BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KEN WACHAL,
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

JOHANNES FARR,
Intervenor-Respondent.

LUBA No. 2018-034

FINAL OPINION
AND ORDER

Appeal from Linn County.

David E. Coulombe, Corvallis, filed the petition for review and argued on behalf of petitioner. With him on the brief was Fewel, Brewer & Coulombe.

No appearance by Linn County.

Joel D. Kalberer, Albany, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Weatherford Thompson PC.

RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

REMANDED 09/28/2018

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision approving a farm relative dwelling on a 40-acre parcel zoned exclusive farm use (EFU).

FACTS

Intervenor-respondent (intervenor) owns a 40-acre parcel zoned EFU that is located six miles southeast of the city of Scio. The property is located in the floodplain of Crabtree Creek.[1] The property includes an existing dwelling that was approved by the county in 1978 through a variance (1978 Variance). Record 66. Twenty-eight acres of the property are used for growing hay, which intervenor cuts and sells from the property. Intervenor also cuts hay for other area farms. Record 76–81. Intervenor also restores tractors and repairs other equipment on the property.

ORS 215.283(1)(d) authorizes the county to approve an accessory dwelling on EFU-zoned land to be occupied by a relative of the farm operator, if "the farm operator does or will require the assistance of the relative in the

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[1] Linn County Code (LCC) 870.050(Q) defines "floodplain" to mean "any land area susceptible to flooding from any source, the areas of which are delineated on the Flood Insurance Rate Maps applicable to Linn County." As we discuss in more detail below, intervenor obtained a Letter of Map Amendment (LOMA) to remove a .02-acre portion of the property from the Area of Special Flood Hazard, defined in LCC 870.050(C) as "the land in the floodplain that is subject to a one percent (1%) or greater chance of flooding in any given year."

management of the farm use[.]" Intervenor applied for approval of a farm relative dwelling to be located on the subject property, that would be occupied by intervenor's adult son and his family.[2] The proposed location of the farm relative dwelling is approximately 500 feet from Crabtree Creek. The proposed farm relative dwelling would be served by the well that serves the existing dwelling, and by a separate driveway and a separate septic system and drainfield.

The county planning director approved the application, and petitioner appealed the decision to the planning commission, which held a hearing and approved the application. Petitioner appealed the planning commission's decision to the board of county commissioners, which also held a hearing on the application and at the conclusion of the hearing voted to approve the application. At a subsequent hearing, the board of county commissioners adopted a decision approving the application with findings in support of the decision.

This appeal followed.

MOTION TO STRIKE

Petitioner moves to strike portions of intervenor's response brief that petitioner alleges include facts not supported by the record. Petitioner describes seven instances in which petitioner alleges the response brief contains facts that

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[2] Intervenor is 69 years old and submitted evidence of a medical condition. Record 128. Intervenor's medical condition is undisputed.

are not supported by the record, a few of which are repetitive. However, petitioner recognizes that in all but two instances, the response brief includes citations to the record pages or testimony provided at a hearing to support a factual allegation included in the response brief, but nonetheless argues that the cited record pages and testimony do not provide evidentiary support for the factual allegation.

Intervenor responds that with two exceptions, the cited record pages and hearing testimony do provide support for the factual allegations contained in the response brief. Intervenor concedes that the two exceptions in his brief at page 5 and page 19 include a statement indicating that intervenor has obtained building permits for the farm relative dwelling that has been constructed. Intervenor argues that the statement is "harmless" because petitioner has not established that the facts are "material." *Id.*

LUBA disregards any allegations of material fact that are not supported by the record, where a party demonstrates that is the case. However, a lack of evidentiary support for arguments and factual allegations in a brief is not a basis for striking those portions of the brief. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff'd* 89 Or App 40, 747 P2d 373 (1987). Here, all but two allegations of fact are supported by citations to the record, and the cited record pages could reasonably be read to support the factual allegation. Petitioner's motion to strike those portions of the brief that

cite those record pages is denied. LUBA will disregard the portions of intervenor's brief that assert facts that lack foundation in the record.

Petitioner's motion to strike is denied.

FIRST ASSIGNMENT OF ERROR

In a portion of his first assignment of error, petitioner argues that the county's findings are inadequate. Adequate findings are required to support quasi-judicial land use decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20–21, 569 P2d 1063 (1977). Generally, findings must: (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

According to petitioner, the decision incorporated documents as findings that are not adequately identified in the decision and therefore, the incorporation was ineffective. Petitioner relies on the prefatory statement that "[b]ased on the facts, the evidence and testimony received at the public hearing, the Board finds * * *." Record 8. Similar language is included in various sections of the decision. Petitioner argues that the decision must be remanded based on the ineffective incorporation under *Gonzalez v. Lane County*, 24 Or LUBA 251, 258–59 (1992) (holding that if a local government decision maker chooses to incorporate all or portions of another document by

reference into its findings, it must clearly (1) indicate its intent to do so and (2) identify the document or portions of the document so incorporated.)

Intervenor responds, and we agree, that the county's decision does not incorporate any documents as findings. The decision includes the entirety of the county's findings of fact and conclusions of law in support of the decision. The prefatory language that petitioner relies on in support of his argument does not serve to incorporate any other material as findings. Rather, such a statement indicates that the county has evaluated facts, evidence, and argument in the record in reaching its decision and adopting the findings in support of its decision.

In another portion of the first assignment of error, petitioner argues that several findings in the decision that explain why the county concluded that the application meets the criteria in Linn County Code (LCC) 933.310(B)(1), LCC 933.310(B)(3), and in OAR 660-033-0130(9) are not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). Those LCC provisions are set out below in our resolution of the second and third assignments of error. Because petitioner's second and third assignments of error also challenge the county's findings that each of those criteria are satisfied and argue that the findings are not supported by substantial evidence in the record, we address the arguments in our resolution of the second and third assignments of error.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 215.283(1)(d) allows a dwelling on land zoned EFU. A use under ORS 215.283(1) is a use that may be established on EFU-zoned land as a permitted use, free of supplemental county regulation. *See Brentmar v. Jackson County*, 321 Or 481, 496-97, 900 P2d 1030 (1995) (discussing the difference between ORS 215.283(1) and (2) uses).[3] The Land Conservation and Development Commission (LCDC) has adopted rules at OAR 660-033-0130(9) adding additional qualifications.[4]

LCC 928.325(B)(1) allows in the EFU zone "a farm-relative dwelling, subject to LCC 933.420." LCC 933.310(A) subjects uses permitted in "LCC

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[3] Two categories of uses in the EFU zone are set out at ORS 215.213(1) and 215.283(1) (hereafter subsection (1) uses) and ORS 215.213(2) and 215.283(2) (hereafter subsection (2) uses). The Oregon Supreme Court has drawn a distinction between subsection (1) and subsection (2) uses. The court described subsection (1) uses as uses that are allowed by right, which may not be subject to additional local criteria. *Brentmar*, 321 Or at 496. Differently, subsection (2) uses may be subject to additional local criteria and are subject to additional statutory criteria as well.

[4] In a decision after *Brentmar*, the court clarified that the prohibition against applying additional local government criteria to subsection (1) uses did not apply to the LCDC. *Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997). LCDC is therefore free to enact administrative rules that regulate both subsection (1) and (2) uses more stringently than the EFU statutes, even if the rules "have the effect of prohibiting uses otherwise permissible under the applicable statue." *Id.*

928.320 to 928.336" to additional criteria, at LCC 933.310(B).[5] Petitioner's second assignment of error includes subassignments of error that challenge the county's conclusion that the application meets LCC 933.310(B)(1), (2), and (3). We address each subassignment of error below.

A. LCC 933.310(B)(1)

LCC 933.310(B)(1) requires the county to find that "[t]he development site has physical characteristics needed to support the use. Those characteristics include, but are not limited to, suitability for a sewage treatment system and an adequate supply of potable water."

1. Location of the Proposed Dwelling

Petitioner argues that the board of county commissioners improperly construed LCC 933.310(B)(1) when it concluded that nothing in the LCC or state law requires the proposed dwelling to be sited nearer to the existing dwelling and its associated infrastructure. Petitioner points out that the proposed dwelling will result in the removal of approximately three acres of farm land from farm use. According to petitioner, removing additional farmland on the property from use for farming is inconsistent with the legislature's expressed preference for preserving farm land, and with the

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[5] Intervenor cites *Brentmar*, 321 Or 481, and argues that LCC 933.200 does not apply as additional approval criteria, but does not argue that LCC 933.310(B) does not apply to the application. Response Brief 16.

purpose of the Rural Resource Zoning District, set out at LCC 928.300(A)(1), "to preserve land suitable for agricultural production."

Intervenor responds that the county correctly found that nothing in the LCC or state law requires the proposed dwelling to be sited in a location closer to the existing developed dwelling and infrastructure on the property. We agree with intervenor. The only direction in ORS 215.283(1)(d) regarding where a farm relative dwelling may be sited is that it must be located on "the same lot or parcel as the dwelling of the farm operator." Petitioner does not argue that the proposed dwelling will not be located on "the same lot or parcel" as intervenor's dwelling.[6] Finally, intervenor also responds that the Court of Appeals has concluded that the uses allowed in ORS 215.283(1) "[are] related to and promote[] the agricultural use of farm land." *Hopper v. Clackamas County*, 87 Or App 167, 172, 741 P2d 921 (1987). Accordingly, allowing the farm relative dwelling "promotes the agricultural use of farm land." We agree with intervenor that nothing in state law either requires the farm relative dwelling to be sited closer to the existing dwelling or prohibits siting the proposed farm relative dwelling on land that is currently in agricultural use.

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[6] Pursuant to LCC 933.420, which implements ORS 215.283(1)(d), the farm relative dwelling may be permitted "on an authorized unit of land in the EFU [zone] * * *." In the first subassignment of error under the third assignment of error, petitioner argues that "the proposed unit of land is not authorized for residential expansion." Petition for Review 44. That is so, petitioner argues, due to a condition of approval in the 1978 Variance. Petition for Review 44–46. We address that argument under the third assignment of error.

2. Adequate Supply of Potable Water

Petitioner also argues that the county's finding that there is "an adequate supply of potable water" is not supported by substantial evidence in the whole record. LCC 933.310(B); ORS 197.835(9)(a)(C). The proposed dwelling will use the same well as the existing dwelling for its water source. The county relied on a well water report from 2002 to conclude that the property has potable water. Record 121. Petitioner argues that the well water report is not evidence of the current potability of the water on the property because the report is too old. However, a reasonable person would rely on the 2002 report and evidence that the existing well currently serves the existing dwelling to conclude that the property has potable water. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) ("substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding"); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

Petitioner also argues that the county was required to find that the property has an adequate quantity of water from the existing well, but could not adopt such a finding because there is no evidence in the record to support such a conclusion. The county's findings acknowledge that there is no evidence in the record regarding the quantity of available water, such as "a pump test or other means to verify the flow rate of water from the well * * *." Record 7. The county instead included a condition of approval that requires intervenor to

demonstrate that the well has an adequate flow of water "prior to the issuance of residential development permits for the farm-relative dwelling * * *." *Id.*

Petitioner argues that the county failed to find, and could not find, that compliance with the "adequate supply" standard was "feasible" because the record lacked any evidentiary support for such a finding. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).[7] Petitioner argues that having failed to adopt

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[7] In *Rhyne*, LUBA relied on the Court of Appeals' decision in *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den* 297 Or 82 (1984) to explain:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances." 23 Or LUBA at 447-48 (citation and footnotes omitted).

such a finding, the county impermissibly deferred finding compliance with LCC 933.310(B)(1) to a later proceeding that does not include the opportunity for public participation.

We agree with petitioner. The county acknowledged that no evidence in the record supports a determination that an adequate flow of water exists, and essentially followed the third *Rhyne* option, but without deferring its decision making to a proceeding that provides the statutorily required notice and hearing. That approach is not a permissible one.

3. Septic

The county found that the physical characteristics of the site are suitable for the proposed septic system, which will be a separate septic system from the existing system. The board of county commissioners relied on a site evaluation conducted by the county's Environmental Health Specialist (EHS) sometime in summer. Record 117–120.

In the second subassignment of error, and in a portion of the first assignment of error, petitioner argues that the county's decision that the site is suitable for the septic system is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). Petitioner argues that the county EHS' evaluation failed to comply with OAR 340-071-0130(25), which provides:

> "Groundwater levels. All groundwater levels must be predicted using conditions associated with saturation. *In areas where conditions associated with saturation do not occur* or are inconclusive, such as in soil with rapid or very rapid permeability, *predictions of the high level of the water table must be based on*

> *an agent's past recorded observations*. If such observations have not been made or are inconclusive, the application must be denied until observations can be made. *Groundwater level observations must be made during the period of the year in which high groundwater normally occurs in an area*. A properly installed nest of piezometers or other methods DEQ accepts must be used for making water table observations." (Emphases added.)

Petitioner argues that because the evaluation was conducted in summer, when the water table is not at its highest, the evaluation did not comply with OAR 340-071-0130(25). According to petitioner, there is evidence in the record that 40 years ago, in 1978, the property had a high water table in the location of a development site proposed at that time. Petition for Review 30 (citing Record 70-71).

The county rejected petitioner's argument below, and concluded that the county EHS evaluation provided evidence that the characteristics of the site are suitable for a septic system. The county rejected petitioner's argument regarding OAR 340-071-0130(25) and interpreted the requirement to conduct "groundwater level observations * * * during the period of the year in which high groundwater normally occurs in an area" as inapplicable, because the property is in an area where "conditions associated with saturation" occur. Petitioner does not dispute that the property is located in an area where "conditions associated with saturation" are present. As we understand the county's interpretation, where the county EHS predicted groundwater levels using "conditions associated with saturation" due to the location of the property in an area where conditions associated with saturation occur, no

requirement for observations to be made during high groundwater periods applies.

We think the county's interpretation is correct. ORS 197.835(9)(a)(D); *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). The county's interpretation of the rule is consistent with its express language, which requires the site evaluation to "predict[]" groundwater levels using "conditions associated with saturation." Only if "conditions associated with saturation" are not present or are inconclusive are groundwater levels required to be predicted using "past observations." Groundwater observations must be done during the period when the water table is the highest. OAR 340-071-0150(3)(c)(I) also provides context to support this interpretation. It requires a site evaluation report to include, among other information, "[w]ater table levels as indicated by conditions associated with saturation *or* water table observations[.]" (Emphasis added.)

Accordingly, we agree with intervenor that the site evaluation by the county EHS is evidence a reasonable person would rely on to conclude that the site is suitable for a septic system.

The first subassignment of error is sustained, in part.

B. LCC 933.310(B)(2)

LCC 933.310(B)(2) requires the county to find that "the development will not be located within a mapped geological hazard area or within a 100-year floodplain unless it is demonstrated that the proposal can be designed and

engineered to comply with accepted hazard mitigation requirements." The county found that the proposed dwelling is not located in the floodplain due to the LOMA removing .02 acres from the mapped special flood hazard area. Record 10; *see* n 1.

Petitioner argues that even if the dwelling itself is not located within the *special flood hazard area* due to the LOMA, the dwelling site and the associated infrastructure (driveway, water lines, and septic) remain located in the 100-year floodplain. Petitioner argues that the county improperly construed LCC 933.310(B)(2) to exclude from the definition of "development" the driveway, septic system and drainfield.[8] Petitioner also argues that the county's findings are inadequate to explain why the farm relative dwelling and appurtenant development "can be designed and engineered to comply with accepted hazard mitigation requirements."

Intervenor responds that the county found that compliance with LCC Chapter 870 floodplain design standards would satisfy LCC 933.310(B)(2) and that intervenor "can demonstrate that 'the proposal can be designed and engineered to comply with accepted hazard mitigation requirements' by building in accordance with the floodplain standards." Intervenor's Response Brief 24. The problem with intervenor's response is that the county did not actually find that LCC 933.310(B)(2) will be satisfied by compliance with LCC

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[8] LCC 900.020(A)(15) defines "development" as "to make a material change in the use or appearance of a structure or land * * *."

Chapter 870 design standards as part of the permitting process for access, septic, building, and water lines. Instead, the county simply quoted the purpose statement in LCC 870.030, which is "to promote public safety and welfare and minimize flood-related losses by * * * (B) [r]equiring the construction of structures and utilities in a manner that will reduce damage to the installations and prevent contamination and unsanitary conditions." Record 9. The county noted that, outside the 0.02-acre building envelope, "there may be other parts of the subject property location within the 100-year floodplain still subject to floodplain management standards." Record 10. However, the county found that "the proposed development will not be located within * * * a 100-year floodplain." *Id.*

The county found that the proposed development satisfies LCC 933.310(B)(2) because "the development will not be located within a mapped geological hazard area or within a 100-year floodplain" and did not find, in addition and in the alternative, that intervenor "demonstrated that the proposal can be designed and engineered to comply with accepted hazard mitigation requirements," or that such demonstration could be deferred to later permitting processes required under LCC Chapter 870. Accordingly, we agree with petitioner that remand is necessary for the county to apply LCC 933.310(B)(2) to development outside the building envelope and in the floodplain and to make further findings.

The second subassignment of error is sustained.

3. LCC 933.310(B)(3)

LCC 933.310(B)(3) requires the county to find that "[t[he proposal will not have a significant adverse impact on sensitive fish or wildlife habitat." Crabtree Creek is identified on the Linn County Comprehensive Plan's Sensitive Habitat Inventory Map as sensitive salmonid habitat, and is a mapped wetland on the National Wetlands Inventory (NWI). Record 86. The farm relative dwelling is proposed to be located 500 feet from the bank of the creek. Record 87; 203. LCC 934.535 imposes a 50-foot development setback from the top of the bank of Crabtree Creek.

The county found that the location of the proposed dwelling and septic system more than 500 feet from the creek ensured that the proposed dwelling and infrastructure would not have a significant adverse impact on Crabtree Creek or the inventoried wetlands. The county considered comments from the Oregon Department of Fish and Wildlife (ODFW) and the Oregon Department of State Lands (DSL) that it appeared that the dwelling in a location 500 feet from the creek would not impact fish habitat or wetlands. The county also imposed a condition of approval requiring compliance with any DSL requirements regarding removal, fill, or ground alteration in fish habitat or any wetlands on the property, and a condition requiring intervenor to comply with septic installation requirements included in the septic permit issued by the county's EHP. Record 10-11.

In this subassignment of error and in a portion of the first assignment of error, petitioner argues that there is not substantial evidence in the record to show the location of wetlands on the property. Petition for Review 8–10; 35–42. Petitioner argues that a wetlands delineation is needed, and that the proposed dwelling and septic system are located in wetlands.

Intervenor responds that the county's Sensitive Habitat Inventory Map and the NWI both identify Crabtree Creek as a mapped wetland and sensitive fish habitat, and the NWI is evidence a reasonable person would rely on to determine the location of the wetlands. We agree.

Petitioner also challenges the county's reliance on ODFW and DSL comments, and argues for a different understanding of the comments. Record 189, 194–95. However, the county's findings accurately summarize the comments from ODFW and DSL, and the county properly relied on that evidence to conclude that LCC 933.310(B)(3) was met.

Finally, petitioner challenges an interpretation of Policy 903.510(B)(13) of the Linn County Comprehensive Plan Natural Resources Element, a provision that was referenced in the staff report from the planning director to the planning commission. The planning director opined that the application

satisfied LCC 933.310(B)(3) because a dwelling is not a "major facility" within the meaning of Policy 903.510(B)(13).[9] Record 171.

The board of county commissioners' decision does not cite to or include any findings that rely on Policy 903.510(B)(13). Accordingly, petitioner challenges a finding that the county did not make, and his argument provides no basis for reversal or remand.

The third subassignment of error is denied.

The first assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error includes three subassignments of error.

A. First Subassignment

In his first subassignment of error, petitioner argues that the farm relative dwelling is prohibited by the 1978 Variance decision that approved the existing dwelling. The 1978 Variance includes condition of approval 2, which provides that "[t]his approval is for one house only," and petitioner argues that the condition was intended to prohibit any additional dwellings on the property at any time in the future. Record 66. In support of his argument, petitioner relies on a staff report that was provided to the board of county commissioners prior

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[9] Policy 903.510(B)(13) provides that "the development of a major facility shall be accomplished in a manner not having a significant adverse impact on a sensitive fish or wildlife habitat or scenic or historic area."

to its 1978 hearing on the variance application that included a recommendation that the decision "limit residential development to the one house requested." Record 68.

In the challenged decision, the board of county commissioners interpreted the 1978 condition of approval to apply to the 1978 dwelling approval only, and to clarify that only the dwelling sought in the application was approved. The board of county commissioners concluded that it was not intended to restrict future development on the property to one dwelling.[10] Record 16. We agree with intervenor that the board of county commissioners' interpretation of the condition does not improperly construe the condition and that the condition is most reasonably interpreted to confirm that the application approved only one dwelling on the entire property, which at the time included both EFU zoned and Agriculture Residential Timber (ART) zoned property. ORS 197.835(9)(a)(D); *see* n 10.

The first subassignment of error is denied.

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[10] Intervenor points out that at the time of the 1978 Variance, the property included a portion that was zoned Agriculture Residential Timber (ART), a zoning classification that would allow partition of the property and possible additional dwellings. Record 67. Intervenor responds that the 1978 Variance also included condition of approval 1, which required the applicant to apply to change the zoning of the ART portion of the property to EFU, which would prohibit partition and additional dwellings. Accordingly, we understand intervenor to argue, conditions of approval 1 and 2 worked together to limit the 1978 Variance decision to the dwelling approved and to limit future partition of the ART-zoned portion.

B. Second Subassignment

OAR 660-033-0130(9) is the administrative rule that implements ORS 215.283(1)(d) and Statewide Planning Goal 3 (Agricultural Land).[11] As relevant here, first, the rule requires that the farm operator require the assistance of the relative in the management of the "existing commercial farming operation." *Id.* Second, the rule defines "farm operator" as a "person who operates a farm, doing the work and making the day-to-day decisions about such things as planting, harvesting, feeding and marketing." LCC 933.420 implements the rule in substantially the same language.

1. Existing Commercial Farming Operation

The applicable LCDC rule does not define "commercial farming operation" as that phrase is used in the statute or the rule. *Harland v. Polk County*, 44 Or LUBA 420, 435 (2003). The county found that 25 acres of

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[11] OAR 660-033-0130(9) provides, in relevant part:

> "(a) To qualify for a relative farm help dwelling, a dwelling shall be occupied by relatives whose assistance in the management and farm use of the existing commercial farming operation is required by the farm operator. * * * The farm operator shall continue to play the predominant role in the management and farm use of the farm. A farm operator is a person who operates a farm, doing the work and making the day-to-day decisions about such things as planting, harvesting, feeding and marketing.
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> "(b) A relative farm help dwelling must be located on the same lot or parcel as the dwelling of the farm operator and must be on real property used for farm use."

intervenor's property are in use for hay production and that the property is predominately comprised of high value soils. The county found that the property is used for "farm use." Record 12–13.

In his second subassignment of error, petitioner argues that the county's findings are inadequate because the county failed to determine whether intervenor is operating a "commercial farming operation," which is the determination required under OAR 660-033-0130(9)(a) and LCC 933.420(B)(5). Petitioner argues that the county improperly construed the rule and code section by equating "farm use" with a "commercial farming operation."

Intervenor responds by pointing to the LCC definitions of "[c]ommercial" and "farm * * * operation," and argues that the LCC definitions mean that the county has defined the phrase "commercial farming operation" as used in the rule and is entitled to rely on that definition. The LCC definitions of "commercial" and "farm * * * operation" are synonymous with the definition of "farm use" in ORS 215.203(2)(a)."[12] Intervenor argues that in *Harland*,

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[12] LCC 920.100(B)(55) defines "[c]ommercial" as "any use or activity conducted, made, done, or operated primarily for obtaining a profit in money." LCC 920.100(B)(107) defines "farm * * * operation" as "all units of land in the same ownership that are used by the farm operator for farm use as defined in ORS 215.203."

ORS 215.203(2)(a) defines "farm use" in relevant part as:

> "As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by

LUBA concluded that by deciding to not define "commercial farming operation," LCDC allowed individual counties the discretion to determine if a particular farm operation is "commercial" for purposes of a farm relative dwelling application.

Intervenor's summary of our holding in *Harland* is correct, as far as it goes. However, there are two problems with intervenor's argument. First, the county's findings do not cite or rely on the LCC definitions that intervenor cites, and do not expressly interpret those provisions. Second, and more importantly, even if we assume that in failing to define "commercial farming operation," LCDC intended to give individual counties discretion to determine whether a particular farming operation is "commercial," that does not mean that a county may equate an "existing commercial farming operation" with "farm use." OAR 660-033-0130(9)(a) uses both the phrase "farm use" and the phrase "existing commercial farming operation" within the same sentence, and LCDC is presumed to have intended different meanings when it uses different terms. *See Scott v. State Farm Mutual Auto. Ins.*, 345 Or. 146, 155, 190 P.3d 372 (2008) (when the legislature uses two different terms, it is presumed that it intends two different meanings). In *Harland*, we explained that a finding that a

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> raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, furbearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof."

farm is a "farm use" has little bearing on whether the farm is an "existing commercial farming operation." 44 Or LUBA at 433 ("the relatively minor level of agricultural activity that might qualify a property for preferential agricultural assessment is not necessarily sufficient to qualify as a commercial farming operation within the meaning of OAR 660-033-0130(9)"). Accordingly, to the extent that the county equated the term "farm use" with the term "commercial farming operation," the county improperly construed OAR 660-033-0130(9)(a).

In *Harland*, we held that a county may consider, in approving a farm relative dwelling under OAR 660-033-0130(9), whether the farm operation in question meets the thresholds for a "commercial agricultural enterprise" under OAR 660-033-0020.[13] 44 Or LUBA at 434 ("If the farm is of sufficient scale and productivity to satisfy [the requirements for a 'commercial agricultural enterprise'], we believe the farm could clearly be viewed as a commercial farm operation."). We also commented in *Harland* that the county could consider whether the farm operation would qualify to site a primary dwelling in

[13] OAR 660-033-0020 includes a definition of a similar phrase, "commercial agricultural enterprise." Under the rule, the phrase "commercial agricultural enterprise" serves a particular purpose under OAR 660-033-0100, which allows counties to approve farm parcels smaller than the statutory minimum based on findings that the smaller parcels would maintain the commercial agricultural enterprise in the county.

conjunction with farm use, under the standards at OAR 660-033-0135. *Id.* at 434 n 12.

The county found that "the * * * dwelling will be located on a property used for farm use[.]" Record 13. We agree with petitioner that the county's findings are inadequate where the county did not address whether the farm is a "commercial farming operation."

Petitioner further argues that the activities occurring on the property are not a "farm use" as defined in ORS 215.203(2)(a). According to petitioner, the Schedule F tax return information submitted by intervenor as part of the application demonstrates that in the three tax years submitted intervenor lost $34,000, $25,000 and $9,000 in the most recent tax year submitted, 2016.[14] According to petitioner, the tax returns are evidence that intervenor does not operate a farm because the serial annual losses indicate that intervenor does not farm for "the primary purpose of obtaining a profit in money." Finally, petitioner argues that intervenor's tractor restoration is not a farm use on the property, and intervenor's engaging in cutting hay for other area farms in not a farm use on the property.

The requirement in ORS 215.203(2) that land must be employed "for the primary purpose of obtaining a profit in money" by one of the uses specified in the statute in order to be considered in "farm use" is an objective test that

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[14] Internal Revenue Service (IRS) Form 1040, Schedule F is entitled "Profit or Loss from Farming."

focuses on the activities that are occurring on the land rather than on the actual motivation of the owner or operator. *Cox v. Polk County*, 39 Or LUBA 1, 11 (2000), *rev and rem on other grounds* 174 Or App 332, 25 P3d 970 (2001). The hay production that is occurring on the property is "raising, harvesting and selling crops" within the meaning of ORS 215.203(2)(a), and intervenor's Schedule F shows that intervenor receives income from that hay production. Accordingly, we disagree with petitioner that the hay production that is occurring on the property is not a "farm use" merely because intervenor has not profited from the activity.

However, we agree with petitioner that other activities that are occurring on the property, specifically tractor restoration and repair, and intervenor's off-site activity cutting hay under contracts with other area farmers, do not constitute the "farm use" of the property. Neither of those activities qualify as a "farm use" on the property within the meaning of ORS 215.203(2)(a), because they are not "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops * * *." Accordingly, whether intervenor requires assistance performing those activities is not a valid consideration in determining whether to approve a farm relative dwelling.

The second subassignment of error is sustained, in part.

C. Third Subassignment

The county found that intervenor's age and chronic medical conditions require the assistance of a relative to assist with the farming operation. Record 15. The county based its findings on a letter from a physician and intervenor's application. Record 128. The county also found that intervenor's relative will assist with farming the property for hay and maintaining farm equipment. *Id.*

During the proceedings below, petitioner testified that intervenor "owns * * * a small engine repair shop in Salem." Petition for Review 59; Record 62. Intervenor and intervenor's son testified that intervenor is "retired." Intervenor's Response Brief, Appendix 36. In response to petitioner's argument below that assistance on the farm is required only because intervenor is substantially employed off of the farm, the county found:

> "[petitioner's arguments] are speculative, as no evidence was submitted into the record to demonstrate that the applicant is employed full time off-site and, if so, that such employment presents him from farming the subject property. Further, the Board finds the question to be irrelevant. The questions before the Board are whether the property is in farm use, whether [intervenor] manages and farms the property, and whether a qualifying relative's assistance is required to conduct the continued farm use of the land." Record 14.

In his third subassignment of error, petitioner argues that the county's decision that a relative's assistance is needed is not supported by substantial evidence in the record because the county failed to properly consider petitioner's testimony that intervenor owns a small engine repair shop, and that testimony is not rebutted by anything in the record. ORS 197.835(9)(a)(C).

Intervenor responds that the evidence in the record that intervenor is retired supports the county's conclusion that intervenor requires assistance in the management of the farm.

In *Richards v. Jefferson County*, __ Or LUBA __ (LUBA No. 2017-103, January 30, 2018), we rejected a similar finding by the county that operation of a separate business or businesses away from the farm is "irrelevant" in determining whether the farm operator plays a "predominant role" in operating the farm:

> "We disagree that such information is entirely irrelevant. While a person can certainly be employed off a farm and still qualify as a 'farm operator' for purposes of OAR 660-033-0130(9)(a), the applicant must establish that the farm operator 'continue[s] to play the predominant role' in farm use of the property, and continues to 'operate [the] farm, doing the work[.]' These qualifications might not be met if the reason the farm operator requires the assistance of the relative is because the farm operator is substantially employed off the farm and does not have enough time to do the work." *Richards*, __ Or LUBA __ (slip op at 12).

In the present case, intervenor states that he is "retired."[15] Intervenor's Response Brief at App 36. Stating that intervenor is retired or is no longer employed in Salem does not address the issue, which is whether intervenor requires assistance because he owns a business off of the farm and does not have enough time to do the work. Owning or operating a business off of the

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[15] At oral argument intervenor's counsel stated that "[intervenor] no longer has employment in Salem." LUBA Oral Argument, September 6, 2018 at 21:04-07

farm could mean that the farm operator requires the assistance of the relative because the farm operator does not have enough time to do the work on the farm. Accordingly, we agree with petitioner that remand is required in order for the county to address the evidentiary dispute between petitioner and intervenor over whether intervenor spends substantial time off of the farm due to owning an offsite business, because the county erred in concluding that the issue is "irrelevant." *Richards*, __ Or LUBA __ (slip op at 12).

The third subassignment of error is sustained.

A portion of the third assignment of error is sustained.

The county's decision is remanded.