwelling. The findings rely upon the approval of the North dwelling as
19 the primary farm dwelling in order to approve both the relative farm dwelling
20 and the accessory farm dwelling. As noted, DCC 18.16.050(D)(1)(d)
21 authorizes a relative farm dwelling if located on the “same lot or parcel as the
22 dwelling of the farm operator[.]” Similarly, DCC 18.16.050(C)(1)(b) authorizes
23 an accessory farm dwelling that is located on the “same lot or parcel as the
24 primary farm dwelling[.]”

25 Petitioner argues that the county erred in relying upon the North
26 dwelling as the dwelling necessary to authorize the relative and accessory

1 dwellings. According to petitioner, the North dwelling cannot function as the
2 “dwelling of the farm operator” for purposes of DCC 18.16.050(D)(1)(d) or the
3 “primary farm dwelling” for purposes of DCC 18.16.050(C)(1)(b) because the
4 North dwelling was placed illegally on the property in the mid-1990s and
5 therefore is not a “lawfully established” dwelling. Petitioner contends that the
6 only way to approve the North dwelling as the primary farm dwelling is to
7 apply the standards at DCC 18.16.050(A) for a dwelling customarily provided
8 in conjunction with farm use and find that the North dwelling meets those
9 standards. However, petitioner argues that the North dwelling cannot possibly
10 meet DCC 18.16.050(A)(1)(a)(iv), which requires that there be no other
11 dwelling on the subject property. Petitioner contends that there is already a
12 lawfully established primary farm dwelling on the property: the 1932
13 dwelling.

14 Intervenor responds that during the proceedings below no party
15 challenged approval of the proposed use of the North dwelling as the home of
16 the farm operator or the primary farm dwelling for purposes of DCC
17 18.16.050(D) or (C), or argued that the North dwelling must be approved as a
18 primary farm dwelling under DCC 18.16.050(A), and therefore the issue raised
19 under the first assignment of error is waived. ORS 197.763(1); 197.835(3).¹

¹ ORS 197.763(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.”

1 Petitioner offers no response to intervenor’s waiver challenge, either in
2 briefing or at oral argument. Accordingly, we agree with intervenor that the
3 issue raised under the first assignment of error is waived.²

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 DCC 18.16.050(C)(1)(a) requires that an accessory farm dwelling be
7 occupied by a person or persons who will be “principally engaged” in the farm
8 use of the land.³ The county approved the South dwelling as an accessory farm

ORS 197.835(3) provides:

“Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

² If we were required to reach the merits, we would probably disagree with petitioner’s argument that the *only* way to approve use of the North dwelling as the home of the farm operator and primary farm dwelling is to approve it under the standards at DCC 18.16.050(A) for establishing a new primary farm dwelling. The county’s findings quote DCC 18.16.020(J), which in relevant part allows the “replacement” of a lawfully established dwelling, and further provides that the original dwelling be either removed or “converted to an allowable use[.]” The county found that the 1932 dwelling meets the criteria for replacement. Record 603. Petitioner does not argue otherwise. Although the findings do not frame the issue in this manner, or expressly approve use of the North dwelling as a replacement for the 1932 dwelling, the working presumption underpinning the revised application and the county’s approval seems to have been that the North dwelling would become the primary farm dwelling, and the 1932 dwelling would be converted to a relative farm dwelling. Had the issue been raised below, the county might well have responded to the issue by expressly applying DCC 18.16.020(J) to approve the North dwelling as the replacement for the 1932 primary farm dwelling.

³ DCC 18.16.050(C) implements OAR 660-033-0130(24), and authorizes an “accessory” farm dwelling if, among other things:

1 dwelling, based on testimony regarding duties performed by the current
2 occupants David and Terry Page, finding that the Pages are “principally
3 engaged” in farm use, and imposing conditions requiring annual submission of
4 evidence to confirm that the occupant or occupants of the South dwelling are
5 principally engaged in farm use of the ranch.

6 Petitioner contends that the county’s findings do not adequately explain
7 what “principally engaged” means, and do not demonstrate that the standard is
8 met in the present case with respect to the South dwelling.⁴

“The accessory farm dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land and whose seasonal or year-round assistance in the management of the farm use, such as planting, harvesting, marketing or caring for livestock, is or will be required by the farm operator[.]” DCC 18.16.050(C)(1)(a).

⁴ The planning staff decision states, in relevant part:

“* * * The applicants have indicated that the [South dwelling] will be occupied by a person or persons engaged in the farm use of the land. Current occupants of this home are David and Terry Page. The current occupants provide both seasonal (spring/summer months) and year-round assistance in the fundamental management of the farm use, as required by the farm operator. Duties include dehorning assistance, calving records and management, irrigation and livestock water monitoring, weed and grounds management, bookkeeping, and farm equipment maintenance. A condition of approval requires that the [South dwelling] shall be occupied only by a person or persons who are principally engaged in the farm use as required by the farm operator.” Record 606.

The board of commissioners’ decision finds:

1 According to petitioner, “principally engaged” means at a minimum that
2 the person occupying the accessory farm dwelling must spend the majority of
3 working hours engaged in farm use of the land. Petitioner argues that it is
4 undisputed that Mr. Page is employed full-time as a long-haul trucker and does
5 not spend the majority of his working hours working on the ranch. Mrs. Page
6 is a homemaker, and petitioner argues that the record does not include any
7 substantial evidence that she spends the majority of her working hours on ranch
8 duties. Petitioner contends that the county’s findings fail to establish that
9 either Mr. or Mrs. Page is principally engaged in farm use.⁵

“The Board adopts the Planning Division’s findings on this criterion and includes the additional duties performed by the occupants, David and Terry Page. As indicated previously, Mr. and Mrs. Page provide both seasonal (spring/summer months) and year-round assistance. David Page provides assistance by spraying/pruning, mowing grounds, weed control, road grading, cat driving/clearing, monitoring of pond level for irrigation and livestock water, assisting in dehorning elk, and welding and fabrication. Terri Page provides assistance in elk births, elk calf monitoring, elk-related record keeping, general bookkeeping, and ranch security. Based on the evidence in the record, the Board finds the proposed [South dwelling] will be occupied by a person or persons, Mr. and Mrs. Page in this case, who are principally engaged in the farm use of the land and whose assistance in the management of the farm use as required by the farm operator.
* * *”Record 8.

⁵ Initially, intervenor argues that petitioner waived any argument that the county’s findings are inadequate for failure to define what “principally engaged” means or failure to adequately explain why the Pages are “principally engaged” in farm use. However, intervenor concedes that petitioner argued below that the Pages were not “principally engaged,” and submitted definitions and argument about the meaning of that term. Response Brief 14. Because petitioner raised issues below regarding compliance with the principally

1 Intervenor agrees with petitioner that the county erred in concluding that
2 Mr. Page is “principally engaged” in farm use on the property, because the
3 record shows that Mr. Page works full-time off the property. However, we
4 understand intervenor to argue that that error is harmless if the principally
5 engaged test is met by at least one occupant. To the extent the county’s
6 findings addressing the principally engaged standard are inadequate, intervenor
7 argues that the evidence in the record “clearly supports” a finding that Mrs.
8 Page performs work on the ranch and is not employed elsewhere, and that Mrs.
9 Page is “principally engaged” in farm use of the ranch. ORS 197.835(11)(b).⁶

10 We agree with the parties that the county erred in concluding that Mr.
11 Page is “principally engaged” in farm use of the property. Few reported cases
12 have interpreted the principally engaged standard, which also applies to
13 approval of primary farm dwellings. In *Oregon Natural Desert Association v.*
14 *Harney County*, 42 Or LUBA 149, 167-168 (2002), LUBA held that where the

engaged standard, on appeal petitioner may challenge the adequacy of the county’s findings regarding that standard, and ORS 197.763(1) does not require that petitioner have challenged the adequacy of findings during the proceedings below. *Bruce Packing Co. v. City of Silverton*, 45 Or LUBA 334, 352 (2003); *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993). We reject intervenor’s waiver challenge.

⁶ ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”

1 occupants of the proposed farm dwelling operate a non-farm business on the
2 property that represents their primary economic livelihood, the county must
3 evaluate the extent to which the occupants of the proposed dwelling will be
4 engaged in farm use of the property, as opposed to nonfarm uses, and allow the
5 dwelling only if the evidence shows at least one occupant will be “principally
6 engaged” in farm use. The evidence is undisputed that Mr. Page is employed
7 full-time as a long-haul trucker. The findings do not acknowledge that
8 undisputed fact, or provide a basis to conclude that Mr. Page is “principally
9 engaged” in farm use on the ranch.

10 We generally agree with petitioner that the “principally engaged”
11 standard requires the applicant to submit, and the county to evaluate, evidence
12 that, to the extent necessary, describes or quantifies the amount of time that the
13 occupant of an accessory farm dwelling will be engaged in farm use of the
14 property. Because the number of hours required on average each week for a
15 person to be principally engaged in farm use will likely vary significantly from
16 farm use to farm use the starting point will be to establish the average number
17 of hours each week typically required for a full time employee of the relevant
18 farm use. A person “principally engaged” in that farm use must devote a
19 similar number of hours, whether that person is also employed off the farm or
20 not.⁷

⁷ Against what time frame the “principally engaged” test is applied may depend on the nature of the farm enterprise in question, and could take into account seasonal variations. In *Oregon Natural Desert Association v. Harney County*, 65 Or LUBA 246, 262 (2012), we affirmed the county’s conclusion that the “principally engaged” standard is met by evidence that the occupants of a proposed farm dwelling would work full time for approximately five months of year on the property, where the property was accessible and suitable for

1 The planning director’s findings lump together the tasks performed by
2 the Pages, and do not attempt to separate the two. The board of
3 commissioners’ findings separately describe the tasks performed by Mr. and
4 Mrs. Page, and state that Mrs. Page “provides assistance in elk births, elk calf
5 monitoring, elk-related record keeping, general bookkeeping, and ranch
6 security.” Record 8. However, the findings do not attempt to quantify the
7 time Mrs. Page spends on these duties or establish that the time Mrs. Page
8 devotes to ranch duties, on average, is approximately that required of a full
9 time employee of the ranch. Petitioner contends that elk births and associated
10 monitoring and record-keeping occur only three months of the year. Further,
11 we understand petitioner to question whether “general bookkeeping” and
12 “ranch security” qualify as “farm use of the land” in which a person can be
13 “principally engaged” for purposes of DCC 18.16.050(C) and OAR 660-033-
14 0130(24).

15 We agree with petitioner that the county’s findings are inadequate and
16 fail to establish that Mrs. Page is “principally engaged” in farm use of the land.
17 Intervenors and the county must make some effort to describe if not quantify
18 the amount of ranch work Mrs. Page performs or will perform over a given
19 time period, in order for the county to make an informed judgment whether the
20 principally engaged test is met in this case. Further, we agree with petitioner
21 that the activities that the county may consider in determining whether a person
22 is principally engaged in farm use must actually qualify as part of the farm use.

grazing only five months of the year, due to high altitude and snow the remainder of the year. We rejected the petitioner’s argument that under those circumstances the county could not conclude that the dwelling would be occupied by persons principally engaged in farm use of the land.

1 “Farm use” is a defined term. ORS 215.203(2)(a). As defined by ORS
2 215.203(2)(a), a potentially broad number of tasks or duties could be
3 performed by a person who is principally engaged in farm use.⁸ Time spent on
4 performing recordkeeping or bookkeeping necessary to run a farm operation
5 almost certainly could be counted toward the principally engaged test.
6 However, the challenged decision does not describe the “general bookkeeping”
7 Mrs. Page performs, demonstrate that it is necessary to run the farm operation,
8 or quantify the amount of time spent on that task. “Ranch security” is also
9 undescribed and unquantified, but appears to consist of Mrs. Page simply being
10 present in her rented home or on the ranch for periods of time. Keeping an eye
11 out for strangers while going about her business in the home or while out in the

⁸ ORS 215.203(2)(a) provides, in relevant part:

“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-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. * * *”

1 yard is not the kind of ranch security that may be counted toward the
2 “principally engaged” test. One of the evident purposes of the principally
3 engaged test is to distinguish between dwellings occupied by those principally
4 engaged in farm use and dwellings used primarily as a rural residence. In our
5 view, activities inseparable from general rural residential living do not
6 constitute activities that can be considered in determining whether a dwelling
7 occupant is “principally engaged in farm use of the land,” even if those
8 residential activities arguably benefit or assist the farm operation in some way.
9 The county’s findings fail to establish that the undescribed actions Mrs. Page
10 performs with respect to “ranch security” can be considered for purposes of the
11 principally engaged test.

12 Finally, we disagree with intervenor that the record “clearly supports” a
13 conclusion that Mrs. Page is principally engaged in farm use of the land, for
14 purposes of ORS 197.835(11)(b). The “clearly supports” test is considerably
15 more demanding than the substantial evidence standard, and is generally only
16 appropriately applied to approval standards that are objective or do not require
17 interpretation or much discretionary judgment. *Waugh v. Coos County*, 26 Or
18 LUBA 300, 306-08 (1993). The principally engaged standard is not such a
19 standard, and, in any case, for the reasons above the evidence intervenor cites
20 to falls far short of establishing that Mrs. Page is principally engaged in farm
21 use of the land.

22 The second assignment of error is sustained.

23 **THIRD ASSIGNMENT OF ERROR**

24 Under the third assignment of error, we address challenges petitioner
25 directs against the county’s approval of the 1932 dwelling as a relative farm
26 assistance dwelling.

1 DCC 18.16.050(D)(1)(d), which implements ORS 215.283(1)(d),
2 requires a finding that the “farm operator does, or will, require the assistance of
3 the relative in management of the farm use.”⁹ As noted, the 1932 dwelling will
4 be occupied by intervenor Kathy Simpson’s parents, Eldon and Marilyn
5 Tobiasson, retired farmers who have lived on the property for some years. The
6 applicants submitted testimony describing the farm work the Tobiassons
7 perform on the ranch.

8 Petitioner submitted testimony below that Eldon Tobiasson is in his 80s,
9 suffers from advanced Parkinson’s disease, and is unable to work. Record 771.
10 The planning director’s decision does not resolve that evidentiary conflict, but
11 concludes that the applicants had demonstrated that they “require the
12 assistance” of the Tobiassons in managing the ranch. However, the planning
13 director imposed a condition requiring annual reporting of what assistance the
14 residents of the 1932 dwelling provide to the farm operator.

15 At the hearing before the board of commissioners, Marilyn Tobiasson
16 testified that she and her husband continue to work hard on the farm and that
17 there is “nothing they can’t do.” Record 318. The commissioners’ decision
18 concludes:

⁹ DCC 18.16.050(D)(1)(d) requires a finding that:

“The dwelling is located on the same lot or parcel as the dwelling of the farm operator, and is occupied by a relative of the farm operator or farm operator’s spouse, including a grandparent, step-grandparent, grandchild, parent, step-parent, child, brother, sister, sibling, step-sibling, niece, nephew, or first cousin of either, if the farm operator does, or will, require the assistance of the relative in the management of the farm use.”

1 “* * * Eldon Tobiasson assists on the ranch by repair[ing] fencing,
2 aiding in fabrication of repairs, driving a tractor (discing, seeding,
3 raking, baling), moving of irrigation (handlines, wheelines),
4 planting of seed, controlling gophers in the hay fields, maintaining
5 the property, cutting and hauling firewood, picking up rocks,
6 driving dump truck, and feeding livestock. Marilyn Tobiasson
7 provides seasonal work on the ranch, including but not limited to
8 assisting with and monitoring cows and calves, preparing fields,
9 and operating backhoe and other farm equipment.” Record 11.

10 On appeal, petitioner argues that nothing in the record refutes his
11 testimony that Eldon Tobiasson is unable to work and cannot provide
12 “assistance,” and the county’s findings on this point are not supported by
13 substantial evidence. However, intervenor argues, and we agree, that there is
14 refuting testimony from Marilyn Tobiasson and that testimony constitutes
15 substantial evidence in the record that Eldon Tobiasson is still able to work on
16 the farm. The county is entitled to choose between conflicting evidence, as
17 long as a reasonable person could rely on the evidence the county chose.
18 Petitioner has not demonstrated that the county’s findings regarding Eldon
19 Tobiasson are inadequate or unsupported by substantial evidence. In any case,
20 petitioner offers no challenge to the findings regarding Marilyn Tobiasson.
21 She also qualifies as a “relative” for purposes of DCC 18.16.050(D)(1)(d), and
22 petitioner does not dispute that Mrs. Tobiasson assists in the management of
23 the ranch.

24 The third assignment of error is denied.

25 **FOURTH ASSIGNMENT OF ERROR**

26 Petitioner’s final argument is entitled “overall credibility of applicant,”
27 and argues that the enforcement action against the applicants that led to the
28 application being filed, and alleged inconsistencies in the Simpsons’ testimony,
29 show that their testimony is not credible. However, petitioner fails to relate

1 this argument to any specific issue, finding, or approval criterion. Absent a
2 more developed argument, petitioner has not established a basis for reversal or
3 remand. *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220
4 (1982).

5 The fourth assignment of error is denied.

6 The county's decision is remanded.