

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a county hearings officer's
4 decision approving a farm dwelling.

5 **MOTION TO INTERVENE**

6 Ralph Hatley, the applicant below, moves to intervene
7 in this proceeding on the side of respondent. There is no
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject property is designated Agricultural on the
11 Clackamas County Comprehensive Plan map and is zoned
12 Exclusive Farm Use, 10-acre district (EFU-20). The property
13 is 26.83 acres in size and is relatively flat. The property
14 includes 15 acres currently used to produce hay at a
15 noncommercial level. The subject property includes an
16 airstrip located along the western boundary and two
17 non-residential buildings sited in the northeast corner.¹

18 On October 2, 1992, intervenor filed an application for
19 approval of a farm dwelling. The farm dwelling is proposed
20 to be located in the northeast corner of the subject
21 property, near the existing buildings. Intervenor also

¹In the past, intervenor and the property owner have used the property for airport operations, commercial and social skydiving activities and a business selling used skydiving equipment. A circuit court judgment issued in 1993 allows limited use of a three-acre portion of the property for a personal use airport, as a nonconforming use, including restricted skydiving activities, but prohibits use of the property for the sale of skydiving equipment.

1 submitted a farm management plan calling for planting
2 10 acres of blueberries, in two stages of five acres each,
3 and continuing the existing hay growing operation.

4 On May 20, 1993, after a public hearing, the county
5 hearings officer approved intervenor's application with
6 conditions (first decision). Intervenor asked for
7 reconsideration of the first decision with regard to
8 finding 2 and condition 5. Reconsideration was granted and
9 an additional public hearing was held. On October 6, 1993,
10 the hearings officer issued a decision approving the farm
11 dwelling (challenged decision). The challenged decision
12 incorporates the findings in the first decision, adopts
13 additional findings and modifies condition 5. This appeal
14 followed.

15 **ASSIGNMENT OF ERROR**

16 As relevant here, Clackamas County Zoning and
17 Development Ordinance (ZDO) 401.04A establishes the
18 following standard for approval of a farm dwelling in the
19 EFU-20 zone:

20 * * * A permanent principal dwelling may be
21 established in conjunction with an existing
22 commercial farm use on a legal lot of record
23 larger than five (5) acres in size, subject to
24 review with notice, pursuant to [ZDO] 1305.02,
25 when the applicant provides a farm management plan
26 as provided under [ZDO] 401.10 and other evidence
27 as necessary to demonstrate that all the following
28 criteria are satisfied:

29 "1. The land is currently used for a commercial
30 farm use and such use will be continued or

1 intensified with the addition of a permanent
2 dwelling[.]

3 " * * * * " (Emphases added.)

4 In addition, ZDO 202 includes the following definition of a
5 "commercial farm":

6 "FARM, COMMERCIAL: A farm unit with all of the
7 following characteristics:

8 "(a) The land is used for the primary purpose of
9 obtaining a profit in money from activities
10 described in [ZDO] 401.03A and B, and
11 [ZDO] 402.03A and B;^[2]

12 "(b) The net income derived from farm products is
13 significant; and

14 "(c) Products from the farm unit contribute
15 substantially to the agricultural economy, to
16 agricultural processors and [to] farm
17 markets."

18 Petitioners contend the challenged decision fails to
19 comply with the requirement of ZDO 401.04A that a farm
20 dwelling be established only if there is an existing
21 commercial farm use on the subject property, as the term
22 "commercial farm" is defined in ZDO 202.

23 **A. Substantial Contribution to Agricultural Economy**

24 Petitioners contend the challenged decision fails to
25 determine the proposed farm operation satisfies part (c) of
26 the commercial farm definition quoted above, or to require
27 that compliance with part (c) be established as a condition

²These uses generally include various types of farm use and the propagation and harvesting of forest products.

1 of approval. The first decision did not purport to
2 determine compliance with part (c) of the ZDO commercial
3 farm definition. Rather, condition 5 of the first decision
4 required, among other things, that prior to the issuance of
5 a building permit, intervenor establish the "blueberries and
6 hay produced from the subject property contribute
7 substantially to the agricultural economy, to agricultural
8 processors and [to] farm markets." Record 90. According to
9 petitioners, the challenged decision deletes this
10 requirement, but does not include findings demonstrating
11 compliance with part (c) of the commercial farm definition.

12 The county and intervenor (respondents) concede the
13 challenged decision does not include findings specifically
14 addressing part (c) of the commercial farm definition.
15 However, respondents argue it is sufficient that the
16 decision finds proper implementation of intervenor's farm
17 management plan "will meet the definition of a commercial
18 farm * * *." Record 85.

19 Intervenor also argues that even if the findings are
20 inadequate in this regard, this aspect of the challenged
21 decision should be affirmed, because the evidence in the
22 record clearly supports a determination that the proposed
23 farm management plan satisfies part (c) of the commercial
24 farm definition. ORS 197.835(9)(b).

25 ZDO 401.04A, together with part (c) of the ZDO 202
26 definition of commercial farm, require the county to

1 determine that the farm use which justifies approval of a
2 farm dwelling is commercial in nature, in that its products
3 "contribute substantially to the agricultural economy, to
4 agricultural processors and [to] farm markets." A finding
5 that simply states the applicant's farm management plan
6 meets the definition of commercial farm is impermissibly
7 conclusory. Consequently, we agree with petitioners that
8 the county's findings are inadequate in this regard.

9 However, under ORS 197.835(9)(b), we are required to
10 affirm this part of the county's decision if the parties
11 identify evidence in the record that "clearly supports" the
12 decision. We have reviewed the relevant evidence cited by
13 the parties. Record 148-52. Testimony by the former Oregon
14 Department of Agriculture agricultural development
15 administrator and by intervenor states there are overseas,
16 farm direct and U-pick markets for the blueberries to be
17 produced on the subject property, but does not address
18 whether the blueberries produced by the proposed farm
19 operation will "contribute substantially" to those markets,
20 agricultural processors and the county's agricultural
21 economy.³ We therefore conclude the evidence identified in
22 the record does not "clearly support" a determination that

³In addition, the cited evidence does not mention markets for or the significance of the 15 acres of hay to be produced as part of the proposed farm management plan and, therefore, provides no basis for determining that part (c) of the commercial farm definition is satisfied on the basis of either hay or blueberry production.

1 the proposed farm use satisfies part (c) of the ZDO
2 commercial farm definition.

3 This subassignment of error is sustained.

4 **B. Existing/Current Commercial Farm Use**

5 Petitioners contend that under ZDO 401.04A and the
6 definition of "commercial farm," the county cannot issue
7 building permits for a farm dwelling on the subject property
8 until it determines that a farm operation satisfying the
9 ZDO 202 definition of "commercial farm" currently exists on
10 the property. Petitioners further contend the county's
11 interpretation of the relevant ZDO provisions in this regard
12 is conflicting and inadequate for LUBA review.

13 **1. Articulation of Interpretation**

14 Finding 2 of the first decision addresses how much farm
15 use must be established on the subject property before a
16 farm dwelling may be built. Record 88. Petitioners argue
17 this finding, which is incorporated into the challenged
18 decision, is inconsistent with modified condition 5 of the
19 challenged decision. Petitioners further argue the
20 challenged decision does not explain how the county
21 interprets the requirements of ZDO 401.04A and the
22 commercial farm definition.

23 As relevant to this issue, finding 2 states:

24 "[A]t a minimum, [intervenor] must establish a
25 commercial farm use on the subject property before
26 a dwelling can be established thereon. * * * A
27 commercial farm in Clackamas County is one wherein
28 the land is used for the primary purpose of

1 obtaining a profit in money from farm use thereon,
2 the net income derived from farm products is
3 significant, and products from the farm contribute
4 to the agricultural economy, to agricultural
5 processors and farm markets. It is well
6 established in Clackamas County that the minimum
7 net income recognized as significant is \$10,000
8 annually.^[4] [T]o require this level of farm use
9 before the dwelling can be established on the
10 property is extremely burdensome. In addition, it
11 means that a certain amount of discretion will be
12 necessary to determine whether the current farm
13 use on the subject property is sufficient to meet
14 the standards required by the ZDO. * * *"
15 Record 88.

16 The challenged decision adds the following finding:

17 "The planting of five acres of blueberries, if
18 properly planted, fertilized, irrigated and cared
19 for, can produce \$10,000 net annual profit."
20 Record 2.

21 Additionally, modified condition 5 adopted by the challenged
22 decision requires:

23 "Prior to issuance of residential permits,
24 [intervenor] shall have planted the first five
25 acres of blueberries on the subject property. In
26 addition, [intervenor] shall bear the burden of
27 establishing to the satisfaction of the Planning
28 Director that the subject property is used for the
29 primary purpose of obtaining a profit in money
30 from the production of blueberries and hay.

31 "The determination as to whether the applicant has
32 met [condition 5] shall be made by the Planning

⁴Part (b) of the commercial farm definition requires that the "net income derived from farm products is significant." ZDO 202. The parties agree that \$10,000 or more annual net income from farm products satisfies this part of the commercial farm definition. However, as explained under the following subassignment of error, petitioners contend this level of income must already have been produced by the subject farm operation before building permits for a farm dwelling may be issued.

1 Director pursuant to [ZDO] 1305.02 [(planning
2 director decision with notice and opportunity to
3 appeal)] with the addition that notice for the
4 application review [shall be given to
5 petitioners]." Record 3.

6 We find no inconsistency between finding 2 and modified
7 condition 5. Finding 2 reiterates the county's definition
8 of "commercial farm" and states that, under the relevant ZDO
9 provisions, a commercial farm must be "established" before a
10 farm dwelling can be built on the subject property.
11 Finding 2 further provides that a level of farm use
12 producing at least \$10,000 annual net profit is required
13 before a dwelling can be built. The additional finding in
14 the challenged decision quoted above determines five acres
15 of blueberries, properly planted and cared for, can produce
16 this level of income. Finally, modified condition 5
17 requires that prior to issuance of building permits for a
18 farm dwelling, intervenor must plant five acres of
19 blueberries, and establish that "the subject property is
20 used for the primary purpose of obtaining a profit in money
21 from the production of blueberries and hay" (essentially
22 part (a) of the county's commercial farm definition).
23 Record 3.

24 We infer from the above findings and condition that the
25 county interprets the requirements of ZDO 401.04A for
26 "existing" and "current" commercial farm use to be satisfied
27 when a farm management plan for a commercial farm use is
28 implemented to the extent that (1) perennials capable of

1 producing at least \$10,000 in annual net income have been
2 planted on the subject property, and (2) the subject
3 property "is used for the primary purpose of obtaining a
4 profit in money from" farm use. Whether we are required to
5 affirm this interpretation of ZDO 401.04A and the ZDO 202
6 definition of commercial farm is addressed in the following
7 section.

8 **2. Correctness of Interpretation**

9 Petitioners argue that with regard to how much farm use
10 must actually exist on a property before building permits
11 for a farm dwelling can be issued, the county's EFU-20 zone
12 is more strict than required by state statute or
13 administrative rule.⁵ ZDO 401.04A requires "an existing
14 commercial farm use" and that the property "is currently
15 used for commercial farm use." Further, petitioners note
16 the ZDO 202 definition of commercial farm is written in the
17 present tense, and part (b) specifically requires that the
18 "net income derived from farm products is significant."
19 (Emphasis added.) According to petitioners, this means the
20 ZDO "plainly requires that farm operations actually produce
21 a significant level of income before the county may
22 determine that the owner is pursuing a commercial farm

⁵We note petitioners do not contend the level of existing farm use on the subject property required by the challenged decision prior to issuance of building permits for a farm dwelling is insufficient under ORS 215.283(1)(f) or OAR 660-05-030(4) (in effect when intervenor filed the subject application).

1 operation that justifies [issuance of] a farm dwelling
2 permit." Petition for Review 15. Petitioners argue
3 ZDO 401.04A cannot be interpreted to allow issuance of
4 building permits for a farm dwelling based on the planting
5 of perennials that are capable of producing the necessary
6 amount of income in the future, where the existing farm
7 operation has not yet produced such income.

8 This Board is required to defer to a local government's
9 interpretation of its own enactments, unless that
10 interpretation is contrary to the express words, policy or
11 context of the local enactment.⁶ Clark v. Jackson County,
12 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must
13 defer to a local government's interpretation of its own
14 enactments, unless that interpretation is "clearly wrong."
15 Goose Hollow Foothills League v. City of Portland, 117 Or
16 App 211, 217, 843 P2d 992 (1992).

17 In Testa v. Clackamas County, ___ Or LUBA ___ (LUBA
18 No. 93-098, January 4, 1994), aff'd 127 Or App 138 (1994),
19 we reviewed the county's interpretation of the same ZDO
20 provisions at issue here. We determined the county's
21 interpretation of the ZDO 401.04A requirements for current

⁶ORS 197.829, enacted in 1993, essentially codifies the Clark v. Jackson County decision, with the exception that we are not required to defer to a local government's interpretation of its regulations if that interpretation is contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. However, here there is no contention the county's interpretation of the relevant ZDO provisions is contrary to state requirements. See n 5, supra.

1 and existing commercial farm use of the subject property, as
2 being satisfied where a farm management plan for a
3 commercial farm use has been "substantially implemented," to
4 be within the county's interpretive discretion, so long as
5 its interpretation does not provide less protection to EFU
6 zoned land than what is required by ORS 215.283(1)(f) and
7 OAR 660-05-030(4).⁷ Testa, slip op at 11-13.

8 Although the challenged decision does not explicitly
9 refer to "substantial implementation" of the proposed farm
10 management plan, the interpretation of ZDO 401.04A expressed
11 therein is consistent with that expressed in the decision
12 reviewed in Testa. The only argument related to the
13 county's interpretation of ZDO 401.04A that was not made in
14 Testa is that the ZDO 202 definition of commercial farm is
15 worded in the present tense and, therefore, requires that
16 the net income from farm products is significant. According
17 to petitioners, this means the farm operation must have
18 already produced a net annual income of at least \$10,000
19 before building permits for a farm dwelling can be issued.
20 However, we continue to believe that under Clark v. Jackson
21 County, if the county approves a farm dwelling based on a

⁷In Testa, the commercial farm operation proposed was ratite (emu and rhea) breeding and woodlot use. We agreed with the county that the applicants' farm management plan would be "substantially implemented" when 4 1/2 acres were cleared for the ratite operation, nine runs for adult birds were built and water to those runs installed, an incubation barn was built, and one trio and one pair of proven breeder birds were moved onto the property.

1 farm management plan proposing a commercial farm use, the
2 county may interpret ZDO 401.04A to allow issuance of
3 building permits for that farm dwelling when the farm
4 management plan is substantially implemented, including a
5 situation where perennial crops capable of producing the
6 level of income required for commercial farm use have been
7 planted on the subject property.

8 This subassignment of error is denied.⁸

9 **C. Conditions of Approval**

10 According to petitioners, even assuming that
11 establishing farm activities on the subject property with
12 the potential to produce the necessary farm income can
13 satisfy ZDO 401.04A and justify issuance of a building
14 permit for a farm dwelling, the challenged decision does not
15 impose conditions sufficient to ensure this will occur prior
16 to issuance of such a farm dwelling permit. Petitioners
17 point out the challenged decision finds five acres of
18 blueberries can produce a \$10,000 net annual profit "if
19 properly planted, fertilized, irrigated and cared for."
20 Record 2. Petitioners argue simply requiring that five
21 acres of blueberries be planted, as is required by modified

⁸In the first subassignment of error, supra, we determine the challenged decision does not demonstrate that the proposed farm operation satisfies part (c) of the county's commercial farm definition. In this assignment of error we determine that if the county properly demonstrates that the proposed farm use satisfies the definition of a commercial farm, it may interpret ZDO 401.04A to allow issuance of building permits for a proposed farm dwelling when less than the entire commercial farm use proposed in the farm management plan exists on the subject property.

1 condition 5, does not establish the potential for production
2 of \$10,000 net annual profit. Petitioners contend the
3 county must also find:

4 "[intervenor] has developed a plan for the
5 'proper' planting and maintenance of a
6 commercially viable blueberry farm, that he has
7 the resources, capital, knowledge and skill
8 sufficient to establish such a farm, that he can
9 and will expend the energy and money to develop
10 and care for the plants in a commercially viable
11 way, etc." Petition for Review 22-23.

12 As explained above, modified condition 5 requires
13 intervenor to plant five acres of blueberries and to
14 demonstrate that "the subject property is used for the
15 primary purpose of obtaining a profit in money from the
16 production of blueberries and hay." Record 3. In addition,
17 condition 1 provides:

18 "There must be strict compliance with the use
19 described in the initially filed farm management
20 plan. Failure to establish and maintain the
21 proposed use will be cause for revocation of this
22 approval." Record 89.

23 The farm management plan referred to above states the
24 blueberries are proposed to be planted at a density of 870
25 plants per acre, with a spacing of 5' X 10'. Record 518.
26 It also lists the site preparation techniques to be used and
27 the "cultural operations" (e.g., plowing, disking and
28 harrowing, planting, mulching, pollination, bird control,
29 insect control) to be undertaken during the planting,
30 establishment and production phases of the proposed farm
31 operation. Record 516, 518-20.

1 Petitioners do not challenge the county's determination
2 that five acres of blueberries, if properly planted and
3 maintained, can produce \$10,000 annual net profit. We agree
4 with respondents that the requirements of modified
5 condition 5, together with the requirement of condition 1
6 that intervenor adhere to his farm management plan,
7 adequately ensure that the farm operation established on the
8 subject property prior to issuance of a building permit for
9 the approved farm dwelling is capable of producing the
10 necessary level of farm income.

11 This subassignment of error is denied.

12 The assignment of error is sustained, in part.

13 The county's decision is remanded.