BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

EDWARD SEAGRAVES, Petitioner, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 89-020 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Jay T. Waldron, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Schwabe, Williamson and Wyatt.

Michael E. Judd, Oregon City, filed the respondent's brief and argued on behalf of respondent.

KELLINGTON, Referee, HOLSTUN, Chief Referee; SHERTON, Referee.

REMANDED 08/29/89

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clackamas County Hearings Officer conditionally approving a "temporary dwelling in conjunction with a proposed principal [farm] use * * *." Record 4.

FACTS

The subject property is designated Agriculture in the Clackamas County Comprehensive Plan and is zoned General Agricultural District (GAD), an exclusive farm use zone. The property consists of 38 acres and is currently used for "[c]hurch headquarters, recreation and farming."[1] Record 88. The owner of the property has been engaged in a lengthy legal battle involving an A frame house constructed on the property some twenty years ago. Farming activity involving hay production occurs on a part of the property.[2]

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[1] The parcel at issue was 40 acres in size until the county approved the division of two acres from the property for the purpose of creating a "homestead" in an unrelated proceeding. No party claims that this earlier action has any relevance to this appeal.

[2] The hearings officer found, and it is not disputed, that the haying operation occurring on the property does not constitute a "commercial farm" within the meaning of Clackamas County Zoning and Development Ordinance (ZDO) 202. Record 2. ZDO 202 defines a commercial farm as:

"A farm unit with all of the following characteristics:

"(a) The land is used for the primary purpose of obtaining a profit in money from activities described in Sections 401.03A and B, and 402.03 Aand B;

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

On September 19, 1988, the property owner submitted a "revised request" for a "principle [sic] residence in conjunction with a farm management plan." The farm management plan contemplates establishment of "rhododendron and other nursery stock propagation * * *." On November 2, 1988, the planning department administratively approved the application. The planning department's administrative approval was appealed to the county hearings officer. The notice of appeal to the hearings officer characterized the planning department's approval as "legaliz[ation of] a residence already on the property." Record 84. The notice of the hearings officer's public hearing characterized the decision on appeal as "approving a farm management plan allowing a residence in conjunction with farm use." Record 82. On February 24, 1989, the hearings officer approved a "temporary dwelling in conjunction with a proposed principal [farm] use." Record 4. This appeal followed.

> "(c) Products from the farm unit contribute significantly to the agricultural economy, to agricultural processors and farm markets."

A non commercial farm is defined as follows in ZDO 202:

> "A parcel where all or part of the land is used for production of farm products for use or consumption by the owners or residents of the property, or provides insignificant income."

The hearings officer did not specifically find that the current use of the property constitutes a "non commercial" farm. The hearings officer did, however, find that that the haying operation did not constitute a "commercial farm" under the county's definition of commercial farm in ZDO 202. Record 2.

FIRST ASSIGNMENT OF ERROR

"Petitioner did not receive adequate notice of the proposed county action."

Petitioner argues he did not receive actual or constructive notice that the proceedings before the county hearings officer concerned approval of a temporary dwelling under ZDO 402.04B. As a result, petitioner contends he was prejudicially deprived of an opportunity to address the criteria of ZDO 402.04B. Petitioner concedes that at the beginning of the hearing before the hearings officer, the parties were advised that approval of a temporary dwelling would be considered. However, petitioner contends "[t]he only mention of a temporary dwelling occurred during the hearing, which Mr. Seagraves, who was not represented by counsel, did not understand."[3] Petition for Review 9.

The county argues that it did not err in characterizing the proposal as it did in its various notices. The county contends that neither the application nor the county's notices identified the proposed dwelling as either a permanent or temporary dwelling. The county suggests that the notices it provided cover the range of farm dwelling approvals authorized by ZDO 402, and provides adequate notice that the county may approve a dwelling on either a permanent or temporary basis. The county further argues that petitioner could not be prejudiced by not

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[3]It is not clear whether petitioner claims he did not understand what the county said concerning the applicability of the temporary dwelling criteria, or whether petitioner claims he did not understand that the temporary dwelling provisions applied at all.

knowing that ZDO 402.04B relating to temporary dwellings could be applied, because that subsection contains no approval criteria, but rather refers the decision maker to the approval criteria of ZDO 402.04A relating to approvals of permanent dwellings. The county contends that the only distinction between these two kinds of farm dwellings, with regard to approval criteria, is that for a permanent dwelling the county must find that a commercial farm use exists on the subject property, whereas for a temporary dwelling the county must find that, through implementation of an approved farm management plan, a commercial farm use of the property can be established.

We first consider whether the county did provide adequate notice of its proposed action. ZDO 402.04 relating to both permanent and temporary dwellings in conjunction with farm use provides:

> "USES SUBJECT TO REVIEW BY THE PLANNING DIRECTOR
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> "A. Principal Dwelling in Conjunction With a Principal Use: A permanent principal dwelling may be established in conjunction with an existing commercial farm use on a preexisting legal lot of record larger than five (5) acres in size, subject to review with notice, pursuant to 1305.02, when the applicant provides a farm management plan as provided under 401.10/402.10 and other evidence as necessary to demonstrate that all the following criteria are satisfied:
>
> "1. The land is currently used for a commercial farm use and such use will be continued or intensified with the addition of a permanent dwelling;
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> "2. A dwelling is customarily incidental to the type of farm use proposed;

"3. The lot is as large as the acreage supporting the typical commercial farm unit in the area (within a one-mile radius of the subject property), or the land supports a commercial farm use of greater intensity (such as a nursery) than commercial farms in the area, and the acreage is comparable to a commercial farms of the same use.

"4. The lot is appropriately located to support the commercial farm use, as described in the farm management plan, considering the following factors:

"a. Soil type, topography, climate, water availability, and existing buildings or improvements;

"b. Cultivation, irrigation, harvesting, spraying, fertilizing, and other farm practices associated with the principal use;

"c. Marketing capabilities and delivery systems.

"5. Development of a dwelling site will not adversely affect or limit the existing or potential farm uses in the area; and

"6. Development of a dwelling site will not substantially reduce the agricultural productivity of the property.

"7. A principal dwelling which is a mobile home shall satisfy the provisions of Section 824.

"B. Temporary Dwelling In Conjunction With a Proposed Principal Use: When a commercial farm use does not currently exist on the property, but a farm management plan and other evidence provided by the applicant demonstrates that criteria under 401.04A/402.04A2-5 can be satisfied by the applicant's proposal, a temporary permit for a mobile home or trailer house may be allowed, subject to review with notice pursuant to 1305.02, provided that:

"1. Within two years of the issuance of the installation permit for the mobile home or

trailer the approved management plan shall be implemented, or

"2. If the plan is not implemented within this prescribed period, the mobile home or trailer house shall be removed from the property, or

"3. If a plan is only partially implemented within the two-year period, the applicant may apply for a one year time extension based upon evidence demonstrating that progress has been made toward implementing the management plan. Application for a time extension must be received at least 30 days prior to the expiration of the temporary permit.

"4. If the temporary permit is for use of a trailer house, said trailer house must be removed at the end of the temporary permit period and may not be used as a permanent dwelling on the property."

The dwellings authorized by ZDO 402.04A and B, are considered farm dwellings as opposed to nonfarm dwellings. In ZDO 402.04A and B, the county has drawn a distinction between "permanent" dwellings for which all of the criteria in ZDO 402.04 must be met, and "temporary" dwellings which may be approved when a commercial farm use is not yet established but a submitted farm management plan shows that all of the criteria of ZDO 402.04 can be met within a period of two years, with a possibility of a one year extension.[4] In this context, approval of a "temporary

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[4]Under ZDO 402.04B, the applicant has a period of two years to implement the farm management plan. An additional year may be granted by the county if the county finds that the farm management plan is partially implemented at the expiration of two years. ZDO 402.04B(3). The relevant county approval condition provides as follows:

"(2) Within two years of the issuance of the installation permit for the mobile home or trailer the farm management

dwelling" means issuance of a temporary permit for a mobile home or trailer house.

In this case, the notice of the planning department's approval of the application was entitled "Notice Of Decision on Administrative Farm Management Plan." This notice characterized the department's approval as follows:

> "PROPOSAL: Establish a principal dwelling in conjunction with a farm use. The specific request is to legalize a residence that is already on the property.." Record 85.

The county's notice also described the department's decision as follows:

> "1. There must be strict compliance with the use described in the management plan. Failure to establish and maintain the proposed use <u>will be cause for revocation of this approval</u>.
>
> "* * * * *
>
> "4. To meet the <u>Matteo</u> provisions, at least one acre of Azeleas and Rhododendrons must be planted before a permanent residence can be approved on the property. The applicant should contact this office when the planting is completed so staff can do a field check to establish compliance

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> plan shall be implemented. There must be strict compliance with the use described in the farm management plan. Failure to establish and maintain the proposed use will be cause for revocation of the approval.
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> "(a) If said farm management plan is not implemented within the prescribed period, the mobile home shall be removed from the property.
>
> "(b) If said farm management plan is only partially implemented within the two year period, the applicant may apply for a one year time extension based upon evidence demonstrating that progress has been made toward implementing the management plan. Application for a time extension must be received at least 30 days prior to the expiration of the temporary permit." Record 5.

with Matteo." (Emphasis supplied.) Record 86.

The notices advising of the public hearing on the appeal of the planning department's decision stated in part:

"Subject: Farm Management Appeal Application

"Proposal: Appeal [sic] staff decision approving a farm management plan allowing a residence in conjunction with farm use." Record 76, 82.

The function of public notice is to provide parties with sufficient information to prepare for public hearings and address relevant criteria. See, Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973). Here, ZDO 402.04A and B provide alternate bases for approval of a farm dwelling. All approval criteria are contained within the same section. Furthermore, the county follows the same procedure for both permanent and temporary farm dwellings, although different approval criteria apply.

We see no error in the notification the county provided regarding the planning department's approval or in the county's notices of public hearing. The county's notices specified that an application for a farm dwelling would be considered. Additionally, all of the county's notices advised that the proposal involved the approval of a farm management plan, which is required for either a permanent or a temporary farm dwelling under the ZDO. Petitioner does not contend that the notices he received were inadequate to put him on notice that a farm dwelling of some sort was under consideration. Although the county failed to specify in its notices whether it was

considering approval of a permanent or temporary farm dwelling, or both, we do not believe the county's lack of precision deprived petitioner of his opportunity to address relevant criteria.[5]

Furthermore, even if the county's notices were inadequate, the county's error was procedural and petitioner had an obligation to object at the hearing when he was advised that a temporary dwelling in conjunction with a farm management plan would be considered. Territorial Neighbors v. Lane County, ___Or LUBA___ (LUBA No. 87-083, 1987) slip op 18. Petitioner was specifically advised during the public hearing that the county would consider approval of the dwelling as a temporary dwelling under ZDO 402.04B. If petitioner was surprised by the possibility of an approval of a temporary

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[5] Petitioner cites our decision in Boeh v. Benton County, 6 Or LUBA 108 (1982) (Boeh) to support his position that the county's notice was inadequate. In Boeh, the notice the county provided described the proposal under consideration as a conditional use permit to allow replacement of an existing nonconforming residential mobile home with a larger one. However, the county instead authorized expansion and modification of the nonconforming use to allow automobile repair and outside storage. According to petitioner, LUBA decided in Boeh that the county's approval was "not in accordance with proper procedures and was prejudicial to petitioners". 6 Or LUBA at 116.

In Boeh, we concluded the county's notice was inadequate to identify the nature of the request and, therefore, denied petitioners the opportunity to address relevant criteria. Unlike the notice in Boeh, which inaccurately characterized the requested approval, the notice provided by the county in this case is accurate and sufficiently broad to give notice that either a temporary or a permanent farm dwelling may be approved. In any event, as noted infra, the nature of the request was made explicitly known to petitioner at the public hearing before the county reached its decision.

dwelling he could have, but did not, object and request a continuation of the public hearing for additional preparation. See Apalegeti v.Washington County, 80 Or App 508,514, 723 P2d 102 (1986).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The county had no authority to approve a temporary dwelling in conjunction with a proposed farm use."

ZDO 1303.02 provides:

> "NATURE OF ACTION: Findings: The action may be to approve the application as submitted, to deny the application or to approve the application with such conditions as may be necessary to carry out the Comprehensive Plan and as provided for in subsection 1305.05. In all cases the Hearings Officer shall state his decision upon the close of the hearing or upon continuance of the matter and shall enter findings based upon the record before him to justify his decision."

Petitioner argues that under ZDO 1303.02, the county may only approve, approve with conditions or deny an application as submitted and that the application submitted in this case was not for a temporary dwelling in conjunction with a farm management plan. Petitioner points out that the applicant applied for a principal residence in conjunction with a farm management plan. Petitioner contends that the county had no authority to approve a temporary dwelling when the application was for a permanent dwelling.

The subject application states that the proposed dwelling is in conjunction with a farm management plan. The application also states that hay production occurs on the property.

However, looking to the substance of the document rather than simply to the words used, we note that the farm management plan encompasses both existing and proposed farm uses. Accordingly, the application can be understood as being for either a permanent dwelling in conjunction with an existing farm use or for a temporary dwelling in conjunction with farm uses proposed under the farm management plan.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "Under ORS 215.286(1)(f) [sic] a farm dwelling is not permitted unless the use is already in existence at the time of application."

Petitioner claims ZDO 402.04B has no effect because it authorizes a dwelling on property zoned for exclusive farm use, without requiring that a farm use exist on the property. Petitioner argues that the county's authorization of a dwelling not in conjunction with a current farm use violates ORS 215.283 (1)(f), OAR 660-05-030(4),[6] this Board's decision in Matteo v. Polk County, 11 Or LUBA 259 (1984) aff'd without

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[6] OAR 660-05-030(4) provides:

> "ORS 215.213(1)(g) and 215.283(1)(f) authorize a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day to day activites on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than for farm use, a proposed dwelling would not be 'customarily provided in conjunction with with farm use' and could only be approved according to ORS 215.213(3) or 215.283(3). At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land * * *"

opinion, 70 Or App 179 (1984)(Matteo I), and Newcomer v. Clackamas County, 92 Or App 174, 758 P2d 450 (1988) (Newcomer I), as modified, 94 Or App 33, 764 P2d 927 (1988) (Newcomer II).

The county argues that ZDO 402.04A and B are acknowledged land use regulations and were acknowledged after the effective date of OAR 660-05-030. The county maintains that this evinces an interpretation by the Land Conservation and Development Commission (LCDC) that the disputed ZDO provision is consistent with its administrative rule. The county also contends that this assignment of error is an impermissable collateral attack on the county's acknowledged ordinance. Additionally, the county maintains that ZDO 402.04B is not inconsistent with ORS 215.213 or ORS 215.283 because it authorizes only a temporary, and not a permanent dwelling. Finally, the county states that there is no statutory requirement that land be "currently employed" in commercial farm use before a farm dwelling is established. The county contends that it did everything required by the LCDC rule, Newcomer I, Newcomer II, and the exclusive farm use statute. The county points out that the hearings officer found that the proposed dwelling is "customarily provided in conjunction with [sic] farm uses proposed," and petitioner does not challenge that finding. Record 3.

We must decide whether the county's attempt to provide a mechanism for an applicant to reside on land zoned for exclusive farm use, while in the process of establishing a commercial

"farm use" is lawful under OAR 660-05-030(4) and ORS 215.283. In Newcomer I, the court stated:

> "Whether the proposed dwelling is one which is customarily provided in conjunction with farm use is the threshhold question." 92 Or App at185.

Further, the court stated with regard to the statutory standard "customarily provided in conjunction with farm use"

> "We do not agree that additional and different restrictions in local legislation obviate the need for compliance with, and a finding concerning, a standard which the state statute makes essential." 92 Or App at 186.[7]

In Newcomer II the court withdrew its conclusion in Newcomer I

> "that ORS 215.283(1)(f) allows farm dwellings to be permitted on agricultural parcels before some actual farm use is initiated on them." 94 Or App at 39.

It is not clear whether this modification of the Newcomer I decision is based solely on OAR 660-05-030(4), see n 6 supra, or whether it is also based on a change in the court's view of the proper interpretation of ORS 215.283(1)(f) standing alone. In any event, it is clear from the court's decision in Newcomer II

> "that OAR 660-05-030(4) and any other applicable LCDC rules must be taken into account by the county in any further proceedings [concerning whether a dwelling is customarily provided in conjunction with farm use, i.e. is a farm dwelling]." 94 Or App at 39.

We understand Newcomer II to require that the standard in OAR 660-05-030(4) (that establishment of farm uses preceed establishment of a farm dwelling) be satisfied by the county in

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[7]The court stated that statutory requirements continue to apply after acknowledgment. Newcomer I, 92 Or App at 186, n 5. See Greenwood v. Polk County, 11 Or LUBA 230, 236 (1984).

approving temporary or permanent farm dwellings.[8] To the extent the ZDO would allow a temporary farm dwelling without requiring that farm use first be established on the property, OAR 660-05-030(4) controls.[9]

In the present case, the county found

"* * * A residence is customarily provided in conjunction with farm uses proposed. The unrebutted

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[8]To the extent the court's decision in Newcomer II is based solely on LCDC's exercise of substantive policymaking authority in adopting OAR 660-05-030(4), as opposed to an interpretation of ORS 215.283(1)(f), to impose the requirement stated in the rule, the court does not discuss the possible relevance of ORS 197.245 and 197.640(3)(b). ORS 197.245 provides that absent compelling circumstances comprehensive plans may not be required to be made consistent with new or amended goals until periodic review or one year after adoption of the goal amendment. ORS 197.640(3)(b) provides LCDC may require during periodic review that plans be amended to comply with new or amended goals or land use policies subsequently adopted as rules interpreting goals.

[9]There is dictum in our decison in Kola Tepee v. Marion County, __ Or LUBA __ (LUBA no. 89-021, June 28, 1989) that can be read to suggest a different result. In that case we stated, that an acknowledged county EFU zone allowing churches as a conditional use rather than a use permitted outright could not be attacked as inconsistent with ORS 215.283 in an appeal of the county's denial of a conditional use permit for a church. We reasoned in that case that the EFU zoning statutes are mandatory requirements use of particular property only because Goal 3 requires that EFU zones be adopted for agricultural lands. We further reasoned that to the extent an acknowledged EFU zone may conflict with the requirements of ORS 215.213 or 215.283, such conflicts effectively present a goal conflict, not a statutory conflict, and therefore may not be collaterally attacked after acknowledgment

Our decison in Kola Tepee v. Marion County is currently before the Court of Appeals. In addition, unlike the statutory provision at issue in that case, here we have a statutory provision that the Court in Newcomer II interpreted to impose requirements in addition to those imposed by the county's acknowledged zoning ordinance. We also have a LCDC rule imposing a substantive requirement that farm use of the property preceed approval of farm dwellings, a substantive requirement not stated in the county's zoning ordinance. Neither the rule nor the statute apparently envision an exception for temporary, as opposed to permanent, farm dwellings. In these circumstances, it is not appropriate to expand our reasoning in Kola Tepee v. Marion County to apply to the issue presented in this assignment of error.

> findings in the staff decision state that 84% of nursery operations the size of the proposed nursery in the farm managment plan have an on farm residence." Record 3.

We do not believe this finding is sufficient to satisfy the requirement of ORS 215.283(1)(f), or the interpretation and explanation of that requirement set out in OAR 660-05-030(4).and Newcomer I and II. In Newcomer II the Court of Appeals required the level of farming activity on the subject parcel must satisfy the requirement for existing farm use described in OAR 660-05-030(4). The statutory and rule requirement for approval of a dwelling in conjunction with a farm use, as interpreted by LCDC and the Court of Appeals, is that farm use first exist on the property. The only indication we have from the county regarding the current level of farm use on the subject property is the county's view that the level of farm use at the time of approval does not constitute a "commercial farm use." See n 2. We cannot determine from the county's decision whether it concluded the property satisfies the requirement in OAR 660-05-030(4) that farm use be established on the property before a farm dwelling is approved. Accordingly, we conclude that the county's decision exceeds the authority granted to it by ORS 215.283(1)(f) and OAR 660-05-030(4) with regard to allowing dwellings in conjunction with farm use in an exclusive farm use zone.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

"The applicant cannot satisfy the ZDO requirement that

> the farm management plan be fully implemented within two years of the dwelling approval."

Petitioner argues that the farm management plan will take four years to implement and that, accordingly, the county's approval violates ZDO 402.04B(1) and (3), which require that the farm management plan be implemented within a period of two years.

The county contends that the proposed farm use need only be established to the extent required by OAR 660-05-030(4) within two years as allowed by ZDO 402.04B, and it is unnecessary that all of the objectives of the farm management plan be fully accomplished within that period. The county suggests that the goal of ZDO 402.04B is to require establishment of farm use consistent with OAR 660-05-030(4).

We agree with the county that the term "implemented" in ZDO 402.04B(1) and (3) does not mean that every objective of the farm management plan must be carried out within two years.[10] We reject petitioner's argument that, as a matter of law, the decision violates ZDO 402 04B(1) and (3) because the farm management plan extends for a period of four years.[11]

The fourth assignment of error is denied.

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[10]However, we believe the term "implemented" must be interpreted to require that the level of commercial farm use required by ZDO 202 and 402.04A exist within the time allowed by ZDO 402.04B.

[11]Petitioner's challenge to the county's conclusion that implementation of the farm management plan will produce a commercial farm use on the property within the time allowed by ZDO 402.04B, is addressed under the fifth assignment of error.

FIFTH ASSIGNMENT OF ERROR

> "There is no substantial evidence in the record that demonstrates it is possible to establish a commercial farm use."

Petitioner contends that there is no evidence in the record to support the county's finding that a commercial farm use will be established on the property through implementation of the farm management plan. In this assignment of error, we consider whether the county's decision that a commercial farm use, as defined by the ZDO, can be established on the property is supported by substantial evidence in the whole record.[12]

Petitioner points out that the county's definition of commercial farm use (ZDO 202) and our decision in Wagoner v. Clackamas County, ___ Or LUBA ___ (LUBA No.87-102, April 27, 1988), require that the county find that the net income generated from the commercial farm must be "significant."[13] See n 2. Petitioner also points out that the ZDO requires, and the county's decision found, that a commercial farm can be established on the property within two years. Petitioner claims

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[12]As discussed under the third assignment of error, in order to approve a farm dwelling under the Court of Appeals' decisions in Newcomer I and II, the county must demonstrate that there is existing farm use of the property consistent with ORS 215.283(1)(f) and OAR 660-05-030(4). However, in addition, the county must comply with its own ordinance requirements for approving a temporary dwelling in conjunction with a proposed farm use, i.e. that implementation of the farm management plan will result, within two years, in a commercial farm use having been established on the property. ZDO 402.04B..

[13]Petitioner does not challenge the adequacy of the evidence to support any other definitional characteristic of a commercial farm contained in ZDO 202.

Petitioner argues that the evidence in the record shows that the farm will generate a net loss of at least $5,000 per year and that a projected loss is not equivalent to "significant" net income. Petitioner relies upon the applicant's notes submitted during the local proceedings to support his contention that the proposed farm use will produce a loss. Additionally, petitioner argues that the applicant's testimony undermines the county's conclusion that a commercial farm can be established on the property. The applicant testified during the public hearing as follows:

> "I would use the term marginal as far as making any kind of farm profit, or making a living or livelihood." Record 31.

The county does not disagree that the applicant's notes project a loss will occur under the farm management plan.[14] However, the county argues that these notes were superseded by other evidence submitted by the applicant, and the other evidence establishes that the property will generate significant net income.

The applicant has the burden of producing evidence sufficient to satisfy the relevant approval criteria. It is not

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[14]In fact, the county's decision specifically relies upon the notes as follows:

> "It is evident that the notes on the farm management plan regarding the nursery operation are based upon recommendations from the Oregon State University Extension Service." (Emphasis supplied.) Record 3.

disputed that the applicant's notes provide evidence which demonstrates that the proposed farm will generate net loss. We disagree with the county that the applicant's notes were superseded by other evidence. The fact that the applicant later produced other evidence tending to show that the proposed farm will produce net income, does not, without explanation, avoid the undermining effect of the applicant's conflicting evidence demonstrating a net loss. See, Dickas v. City of Beaverton, ___Or LUBA___ (LUBA No. 88-091 March 31, 1989) slip op 16. We do not believe it is reasonable for the county to conclude that the proposed farm use will generate significant net income based on the applicant's unexplained conflicting evidence regarding the cost of and income from the proposal. See, Younger v. City of Portland, 305 Or 346, 348, 752 P2d 262 (1988).

Accordingly, we conclude that the county's decision that the proposed farm use will generate significant net income is not supported by substantial evidence in the whole record.[15]

The fifth assignment of error is sustained.

The county's decision is remanded.

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[15]Significant net income is a required element of the ZDO definition of commercial farm use. Consequently, the county's decision that there can be a commercial farm use on the property if the farm management plan is implemented is not supported by the evidence in the whole record, and ZDO 402.04B is not satisfied, if the county's determination that the proposed farm use will generate significant net income is not supported by substantial evidence in the record.