BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ARNOLD ROCHLIN,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

and

WESTERN STATES DEVELOPMENT CORPORATION,
Intervenor-Respondent.

LUBA No. 99-025

Appeal from Multnomah County.

Arnold Rochlin, Portland, filed the petition for review and argued on his own behalf.

No appearance by respondent.

Jeff H. Bachrach and Allison P. Hensey, Portland, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Ramis Crew Corrigan and Bachrach.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

AFFIRMED 11/24/99

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that finds substantial compliance with farm plans and validates prior decisions granting approval for two farm dwellings.

MOTION TO INTERVENE

Western States Development Corporation (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In 1989, the county granted three approvals. First, it approved a request to divide a 40-acre Exclusive Farm Use (EFU)-zoned property into two 20-acre parcels (hereafter old parcels one and two). Record 310-23. Contemporaneously with this land division, the county approved two dwellings customarily provided in conjunction with farm use (hereafter farm dwellings)–one on old parcel one and a second dwelling on old parcel two. Record 345-47; 394-96. The two farm dwelling approvals were based on a single farm management plan for both parcels.[1] Record 348-62; 397-411. The farm management plan proposed 12,000 Christmas trees on eight acres of old parcel one and 9,000 Christmas trees on six acres of old parcel two, for a combined acreage of 14 acres and a total of 21,000 Christmas trees.

In 1995, old parcels one and two were reconfigured by a property line adjustment (hereafter new parcels one and two). Record 326-32. Although the configuration of parcels one and two was changed by the 1995 property line adjustment, they both remained 20 acres in size. The 21,000 Christmas trees proposed in the 1989 farm management plan have been planted on the same 14 acres that were proposed for planting in 1989. However, as a result of the 1995 property line adjustment, 7,000 of those Christmas trees are planted on four acres

[1]The farm management plan refers to parcels one and two as lots one and two.

of new parcel two and 14,000 of those Christmas trees are planted on 10 acres of new parcel one.

When the 1989 decisions approving the disputed farm dwellings were made, there was no legal requirement that the dwellings authorized by those 1989 decisions be constructed within any particular period of time. The county adopted Multnomah County Code (MCC) 11.15.2030 and 11.15.2031 in April 1998. Under those code sections, the 1989 farm dwelling approvals will expire two years after the adoption of those new code sections (*i.e.*, April 2000), unless the county finds substantial compliance with the approved 1989 farm plan.[2]

The planning director issued dwelling approval validations for both dwellings on July 22, 1998. The planning director's decisions were appealed to a county hearings officer, who affirmed the planning director's decisions. That decision was appealed to the Board of County Commissioners, which affirmed the hearings officer's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner contends the county's decision that there has been substantial compliance with the 1989 farm plan misconstrues and violates

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[2]MCC 11.15.2030(B) provides that farm dwellings that were approved pursuant to applications received before August 7, 1993 will expire two years after the effective date of the ordinance that adopted MCC 11.15.2030(B). MCC 11.15.2031 provides for "Dwelling Approval Validation." MCC 11.15.2031(B) provides that an approval described in MCC 11.15.2030(B) will remain valid if:

> "The property owner applies for a determination of substantial compliance with the approved farm management plan. That determination shall be initiated and processed as follows:
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> "(1) Application shall be made on appropriate forms and filed with the Planning Director prior to two years after the effective date of this Ordinance;
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> "(2) The Planning Director shall find substantial compliance with the approved farm management plan, based on evidence provided by the applicant, if the activities provided for in the first two years of the farm management plan have been implemented.
>
> "* * * * *"

applicable law and is not supported by adequate findings. The gist of petitioner's argument is that because the 1989 farm plan called for 9,000 trees on six acres of old parcel two and there are only 7,000 trees on four acres of new parcel two, the county's finding of substantial compliance with the 1989 farm plan is erroneous. Petitioner argues:

> "The 1995 boundary change is not challenged. It transferred land planned for farming, but did not approve amendment of the farm plan. Impact on the farm plan was not a criterion or consideration. Only impact on farming as it then existed in the area, and alternative siting of the dwellings, were considered. * * *" Petition for Review 5.

Petitioner goes on to argue that, because the reason for a farm plan in the first place is to ensure that there is a sufficient farming operation on each parcel to justify approval of a farm dwelling, we may not assume that the four acres to be planted in Christmas trees on modified parcel two continue to constitute such a sufficient farming operation. *See Hayes v. Deschutes County.*, 23 Or LUBA 91, 98-99 (1992) (a dwelling customarily provided in conjunction with farm use may not be approved under applicable Land Conservation and Development Commission (LCDC) rules until the farm use that justifies such a dwelling exists on the subject property).

We first consider the 1989 decisions in more detail below, before considering how the 1995 property line adjustment affects the decision challenged in this proceeding.

A. 1989 Farm Dwelling Approval Decisions

At the time the land division and the two farm dwellings were approved in 1989 (those approvals are referred to as PRE 26-89 and PRE 27-89), LCDC's administrative rule concerning farm dwellings, *former* OAR 660-05-030, provided in part:

> "(3) Dwellings proposed for parcels which satisfy the Goal 3 minimum lot size standard cannot be approved within an exclusive farm use zone without the county governing body or its designate first determining whether the dwelling satisfies the additional statutory standard in ORS 215.213(1)(g) or 215.283(1)(f). This standard requires a determination that the dwelling is 'customarily provided in conjunction with farm use.'

> "(4) 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 activities 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 farm use' and could only be approved [as a nonfarm dwelling]." Record 111.

In 1989, MCC 11.15.2010(C), the county's then-existing code criterion for approval of farm dwellings, generally reflected the above rule language.[3] Farm dwellings were allowed as a "Use Permitted Under Prescribed Conditions." As relevant in this appeal, a parcel proposed for a farm dwelling was required to contain at least 19 acres. MCC 11.15.2010 (C)(2).[4] MCC 11.15.2010(C)(3) also required that the proposed farm dwelling would be "[c]onducted according to a farm management plan * * *."[5] As far as we can tell, the county relied on the farm management plan required by MCC 11.15.2010(C)(3) to ensure that the farming

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[3]The 1989 version of MCC 11.15.2010 is included at Record 112-13. All citations in this opinion are to the 1989 version of MCC 11.12.2010.

[4]As previously noted old parcels one and two contained 20 acres and therefore exceeded the minimum parcel size.

[5]MCC 11.15.2010(C)(3) required that the farm management plan contain the following elements:

> "(a) A written description of a five-year development and management plan which describes the proposed cropping or livestock pattern by type, location and area [or] size and which may include forestry as an incidental use,
>
> "(b) Soil test or Soil Conservation Service OR-1 soils field sheet data which demonstrate the land suitability for each proposed crop or pasturage use,
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> "(c) *Certification by the Oregon State University Extension Service, or by a person or group having similar agricultural expertise, that the production acreage and the farm management plan are appropriate for the continuation of the existing commercial agricultural enterprise within the area.* For the purposes of this chapter 'appropriate for the continuation of the existing commercial agricultural enterprise within the area' means:
>
> > "(1) That the proposed farm use and production acreage are similar to the existing commercial farm uses and production acreages in the vicinity[.]
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> "* * * * *" (Emphasis added.)

activities proposed by the applicant in 1989 were sufficient to justify approval of a farm dwelling (*i.e*. in the words of the statute and LCDC's administrative rule, that the dwelling is properly viewed as a dwelling "customarily provided in conjunction with farm use"). More precisely, under MCC 11.15.2010(C)(3)(c), the county apparently relied on "[c]ertification * * * that the production acreage and the farm management plan are appropriate for the continuation of the existing commercial agricultural enterprise within the area." Upon such certification, a farm dwelling could be approved.[6]

In approving farm dwellings for old parcel one and old parcel two, the county found:

> "* * * The applicant has submitted a proposed management plan for a Christmas tree operation. That plan has been reviewed by Bernard Douglass of Douglass Tree Farm who has 25 years of experience in the Christmas tree business. He indicates that the proposed operation is similar to existing nursery operations in the vicinity." Record 346, 395.

The county's decisions approving the farm dwellings conclude:

> "The applicant has satisfied the approval criteria for a farm-related single-family residence in the Exclusive Farm Use District through the submission of a proposed five-year management plan which has been certified by Bernard Douglass of Douglass Tree Farm." Record 347; 396.[7]

The county's findings addressing the criteria for approval of the farm dwellings do not specifically recognize that 12,000 trees were proposed for eight acres of old parcel one and 9,000 trees were proposed for six acres of old parcel two.[8] However, the 1989 farm

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[6]The legal adequacy of this code approach to comply with *former* OAR 660-05-030(3) and (4) is not a relevant consideration in this appeal.

[7]Although MCC 11.15.2010(C) requires a five-year farm management plan and the county found that the applicant submitted a five-year plan, the plan is actually a ten-year management plan. No party assigns significant to this fact, and, for that reason, neither do we.

[8]Similarly, the certification by Bernard Douglass, referenced in the findings, is very brief and does not distinguish between the proposed activities on old parcels one and two:

> "I believe that this farm management plan and production acreage are appropriate for the continuation of the existing commercial agricultural enterprise within the area. The following criterion applies:

management plan that was submitted in support of PRE 26-89 and PRE 27-89 does explain the activities proposed for each parcel separately and in detail. Record 348-59. The 1989 farm management plan estimates a net return on the eight-acre Christmas tree operation on old parcel one of $60,800 and a net return on the six-acre Christmas tree operation on old parcel two of $45,600. Record 360.

B. 1989 Land Division Approval

The county's decision approving the land division that created old parcels one and two (referred to as LD 26-89) specifically references the contemporaneous requests for the disputed farm dwellings described above. In addressing Multnomah County Comprehensive Plan Policy No. 9 – Agricultural Lands, the county adopted the following finding in support of the 1989 land division:

> "* * * This policy states in part that '[t]he county's policy is to restrict the use of [EFU-zoned] lands to exclusive agriculture and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural land from inappropriate and incompatible development.' In order to create the proposed 20-acre parcels in the EFU zone the applicant must obtain approval of a 'use under prescribed conditions' for each parcel pursuant to MCC 11.15.2010(C). Obtaining such approval requires, among other things, the preparation of a farm management plan. The plan must be certified by a person with agricultural expertise as being 'appropriate for the continuation of the existing commercial agricultural enterprise within the area.' [T]he applicant has requested such approval under cases PRE 26-89 and PRE 27-89. * * *" Record 315 (citation and emphasis omitted).

The county's findings make it clear that approval of the land division is conditioned on separate approval of farm dwellings for each of the proposed parcels.[9] In addressing

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> "The proposed farm use and production acreage are similar to the existing commercial farm uses and production acreages in the vicinity." Record 363.

[9]One of the conditions of approval provides:

> "Endorsement of the final partition map shall occur only after the approval of the following 'Use Under Prescribed Conditions' cases under MCC 11.15.2010(C)(2): PRE 26-89 and PRE 27-89." Record 311.

slope constraints on the proposed parcels, the findings that were adopted in support of LD 26-89 explain:

> "All of the projected tree farm activity will be on Cascade silt loam soil grades 7B (3%-8% slope), 7C (8%-15% slope) and 7D (15%-30% slope). Prudent Christmas tree planting avoids slopes in excess of 15%. Christmas tree consultant Bernard Douglass has walked this site and determined that it is feasible to plant Noble fir on the 7D area of the property because most of the 7D area slopes gently. The short, steeper portions create steps as the property gradually slopes to the west and south. The 2 lots created by this partition would each have sufficient gently sloping terrain to support the proposed Christmas tree farm and dwelling on each lot.
>
> "Nearly half of [old parcel one] (9.4 acres) has slopes of 15% or less. It has 6.7 acres rated at 15%-30%. The Farm Management Plan uses about 8 acres of this lot for Christmas trees. [Old parcel two] has 3.4 acres with slopes of 15% or less and nearly 15 acres with slopes rated at 15-30%. [O]nly the gentler-sloped portions of this lot will be planted with Noble fir. The Farm Management Plan uses about 6 acres of [old parcel two] for Christmas trees.
>
> "* * * * *
>
> "The steeper land is a hindrance to most activity and does limit the acreage on the parcel that is suitable for farming. However, this limitation does not render the overall parcel unsuitable for agricultural use and will not prevent implementation of the Farm Management Plan." Record 316-17.

When PRE 26-89, PRE 27-89 and LD 26-89 are viewed together it is clear that they constitute an integrated, coordinated land use approval, with the 1989 farm management plan providing the foundation for all three approvals. After the county approved LD 26-89, PRE 26-89 and PRE 27-89, intervenor was authorized to implement the approved farm management plan for old parcels one and two and to construct a farm dwelling on each of those parcels.[10]

[10]The farm management plan states that the farm operator dwellings will be needed three years after the Christmas trees are planted. Record 361, 410.

B. 1995 Property Line Adjustment

The cover letter that accompanied intervenor's proposed property line adjustment in 1995 includes the following explanation:

> "Applicant requests approval of an EFU property line adjustment. The proposed adjustment * * * will not change the parcel sizes which are currently in existence, *or the number of dwellings which have been previously approved under LD 26-89*.
>
> "[B]oth tracts are composed primarily of 7B, 7C, 7D and 7E soils, all of which are productive soils for agricultural enterprises. This change in tract configuration does not in any way deplete each parcel's agricultural productivity because the soils productivity is consistent over the entire area under consideration.
>
> "*The agricultural management of both tracts will become easier under this proposal because both tracts will not be irregularly shaped as currently in existence* * * *." Record 330 (underlining in original; emphases added).

The application itself indicates that one dwelling is proposed for each parcel. Record 327. The county's 1995 decision approving the proposed lot line adjustment is short, but it includes the following finding:

> "The Lot Line Adjustment of the property as shown on the attached Tentative Plan Map is hereby APPROVED on a finding that:
>
> "* * * * *
>
> "2. The resulting lot configuration is at least as appropriate for the continuation of the existing commercial agricultural enterprise in the area as the lot configuration prior to adjustment[.]" Record 328.

As petitioner correctly argues, because the 1995 property line adjustment adjusts old parcels one and two without making any change in the 1989 farm management plan, new parcel one will have 2,000 more Christmas trees and new parcel two will have 2,000 fewer Christmas trees than those parcels would have had without the property line adjustment. Petitioner is also correct that the 1995 property line adjustment findings do not explicitly address the significance, if any, of this resulting change in the number of trees proposed for each lot. However, as we have previously noted, with one exception, the county's findings

supporting the 1989 partition decision and decisions approving the dwellings similarly did not specifically address the numbers of trees or acreages proposed for Christmas tree production on old parcels one and two.[11]

Reading the 1995 property line adjustment application and the county's approval of that application together, it is reasonably clear that the county intended to approve the property line adjustment to authorize the new configurations of parcels one and two without affecting either the prior authorization of farm dwellings for both parcels or the 1989 farm management plan. The legal significance of the county's critical finding in approving the 1995 property line adjustment, *i.e.* that "[t]he resulting lot configuration is at least as appropriate for the continuation of the existing commercial agricultural enterprise in the area as the lot configuration prior to adjustment," is admittedly unclear. However, we understand that finding to state the view that both new parcel one and new parcel two are "appropriate for the continuation of the existing commercial agricultural enterprise in the area." That was the criterion the county applied in PRE 26-89 and PRE 27-89 to authorize the disputed farm dwellings in the first place.

We seriously question the *adequacy* of the county's 1995 findings to establish that the farm dwelling previously authorized on old parcel two could appropriately continue to be viewed as a farm dwelling notwithstanding the reduced number of trees that would be planted on new parcel two.[12] We also tend to agree with petitioner that the county probably should have required a modification of the 1989 farm management plan when it approved the property line adjustment in 1995, to conform the farm management plan to the modified

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[11]The 1989 land division findings addressing slope constraints do discuss the number of trees and acreages of Christmas tree production proposed for old parcels one and two and are set out earlier in this opinion.

[12]That does not necessarily mean that the previously approved plan to conduct a 9,000-tree Christmas tree farm on old parcel two cannot effectively be reduced to a 7,000-tree Christmas tree farm on new parcel two and remain sufficient to be "appropriate for the continuation of the existing commercial agricultural enterprise in the area" and justify a farm dwelling. The 1995 findings simply did not explain why the county believed that was the case when it approved the 1995 property line adjustment.

parcels. However, we conclude that the time to assign error based on these arguable defects would have been in an appeal of the 1995 property line adjustment. Petitioner's attempt to raise those issues in this appeal constitutes an impermissible collateral attack on the 1995 property line adjustment decision. *See Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145, 148 (1993) (previously adopted decision that was not appealed to LUBA may not be challenged in an appeal of a subsequent decision to LUBA); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 52 (1987) (same). Although the 1995 decision could have been clearer, when viewed in context with the application, it envisioned farm dwellings for new parcels one and two and envisioned retaining the previously approved farm management plan.

Consequently, the county was not required to revisit, in the 1998 decision challenged in this appeal, the question of the adequacy of the 1989 farm management plan to support farm dwellings on new parcels one and two. The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted earlier in this opinion, pre-1993 decisions authorizing farm dwellings will be validated, and thereby continue to authorize farm dwellings, if there has been substantial compliance with the approved farm plan. MCC 11.15.2031(B)(2) provides:

> "The Planning Director shall find substantial compliance with the approved farm management plan, based on evidence provided by the applicant, if the activities provided for in the first two years of the farm management plan have been implemented."

As relevant, the farm management plan at issue in this appeal lists "Year-by-Year Costs Per Acre." Those year-by-year costs for the first two years are set out below:

"	Pre-Planting	Cost/Acre
"1.	Preparation for planting: leveling, fence line, access road adjustment	$ 30
"2.	Spraying to control grass and weeds with Velpar, either by helicopter or backpack	$ 45

"3.	Subsoiling to depth of 18"		$ 45
"4.	Plowing and cultivating		$ 45
"5.	Miscellaneous		$ 30
		Total:	$195

"Year 1		Cost/Acre
"1.	Plowing and disking	$ 30
"2.	Planting stock, 2-1 bare root Noble fir seedlings at $150/1000	$225
"3.	Machine Planting	$105
"4.	Spraying for grass and weed control	$ 30
"5.	Land Rental allowance	$ 90
"6.	Miscellaneous expenses, transportation, and consulting fees	$ 30
"7.	Roadway and landing station construction	$156
	Total:	$666"

Record 352.

Petitioner argues that the county's findings of substantial compliance are inadequate and are not supported by substantial evidence. We understand petitioner to contend that the county's findings fail to demonstrate implementation of required spraying (item 2), subsoiling to a depth of 18 inches (item 3) and plowing and cultivating (item 4).[13] Petitioner argues that the only evidence submitted by the applicant to establish completion of first year activities was evidence of spraying, and petitioner contends that the applicant's evidence

[13]To the extent petitioner's arguments extend to item 1 (preparation for planting: leveling, fence line, access road adjustment) and item 5 (miscellaneous), his arguments are not developed and we do not consider them further, except to note that there is evidence that the access road has been gated and fenced.

does not establish that spraying was done on new parcels one and two. Petitioner contends there is no evidence that subsoiling to 18 inches was done and that the evidence of required plowing and cultivating is limited to the applicant's representation that it was done at the time of planting.

We do not agree with petitioner's arguments concerning spraying. The record includes a bill for spraying and for planting trees. Record 383-84 and 431-32. There is a reference in the bill that creates some confusion about whether the bill is for spraying on this property or some other property. At the local hearing, the planning staff and the applicant's attorney explained that, notwithstanding an erroneous reference in the bill, the bill for spraying and planting was for new parcels one and two.[14] A reasonable person would accept the bill as proof of spraying, with the explanations that were offered during the local hearing. Therefore the bill, as explained, is substantial evidence that pre-planting spraying activity was carried out. *See Douglas v. Multnomah County*, 18 Or LUBA 607, 617-18 (1990) (explaining the nature of substantial evidence and LUBA's review to determine if a decision is supported by substantial evidence).

The only evidence of the other activities required during years one and two is set out in the applicant's statement. Petitioner complains that the applicant's statement does not establish that other pre-planting activities listed in the farm management plan for the first year (set out in the text above) were carried out. The applicant's statement explains:

> "The [farm management] plan's year-by-year cost estimates are intended for estimating budgets and feasibility; as such, they are not required elements of the farm management plan. The techniques for ground preparation and tree planting implemented by the applicant may vary somewhat from those anticipated with the 'cost estimates' shown in the plan, but the goal and the end result is the same. The applicant has now completed the first year's activity (pre-planting) and the second year's activity (planting), as discussed

[14]As petitioner concedes, the bill is for the precise number of trees that the farm management plan projects for old parcels one and two.

below, and is in substantial compliance with the approved farm management plan.

"The applicant purchased Noble fir seedlings at a cost of 23 cents each. * * * The applicant hired Christmas tree contractor BTN of Salem to prepare the ground, apply pre-planting herbicide, plant the seedlings and apply post-planting herbicide. * * * Based on the approved management plan, * * * BTN planted a total of 21,000 seedlings on the two parcels, the maximum number estimated in the plan. * * * The distribution of the seedlings on the two parcels, as adjusted, is roughly 14,000 in Parcel 1 and 7,000 in Parcel 2.

"BTN performed the following farm activities, using the farm management plan as a guide. The ground area outlined in the approved management plan was prepared for planting. Existing grass on the site was sprayed to keep it from competing with the seedlings. In addition, the access road entry had been gated and fenced, providing security for the tree farms. A well that has been dug on Parcel 1 is a potential source of water for irrigation. At this point, the activities expected in the first year of the plan (pre-planting) had been substantially implemented. As called for in the second year, the Noble fir seedlings were planted by machine. The plowing and cultivation necessary for the planting was accomplished by the machine that planted the seedlings. As evident in the photos of the site, * * * the grass in the planted area has been killed, and the fir trees have been planted in rows with the five-foot-by-five-foot spacing recommended in the management plan. BTN returned to spray the tree farms again (with a post planting herbicide), as called for in the BTN contract with [intervenor]. Thus the activities of the second year of the plan (planting and post planting spraying) were implemented by BTN." Record 343-44.

We agree with intervenor that the above representation that plowing and cultivating occurred at the time trees were planted is substantial evidence that that activity occurred.[15] However, we agree with petitioner that there is not substantial evidence in the record that subsoiling to a depth of 18 inches occurred.

The hearings officer's decision, which was adopted by the board of commissioners, addressed opponents' concerns about first year pre-planting activities as follows:

[15]The only contrary evidence consists of expressions of doubt by opponents during the local proceedings that such plowing and cultivating occurred at the time of planting. We believe a reasonable decision maker could have resolved this conflicting testimony in favor of the applicant. Of course that means the plowing and planting occurred in the second rather than the first year. Petitioner does not argue that that discrepancy would be significant, and we do not see that it is.

"The anticipated work schedule for the first two years of the plan was to prepare for planting and plant the seedlings. The applicant states in the plan:

> "'the ground to be planted with Noble fir seedlings is already cleared, but must be prepared in the year before planting. As outlined on the cost sheet, there will be some leveling, spraying, plowing and cultivating, and subsoiling to 18 inches. The spraying may be done by backpack or by helicopter.'

"The plan contemplated 'some' leveling, spraying, plowing and cultivating and subsoiling. There is no indication that all of these tasks were required for the entire acreage to be planted. The basic plan has been accomplished, under a somewhat compressed time line.

"The written materials submitted by applicant, together with the credible testimony does provide substantial evidence that pre-planting activity occurred. The written and oral testimony by appellants is not sufficient to controvert the substantial evidence submitted by applicant. The substantial compliance standard is not a strict compliance standard. The substantial evidence presented by applicant does demonstrate that there is substantial compliance with the farm management plan." Record 18-19.

The hearings officer explained her decision at the board of commissioners' hearing:

> "The best confirmation that I have had that, in fact, the pre-planting activities had occurred * * * to assure survival of the trees was that in fact the trees had survived. * * * We had a relatively dry summer, yet the trees had survived. The plan itself anticipated that, starting the second year, that ten percent of the trees would need to be replaced, probably because they had died. Yet after a dry summer there is no evidence that any of the trees had died. [T]here were 21,000 and they were growing and surviving, so I found that that in itself substantiated the fact that adequate pre-planting activities had occurred to assure the survival of the trees. * * *" Intervenor-respondent's Brief App 16-17.

We have been cited to no testimony or other evidence that any subsoiling to a depth of 18 inches was done during the first or second year. The applicant, hearings officer and board of commissioners never directly confront that issue. Therefore, if petitioner's interpretation of MCC 11.15.2031(B)(2) to require that each of the items listed in the 1989 farm management plan must be implemented is required in this case, the county's finding of substantial compliance is not supported by adequate findings or substantial evidence.

However, the board of commissioners adopted the hearings officer's decision and the hearings officer accepted the applicant's suggested interpretation of MCC 11.15.2031(B)(2) as not necessarily requiring that each task for which a cost estimate is provided be implemented. Instead, the applicant, hearings officer and board of commissioners recast the substantial compliance requirement of MCC 11.15.2031(B)(2) in this case as requiring that pre-planting and planting activities be substantially carried out.

As petitioner notes, because MCC 11.15.2031(B)(2) essentially defines substantial compliance as implementing the "activities provided for in the first two years of the farm management plan," the county's interpretation can be characterized as converting the MCC 11.15.2031(B)(2) substantial compliance standard into a standard that merely requires substantial compliance with substantial compliance. While it is possible to characterize the county's interpretation in the manner petitioner argues, it is also possible to characterize the county's interpretation as not necessarily viewing every single task for which a cost is estimated as the equivalent of an "activity" that must be implemented. Rather the activities called for in the first year are "pre-planting" and "planting" and those activities involve a number of anticipated tasks, without an absolute requirement that all listed tasks be implemented. That approach is much less straightforward than the approach petitioner takes. However, the question for LUBA is whether it exceeds the county's interpretive authority under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and ORS 197.829(1).[16] Although it is an exceeding close call, we conclude that it does not.

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[16]ORS 197.829(1) requires that LUBA affirm a governing body's interpretation of its own land use regulation unless that interpretation:

> "(a) Is inconsistent with the express language of the * * * land use regulation;
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> "(b) Is inconsistent with the purpose for the * * * land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the * * * land use regulation; or

The main difficulty with the county's substantial compliance interpretation of MCC 11.15.2031(B)(2) is that it has no clear foundation in the language of MCC 11.15.2031(B)(2) and offers no reliable way to determine which of the tasks identified in the farm plan must be implemented and which may be altered or ignored altogether. That problem is potentially a real one; and, as petitioner correctly notes, it could make farm management plans an ineffective way to ensure that the dwellings that were justified by the farm management plan are actually needed to carry out the farm management plan. However, we understand the county to have interpreted MCC 11.15.2031(B)(2) as being concerned with the overriding purpose of all the pre-planting activity proposed for the first year rather than the individual tasks described in the farm management plan to implement that pre-planting activity. Under the county's interpretation, the relevant question is whether the pre-planting activity has been implemented in a way that fulfilled the overall purpose of the pre-planting activity, which is to ensure that the trees that are subsequently planted will survive and grow. The county found that such pre-planting activity occurred, and there is substantial evidence in the record to support that finding.[17]

Petitioner's interpretation of MCC 11.15.2031(B)(2) is much more clear, objective and straightforward than the one adopted by the county. Petitioner's interpretation of MCC 11.15.2031(B)(2) would simply require that the applicant implement each task that the applicant said it was going to carry out in the first two years of the approved farm plan. However, we cannot say the county's interpretation is "clearly wrong," which is the test we must apply under *Clark* and ORS 197.829(1). *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996); *Zippel v. Josephine County*, 128 Or App

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"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[17]As the hearings officer noted, the required number of trees has been planted and those trees have survived at a rate that exceeded expectations in the farm management plan.

458, 461, 876 P2d 854 (1994); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992). The county's interpretation is certainly not compelled by the language of MCC 11.15.2031(B)(2) or its purpose or underlying policy. However, we cannot say that it so deviates from the language of MCC 11.15.2031(B)(2) that it is *inconsistent* with the language, purpose, underlying policy or statutory or LCDC rule standards that MCC 11.15.2031(B)(2) was adopted to implement. As MCC 11.15.2031(B)(2) was interpreted by the county, the county's findings are adequate to support its decision that the first two years of the 1989 farm plan have been implemented, and there is substantial evidence to support its decision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues under the third assignment of error that, under *Forster v. Polk County*, 24 Or LUBA 476 (1993), a farm dwelling may not be approved before a farm plan is sufficiently implemented. However, the challenged decision is a decision to validate previously issued decisions that authorize farm dwellings. It is not a decision to authorize a farm dwelling in the first place. We fail to see how our decision in *Forster* has any bearing on this case.

The third assignment of error is denied.

The county's decision is affirmed.