

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision denying an
4 application for a farm dwelling.

5 **FACTS**

6 The subject parcel consists of approximately 38 acres
7 of land zoned General Agriculture District (GAD).¹
8 Petitioner proposes to establish a farm dwelling in
9 conjunction with a proposed cattle raising operation. The
10 planning department denied petitioner's application, and
11 petitioner appealed to the county hearings officer. The
12 hearings officer affirmed the planning department's
13 decision, and this appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 "The Clackamas County findings that petitioner
16 applicant fails to satisfy the acreage
17 requirements to constitute a typical farm unit as
18 required in ZDO 402.04.A.3 are inadequate and are
19 not supported by substantial evidence in the
20 record."

21 **SECOND ASSIGNMENT OF ERROR**

22 "The county's finding that petitioner's
23 application fails to satisfy the criteria of ZDO
24 402.04.A.3 incorrectly interpreted the code by
25 including in the calculation of median size area
26 farms, three farms combined as one."

27 Clackamas County Zoning and Development Ordinance

¹The property is actually 40 acres in size, but apparently only 38 acres are proposed to constitute the "commercial farm unit" at issue in this appeal.

1 (ZDO) 402.04.A.3 provides that a farm dwelling may be
2 established where:

3 * * * * *

4 "The lot is as large as the acreage supporting the
5 typical (median) commercial farm unit in the area
6 (within a one-mile radius of the subject property)
7 * * *."

8 **A. Findings**

9 The county adopted the following findings of compliance
10 with ZDO 402.04.A.3:

11 * * * The 'typical commercial farm unit' is
12 defined as the median-sized farm located within a
13 one-mile radius of the subject property. The
14 staff inventory of commercial farms within a
15 one-mile radius of the subject property found the
16 median to be approximately 47 acres. The
17 applicant proposes a commercial farm use on a
18 38-acre parcel. The attorney for the applicant
19 provided his own inventory and made a claim that
20 staff's inventory counted as one commercial farm 3
21 parcels under 3 separate ownerships when those
22 should be counted as 3 separate 'commercial farm
23 units.' In addition, [Mr. Seagraves] indicates
24 that several areas of farms involved are actually
25 under one or more larger operations. The attorney
26 for the applicant responds that this information
27 further confuses the questions within this
28 one-mile radius area. The Hearings Officer
29 visited the site and the surrounding area and in
30 fact looked at the other properties in dispute.
31 [The Hearings Officer found that] the attorney for
32 the applicant's argument is not persuasive. This
33 criterion is not met." Record 2.

34 Petitioner argues that in its calculations of the
35 median size commercial farm unit in the area, the county
36 impermissibly treated three separate, although adjacent,
37 parcels (tax lots 601, 602 and 603) as one commercial farm

1 unit.² Petitioner states these parcels are owned by three
2 different legal persons: Gerald and Devonna Richards,
3 Richards Farms Inc., and Glen and Mary Richards (Record
4 115-16), and that this establishes these parcels are
5 separate commercial farm units. Petitioner argues that it
6 raised this issue during the proceedings below and, under
7 Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d
8 896 (1979), the county was required to address whether these
9 parcels are three separate commercial farm units in its
10 findings, but failed to do so.

11 The county findings quoted above refer to petitioner's
12 argument that the three Richards' parcels should be
13 considered separate commercial farm units. They also refer
14 to the contrary testimony of an area farmer, Mr. Seagraves.³
15 The findings then state that petitioner's argument is not
16 persuasive. While the county findings are somewhat unclear,
17 read together with the evidence to which they refer, we
18 interpret them to determine that the three Richards' parcels
19 are operated as a single commercial farm unit, and to reject

²There is no dispute that if these parcels are treated as three separate commercial farms, then the median commercial farm size in the area will be significantly reduced and the subject parcel would then likely be as large as the median commercial farm in the area.

³Mr. Seagraves' letter states, in part:

"* * * The Richards' farm adjoining [the Seagraves property] is all one operation of Gerald and Devonna Richards along with 75-100 rented acres in Christmas trees and hay. * * *"
Record 8.

1 petitioner's arguments to the contrary. Accordingly, the
2 county did address the issue raised by petitioner in its
3 decision.

4 This subassignment of error is denied.

5 **B. Evidentiary Support**

6 Petitioner cites evidence in the record to support his
7 argument that the median size of commercial farm units in
8 the area is smaller than the 47 acre median determined by
9 the county.⁴ Petitioner contends the record lacks
10 substantial evidence to support a determination that the
11 Richards' parcels are a single commercial farm unit, based
12 on the fact that they are in three distinct legal
13 ownerships, and based on the following testimony of one of
14 petitioner's representatives:

15 "[L]ook at the three parcels in question, this one
16 has Christmas trees and some pasture, this one is
17 in hay production, and this one is back into
18 Christmas tree production in the rear and there is
19 some pasture here. So the uses are distinct. * *
20 *" Record 30.

21 The county cites evidence to support its determination
22 that the median size of commercial farm units in the area is
23 47 acres. With regard to the Richards' parcels, the county
24 cites the letter from the adjacent farmer, Mr. Seagraves,

⁴Petitioner also contends the county's evidence is unreliable because the county did not personally contact area farmers to determine the size of their commercial farm units. We disagree with petitioner. The county is not required to personally contact area farmers to obtain evidence of the size of area commercial farm units.

1 stating that those parcels are "all one operation," as
2 support for its determination that the Richards' parcels are
3 one commercial farm unit. Record 8.

4 The challenged decision is one to deny petitioner's
5 application for a farm dwelling. It is well established
6 that in seeking to overturn a denial decision, petitioner
7 bears a heavy burden of establishing that it sustained its
8 burden of proof of compliance with applicable criteria as a
9 matter of law. Jurgenson v. Union County Court, 42 Or App
10 505, 600 P2d 1241 (1979); Consolidated Rock Products v.
11 Clackamas County, 17 Or LUBA 609, 619 (1989). The "evidence
12 must be such that a reasonable trier of fact could only say
13 petitioner's evidence should be believed." Morley v. Marion
14 County, 16 Or LUBA 385, 393 (1987); McCoy v. Marion County,
15 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7
16 Or LUBA 42, 46 (1982).

17 As an initial point, we note that there is nothing
18 about the above quoted testimony which shows, as a matter of
19 law, the three Richards' parcels must be considered separate
20 commercial farm units. At best, the evidence cited in the
21 record is merely conflicting on the issue of the median size
22 of the commercial farm units in the area. The choice
23 between conflicting believable evidence belongs to the
24 county. Angel v. City of Portland, 22 Or LUBA 649, 659,
25 aff'd 113 Or App 169 (1992). There is no basis for
26 disturbing that choice here.

- 1 This subassignment of error is denied.
- 2 The first and second assignments of error are denied.
- 3 The county's decision is affirmed.