

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 KEVIN RICHARDS,  
5 *Petitioner,*

6  
7 and

8  
9 CENTRAL OREGON LANDWATCH,  
10 *Intervenor-Petitioner,*

11  
12 vs.

02/27/19 AM 11:04 LUBA

13  
14 JEFFERSON COUNTY,  
15 *Respondent,*

16  
17 and

18  
19 NEW GRASS LLC,  
20 JEFF DUPONT and JENNIFER DUPONT,  
21 *Intervenors-Respondents.*

22  
23 LUBA No. 2018-117

24  
25 FINAL OPINION  
26 AND ORDER

27  
28 Appeal from Jefferson County.

29  
30 Andrew Mulkey, Eugene, filed a petition for review and argued on behalf  
31 of petitioner.

32  
33 Rory Isbell, Bend, filed a petition for review and argued on behalf of  
34 intervenor-petitioner. With him on the brief was Central Oregon Landwatch.

35  
36 David C. Allen, Madras, filed a response brief and argued on behalf of  
37 respondent.

1 Mark O. Cottle, Sherwood, filed a response brief on behalf of  
2 intervenors-respondents.

3  
4 BASSHAM, Board Member; RYAN, Board Chair; ZAMUDIO, Board  
5 Member, participated in the decision.

6  
7 REMANDED 02/27/2019

8  
9 You are entitled to judicial review of this Order. Judicial review is  
10 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a decision on remand approving a relative farm help dwelling.

**FACTS**

We repeat the relevant facts from our earlier decision, *Richards v. Jefferson County*, \_\_ Or LUBA \_\_ (LUBA No 2017-103, Jan 3, 2018) (slip op at 2-3) (*Richards I*):

“The subject property is a rectangular 119-acre parcel located approximately two miles south of the city of Madras. The property is developed with a single-family dwelling located in its northeast corner and a shop building located near the middle of the southern border. The property currently supports a hay-growing operation, irrigated by a center-pivot, supplemented by handline and wheel-line irrigation in the corners.\* \* \*

“The property is owned by New Grass, LLC, whose principals are Jennifer DuPont and Jeff DuPont (the DuPonts). The DuPonts own several businesses, including two in Madras with a total of 25 employees. In 2011, the DuPonts purchased the subject property under a land sale contract. From 2011 on, the DuPonts farmed the property with one or more of their sons, growing hay, and reported revenue from farm operations through an S corporation, Arrow D. In February 2017, the DuPonts, via New Grass, LLC, acquired title to the property. The DuPonts currently reside in the primary dwelling on the property.

“In early 2017, the DuPonts bought approximately 100 head of cattle, and grazed them on leased lands located some distance from the subject property, supplemented by hay grown on the subject property. The DuPonts informed the county that they intend to transport the cattle to the subject property in the fall to graze off the aftermath of the hay harvest.

1            “In April 2017, the DuPonts, through New Grass, LLC, filed an  
2            application for a relative farm help dwelling, to allow their son  
3            Jeremy DuPont to live on the farm and assist with farm operations.  
4            The proposed accessory dwelling would be located near the  
5            existing shop building. \* \* \*”

6            Neighboring farmers, including petitioner, opposed the application, arguing that  
7            the DuPonts failed to demonstrate compliance with the code standards  
8            governing approval of a relative farm help dwelling, including requirements  
9            that the applicant establish that the “farm operator,” who plays a “predominant  
10           role” in a “commercial farming operation,” “does or will require the assistance”  
11           of a relative to manage the farm operation.<sup>1</sup>

12           The county planning commission and board of commissioners approved  
13           the application. The petitioners appealed the commissioners’ decision to

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<sup>1</sup> Jefferson County Zoning Ordinance (JCZO) 301.6(F) requires the applicant for a relative farm help dwelling (which the JCZO terms an “Accessory Farm Dwelling for a Relative”) to demonstrate compliance with the following relevant standards:

- “3. The farm operator does or will require the assistance of the relative in the management of the existing commercial farming operation; and
- “4. The farm operator will 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.”

JCZO 301.6(F) implements OAR 660-033-0130(9) in substantively identical language. OAR 660-033-0130(9) is quoted below.

1 LUBA. LUBA sustained the petitioners’ second and third assignments of error,  
2 remanding to Jefferson County (the county) for additional evidence and  
3 findings regarding the approval standards, including: (1) the identity of the  
4 “farm operator,” (2) whether the farm operator continues to play “the  
5 predominant role” in the farming operation, (3) whether the farm operator “does  
6 or will require the assistance” of a relative to manage the farm operation, and  
7 (4) whether the farm operation qualifies as a “commercial farming operation.”

8 On remand, the county accepted additional evidence from Jeff DuPont,  
9 and adopted additional findings. This appeal followed.

10 **FIRST ASSIGNMENT OF ERROR (COLW)**

11 Intervenor-petitioner Central Oregon Landwatch (COLW) argues that the  
12 county’s decision on remand violated the “law of the case” established in  
13 *Richards I*, because it is inconsistent with the terms of LUBA’s remand.

14 As noted, LUBA remanded the county’s initial decision for the county to  
15 adopt more adequate findings, supported by substantial evidence, regarding four  
16 matters that the applicant has the burden of establishing in order to demonstrate  
17 compliance with the approval criteria governing a relative farm help dwelling.  
18 COLW contends that in *Richards I* LUBA established as a matter of law that  
19 certain findings and evidence are necessary to establish compliance with OAR  
20 660-033-0130(9) and JCZO 301.6(F), with respect to the “farm operator,”  
21 “predominant role,” “does or will require the assistance,” and “commercial  
22 farming operation” elements of the applicable standards. According to COLW,

1 on remand the county ignored LUBA’s directives and instead adopted  
2 conclusory findings that fail to grapple with and resolve, based on substantial  
3 evidence, each of the elements that the applicants must establish in order to gain  
4 approval of a relative farm help dwelling under OAR 660-033-0130(9) and  
5 JCZO 301.6(F).

6 As discussed below, we agree with petitioner and COLW that the  
7 county’s findings on remand, combined with its original findings, are still  
8 inadequate to demonstrate compliance with all of the applicable OAR 660-033-  
9 0130(9) and JCZO 301.6(F) standards, and that some findings are still not  
10 supported by substantial evidence. But we agree with the county that COLW’s  
11 arguments regarding “law of the case” do not provide a basis—or at least an  
12 independent basis—for reversal or remand. COLW’s arguments regarding “law  
13 of the case” are based on *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678  
14 (1992). At issue in *Beck* was whether a party could fail to appeal an adverse  
15 LUBA ruling in a decision that remanded to the local government, but instead  
16 wait until the remand decision comes back to LUBA to challenge that adverse  
17 ruling before LUBA and the Court of Appeals. *Id.* at 151. The Oregon Supreme  
18 Court held that matters conclusively resolved before LUBA cannot be  
19 relitigated in subsequent appeals of subsequent decisions on the same matter.  
20 *Id.* at 151-54. However, COLW has not established how that principle is  
21 violated where (1) LUBA remands to the county to adopt new findings, based  
22 on substantial evidence, and (2) on remand, the county accepts new evidence

1 and adopts new findings, as LUBA directed. COLW cites to nothing in the  
2 record on remand or in the county's remand decision suggesting that the county  
3 attempted to relitigate any issue conclusively resolved in *Richards I*. While our  
4 decision in *Richards I* included discussion of the requirements in OAR 660-  
5 033-0130(9) and JCZO 301.6(F), and that discussion was intended to provide  
6 guidance and a framework for the proceedings on remand, COLW has not  
7 established that the county on remand took any position contrary to any issue  
8 conclusively resolved in *Richards I*. That we conclude below that some of the  
9 county's findings are still insufficient to demonstrate compliance with OAR  
10 660-033-0130(9) and JCZO 301.6(F) does not mean that the county violated the  
11 "law of the case" principle articulated in *Beck*.

12 In addition, COLW's arguments are duplicative of the arguments under  
13 its second and third assignments of error, which directly challenge the adequacy  
14 of the county's findings to establish compliance with OAR 660-033-0130(9)  
15 and JCZO 301.6(F). COLW's arguments under the first assignment of error do  
16 not provide an independent basis for reversal or remand and, for that reason  
17 alone, are denied.

1 **FIRST ASSIGNMENT OF ERROR (Petitioner)**  
2 **SECOND ASSIGNMENT OF ERROR (COLW)**

3           ORS 215.283(1)(d) authorizes in the exclusive farm use (EFU) zone<sup>2</sup> a  
4 “dwelling on real property used for farm use if the dwelling is occupied by a  
5 relative of the farm operator \* \* \* if the farm operator does or will require the  
6 assistance of the relative in the management of the farm use and the dwelling is  
7 located on the same lot or parcel as the dwelling of the farm operator.” OAR  
8 660-033-0130(9) implements and elaborates on the requirements of ORS  
9 215.283(1)(d), authorizing a relative farm help dwelling only if the dwelling is  
10 occupied by relatives “whose assistance in the management and farm use of the  
11 existing commercial farming operation is required by the farm operator.”<sup>3</sup>

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<sup>2</sup> In Jefferson County, the “EFU A-1” zone has been established to preserve areas containing predominantly irrigated agricultural soils for existing and future farm uses related to the production of agricultural crops or products. The EFU A-1 zone recognizes and preserves areas of agricultural land which are more productive than lands in the “EFU A-2” zone, due to soil class and presence of irrigation water. JCZO 301.1(A)–(B).

<sup>3</sup> 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. However, farming of a marijuana crop may not be used to demonstrate compliance with the approval criteria for a relative farm help dwelling. 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



1           In its initial decision, the county adopted no findings whatsoever  
2 regarding whether the DuPonts’ farm operation constitutes an “existing  
3 commercial farming operation” for purposes of OAR 660-033-0130(9) and  
4 JCZO 301.6(F). In our initial appeal, we noted that neither the rule nor the code  
5 define “commercial farming operation.” The petitioners argued that, under any  
6 definition, the hay-growing operation on the subject 119-acre property is simply  
7 too small in scale and intensity to constitute a “commercial” farm operation for  
8 purposes of OAR 660-033-0130(9) and JCZO 301.6(F). We remanded the  
9 decision to the county to address the issue in the first instance, after first  
10 discussing two acceptable “safe harbor” approaches, previously identified in  
11 our cases, to determining whether a farm operation qualifies as a “commercial”  
12 farm operation under the rule.<sup>4</sup> \_\_\_ Or LUBA at \_\_\_ (LUBA No 2017-103, Jan 3,

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operates a farm, doing the work and making the day-to-day decisions about such things as planting, harvesting, feeding and marketing.

“(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.

“(c) For the purpose of subsection (a), ‘relative’ means a child, parent, stepparent, grandchild, grandparent, stepgrandparent, sibling, stepsibling, niece, nephew or first cousin of the farm operator or the farm operator’s spouse.”

<sup>4</sup> We here describe the two approaches discussed in *Richards I* and *Harland* as “safe harbors,” because they are based on specific and facially more rigorous rule standards that apply to somewhat analogous determinations and uses governed by OAR chapter 660, division 033. The two approaches are based on

1 2018) (slip op at 18-19) (citing *Harland v. Polk County*, 44 Or LUBA 420, 434  
2 (2003)).

3 On remand, the county did not resolve the question of whether the  
4 DuPonts' farm operation on the property is a "commercial farming operation"  
5 in either of the two "safe harbor" ways we suggested in *Richards I*. The county

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(1) the OAR 660-033-0020 standards for determining what minimum parcel size is consistent with continuing the "commercial agricultural enterprise" within a local area, and (2) the OAR 660-033-0135 standards for approving a dwelling in conjunction with farm use. The rationale is that if a farm operation meets or exceeds the local thresholds for a "commercial agricultural enterprise," or the farm operation is productive enough to qualify for a primary farm dwelling, then a county could safely conclude, without more analysis, that the farm operation is also a "commercial farming operation" for purposes of approving a "relative farm help dwelling" under OAR 660-033-0130(9).

To those two identified "safe harbors," we can add a third. OAR 660-033-0130(24)(b) sets out standards for when a farm operation with a primary farm dwelling qualifies for an accessory farm dwelling, occupied by a non-relative. Because a relative farm help dwelling is similar in function to an "accessory farm dwelling" allowed under OAR 660-033-0130(24), if the farm operation supporting the primary farm dwelling is sufficient to qualify the property for an accessory farm dwelling under the standards at OAR 660-033-0130(24)(b), we think a county could safely conclude, without more, that the farm operation qualifies as a "commercial farming operation" for purposes of OAR 660-033-0130(9). Of course, the reverse is not true: if the farming operation supporting a proposed relative farm help dwelling did not meet or exceed the relevant standards under any of these three "safe harbors," it would not necessarily mean that the county must conclude that the farming operation at issue is not a "commercial farming operation" for purposes of OAR 660-033-0130(9). It means only that the county must grapple with that issue directly and do the hard work of articulating the thresholds it will apply in determining whether the farm operation at issue qualifies as a "commercial farming operation."

1 did not attempt to devise its own method, or articulate what constitutes a  
2 “commercial” versus “noncommercial” farming operation in this area of the  
3 county. Instead, the county adopted the following brief finding:

4 “The Board finds that the Applicant’s farm operation constitutes an  
5 existing commercial farm operation. The farm has farm deferral  
6 tax status. The farm exceeds the 80 acre minimum lot[] size for a  
7 farm in the EFU-A-1 zone. The operator runs cattle, grows crops,  
8 and receives irrigation on site. The operator buys, sells, and leases  
9 equipment for the farm. The operator provided tax returns that  
10 identified farm income from the property. Aerial photographs  
11 show the property has been cropped continuously for several  
12 years.” Record 4.

13 Petitioner and COLW argue, and we agree, that the above-quoted finding  
14 is inadequate to determine whether the farming operation on the subject  
15 property constitutes a “commercial farming operation” within the meaning of  
16 OAR 660-033-0130(9) and JCZO 301.6(F).

17 The finding first cites the fact that the farm has farm deferral tax status.  
18 As petitioner argues, a farm need not be commercial in scale or intensity to  
19 qualify for deferred tax status, so this finding lends little support to the  
20 conclusion that the DuPont’s farm operation qualifies as “commercial.”

21 The finding next notes that the subject property exceeds the 80-acre  
22 minimum lot size for a farm in the county EFU A-1 zone. The minimum parcel  
23 in the EFU zone is established by Statewide Planning Goal 3 (Agricultural  
24 Lands) and ORS 215.780(1). OAR 660-033-0100 authorizes a county to  
25 approve a minimum parcel size less than 80 acres for land not designated

1 rangeland as long as the county determines that the lesser minimum parcel size  
2 is consistent with maintenance of the “commercial agricultural enterprise” in  
3 the area. The statutory 80-acre minimum parcel size is, in effect, legislatively  
4 deemed consistent with maintenance of the commercial agricultural enterprise.  
5 Thus, that a particular parcel meets or exceeds the applicable minimum parcel  
6 size provides some support for the conclusion that a farm operation on the  
7 property, at least one that occupies all usable portions of the property at an  
8 appropriate level of intensity, is a commercial farming operation. However,  
9 that the parcel meets or exceeds the applicable minimum parcel size does not, in  
10 itself, suffice to establish that any or all farm operations on that parcel are  
11 “commercial” in scale or intensity, or that the parcel thereby qualifies for any  
12 dwelling. *See* OAR 660-033-0100(3) (“A minimum size for new parcels for  
13 farm use does not mean that dwellings may be approved automatically on  
14 parcels that satisfy the minimum parcel size for the area. New dwellings in  
15 conjunction with farm use shall satisfy the criteria for such dwellings set forth  
16 in OAR 660-033-0130(1)”).

17 The above-quoted finding then recites that the “operator runs cattle,  
18 grows crops, and receives irrigation on site.” Record 4. These undisputed facts  
19 establish that there is a farm operation on the property, but do little to establish  
20 that that farm operation is “commercial” in scale or intensity.

21 The finding next states that “[t]he operator buys, sells, and leases  
22 equipment for the farm.” *Id.* Petitioner argues that there is no evidence in the

1 record that the DuPonts buy, sell or lease farm equipment. According to  
2 petitioner, the only evidence on this point is that the DuPonts do not own much  
3 if any farm equipment, and rely on a barter arrangement to borrow equipment  
4 for planting and harvesting. We agree with petitioner that even if it is true that  
5 the DuPonts buy, sell and lease farm equipment, that finding does little to  
6 establish that the farm operation is commercial in scale or intensity.

7 Next, the findings note that “[t]he operator provided tax returns that  
8 identified farm income from the property.” *Id.* Again, this establishes the  
9 existence of a farm operation on the subject property, but does not have an  
10 obvious bearing on whether that farm operation is commercial in scale and  
11 intensity. Further, as we understand it, the tax returns in the record reflect farm  
12 income and expenses that are not limited to operations on the subject property.

13 Finally, the findings note that aerial photographs show “the property has  
14 been cropped continuously for several years.” *Id.* This undisputed fact  
15 establishes a farm operation on the property, but again does little to establish  
16 that that farm operation is commercial in scale or intensity.

17 Collectively, the above-quoted findings fall far short of establishing that  
18 the DuPont’s farm operation is a “commercial farming operation.” It is difficult  
19 to fault the county for the paucity of its analysis, given that the Land  
20 Conservation and Development Commission (LCDC) has not seen fit to  
21 provide any definition or guidance on what constitutes a “commercial farming  
22 operation” for purposes of OAR 660-033-0130(9). Nonetheless, it is the

1 county's obligation, when addressing an application for a relative farm help  
2 dwelling under OAR 660-033-0130(9), to attempt to articulate the thresholds  
3 that separate a "commercial" from a non-commercial farming operation.  
4 Because it is an undefined term, counties have some discretion to determine the  
5 thresholds for a "commercial farming operation" as applied within the county or  
6 within a particular local area or agricultural sector. *Harland*, 44 Or LUBA at  
7 435. If the county chooses not to employ one of the "safe harbors" discussed  
8 above at n 4, the county has no choice but to determine those thresholds in the  
9 first instance. That determination will necessarily constitute a mixed question  
10 of fact and law, subject to LUBA's review for legal error and evidentiary  
11 sufficiency.

12 We understand the county to request that if LUBA remands for more  
13 adequate findings regarding the "commercial farming operation" element of  
14 OAR 660-033-0130(9), LUBA should provide what guidance it can to the  
15 county. We can do so only in a limited and abstract manner, as many of the  
16 predicate findings are necessarily factual in nature. However, as our discussion  
17 above indicates, we believe that, as a legal matter, what distinguishes an  
18 existing "commercial" farming operation from its noncommercial counterparts  
19 is largely a matter of scale and intensity. Roughly speaking, we believe a  
20 commercial farming operation is one that is of sufficient scale and intensity that  
21 would induce and require a reasonable farmer to devote the majority of his or  
22 her working hours to operating a farm on the subject property.

1           Petitioner’s first assignment of error and COLW’s second assignment of  
2 error are sustained.

3           **SECOND ASSIGNMENT OF ERROR (Petitioner)**

4           **THIRD ASSIGNMENT OF ERROR (COLW)**

5           These assignments of error challenge the county’s findings regarding the  
6 other elements of OAR 660-033-0130(9) and JCZO 301.6(F), specifically, that  
7 the “farm operator” residing on the property “requires the assistance” of a  
8 relative in managing the farm operation, and the identified farm operator  
9 continues to play the “predominant role” in that farm operation. Although these  
10 elements are logically distinct (theoretically, a person may be the farm operator,  
11 but not play the predominant role in the farm operation, or vice versa), the  
12 arguments, evidence and findings regarding each element tend to overlap. *See*  
13 *Kenagy v. Benton County*, 112 Or App 17, 20, 826 P2d 1047 (1992) (the  
14 questions of whether the landowner qualifies as a ‘farm operator’ and whether  
15 the farm operator requires assistance in the farm operation are two sides of the  
16 same coin). While we separately address the challenges to the findings under  
17 each element, our discussion will also consider related findings and evidence.

18           **A. Farm Operator**

19           OAR 660-033-0130(9) and JCZO 301.6(F) define a “farm operator” as  
20 the “person who operates a farm, doing the work and making the day-to-day  
21 decisions about such things as planting, harvesting, feeding and marketing.”  
22 Intervenors-respondents’ initial application identified Jeff DuPont as the farm

1 operator and, based on little more than assertions on that point, the county  
2 concluded that Jeff DuPont is the farm operator as required by OAR 660-033-  
3 0130(9) and JCZO 301.6(F). However, the county’s initial findings did not  
4 address contradictory arguments and evidence suggesting that Jeff DuPont was  
5 in fact not the farm operator, but that someone else, either someone leasing the  
6 subject property or Jeremy DuPont, the DuPonts’ son, was the person who  
7 qualified as the farm operator, *i.e.*, the person conducting the hay operation,  
8 doing the work and making the day-to-day decisions. LUBA remanded in part  
9 for the county to address those issues.<sup>5</sup>

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<sup>5</sup> LUBA concluded, in *Richards I*:

“[P]etitioners cite to testimony in the record expressing the surmise that the DuPonts do not farm the subject property at all, but instead lease their hay field to a custom farm operator. Petitioners note that the DuPonts own no hay equipment, report income consistent with lease payments, reported few expenses typical of running a hay operation, and provided no record of actually selling hay. Further, petitioners cite their personal observation that a custom farm operator, Oliver Watson Farms, has conducted all planting and harvest activity on the subject property. Record 29. The record includes photographs of equipment marked Oliver Watson Farms allegedly operating on the subject property. Record 31.

“As noted, the DuPonts responded to this issue in their oral testimony, denying that they lease the subject property or employ other farm operators to plant or harvest the hay.<sup>□</sup> Instead, the DuPonts testified that Jeremy DuPont is able to borrow equipment as compensation for his employment with



1 On remand, Jeff DuPont testified that the DuPonts do not lease the subject  
2 property to a custom hay operator, and also testified regarding the proposed  
3 division of labor between Jeff and Jeremy DuPont. On remand, the county  
4 adopted the following finding:

5 “The Board finds that Jeff DuPont is the farm operator. He makes  
6 the day to day decisions about activities on the farm. The Board  
7 accepts Mr. DuPont’s testimony that he directs the daily farming  
8 activities, including planting, harvesting, feeding and marketing.  
9 He chooses what equipment is needed for the farm. He decides  
10 what to grow. He instructs his son on farm actions; the son is the  
11 worker on the farm and for whom the dwelling is needed. The  
12 Applicant accepts the financial risk of operating the farm. \* \* \*  
13 The Board found that the evidence supported Mr. DuPont’s  
14 assertion that he farms the property himself.” Record 3.

15 The findings do not directly address the dispute regarding whether the property  
16 is leased to a custom hay operator, but the finding that Jeff DuPont makes the

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another farm operator elsewhere, and Jeff or Jeremy DuPont operates the borrowed equipment on the subject property.

“Despite this issue being raised below, the commissioners’ findings do not address the issue, nor adopt any findings addressing whether Jeff DuPont, or some other person or entity, is the ‘farm operator.’<sup>□</sup> See findings quoted at n 3.<sup>□</sup> The findings clearly presume that Jeff DuPont is the farm operator, but there are no findings addressing the evidentiary dispute on this point. We agree with petitioners that if the subject property is leased to another farm operator or the hay operation is otherwise predominantly conducted by someone other than Jeff DuPont, then Jeff DuPont does not qualify as the required ‘farm operator.’ Remand is necessary for the county to address this issue in the first instance.” \_\_ Or LUBA at \_\_ (LUBA No 2017-103, Jan 3, 2018) (slip op at 10-11) (footnotes omitted).

1 day to day decisions about the farm operation would seem to implicitly resolve  
2 that dispute in the applicant’s favor. The finding also does not directly address  
3 the dispute, based on tax records, regarding whether Jeremy DuPont is in fact  
4 the person primarily responsible for conducting farm operations on the subject  
5 property. However, the above-quoted finding is responsive to the definition of  
6 “farm operator,” which focuses not only on who does the “work,” but also on  
7 who makes the “day-to-day decisions about such things as planting, harvesting,  
8 feeding and marketing.” Under that definition, the county reasonably focused  
9 on identifying the person who performs the higher-order decision-making in  
10 running the farm. The county chose to rely on Jeff DuPont’s testimony that he,  
11 and not Jeremy DuPont, makes the final decisions regarding planting,  
12 fertilizing, weed control, marketing, harvesting, cattle operations, etc. Record  
13 125.

14         Petitioner and COLW argue that the above-quoted finding is inadequate  
15 and not supported by substantial evidence, citing to tax records that can be read  
16 to indicate that Jeremy DuPont plays a larger role in the farm operation than  
17 Jeff DuPont. We discuss the dispute on that point under the “predominant role”  
18 element of the test. For present purposes, we disagree with petitioner that the  
19 county’s finding identifying Jeff DuPont as the “farm operator” is not supported  
20 by substantial evidence in the whole record. Substantial evidence is evidence in  
21 the whole record that a reasonable person would rely upon to conclude  
22 compliance with approval criteria. *Dodd v. Hood River County*, 317 Or 172,

1 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752  
2 P2d 262 (1988). A reasonable person could conclude, based on the evidence in  
3 the whole record, that Jeff DuPont is the farm operator as defined in OAR 660-  
4 033-0130(9) and JCZO 301.6(F).

5 The subassignments of error directed at the “farm operator” element are  
6 denied.

7 **B. Predominant Role**

8 OAR 660-033-0130(9) and JCZO 301.6(F) require that the farm operator  
9 “continue to play the predominant role in the management and farm use of the  
10 farm.” As discussed in *Richards I*, the county’s application form requires the  
11 applicant to quantify how many hours per week both the relative and the farm  
12 operator will be engaged in the farm operation, presumably so the county can  
13 use that information to identify the farm operator and determine whether the  
14 farm operator will continue to play the predominant role. The Duponts’  
15 original application asserted that Jeremy DuPont would work “30+” hours per  
16 week, but provided no similar information regarding Jeff DuPont. \_\_\_ Or LUBA  
17 at \_\_\_ (LUBA No 2017-103, Jan 3, 2018) (slip op at 5). The county concluded  
18 that Jeff DuPont would play the predominant role in the farm operation, but on  
19 appeal LUBA concluded that that finding was not supported by any evidence.

20 In *Richards I*, we stated:

21 “The county’s farm relative dwelling application requires that the  
22 applicant indicate ‘how many hours per week’ both the relative and  
23 the farm operator ‘will be engaged in the farming operation.’

1 Record 185. The application states that Jeremy DuPont will work  
2 '30+' hours per week on the farm, but does not provide any  
3 information regarding how many hours per week Jeff DuPont will  
4 be engaged in the farm operation. *Id.* No party cites us to any  
5 evidence on that point. While detailed evidence on that point may  
6 not be necessary in all cases to establish that the applicant qualifies  
7 as a 'farm operator' as defined in OAR 660-033-0130(9)(a), in the  
8 present case we agree with petitioners that the evidence in the  
9 record does not provide a sufficient basis for a reasonable decision-  
10 maker to conclude that Jeff DuPont will play the predominant role  
11 in the farm operation, and the limited findings on that point, quoted  
12 at n 3, are conclusory and inadequate.

13 "First, as petitioners note, the undisputed evidence in the record is  
14 that the DuPonts own and operate several businesses, including  
15 two businesses in the nearby city of Madras employing a total of  
16 25 people. The county argues that it is irrelevant under OAR 660-  
17 033-0130(9)(a) whether and to what extent the farm operator is  
18 employed off the farm. We disagree that such information is  
19 entirely irrelevant. While a person can certainly be employed off a  
20 farm and still qualify as a 'farm operator' for purposes of OAR  
21 660-033-0130(9)(a), the applicant must establish that the farm  
22 operator 'continue[s] to play the predominant role' in farm use of  
23 the property, and continues to 'operate [the] farm, doing the  
24 work[.]' These qualifications might not be met if the reason the  
25 farm operator requires the assistance of the relative is because the  
26 farm operator is substantially employed off the farm and does not  
27 have enough time to do the work." \_\_ Or LUBA at \_\_ (LUBA No  
28 2017-103, Jan 3, 2018) (slip op at 11-12).

29 In relevant part, LUBA noted testimony that Jeff DuPont owns a number  
30 of off-farm businesses, and agreed with the petitioners that the "predominant  
31 role" element may not be met if the reason the farm operator requires assistance  
32 is that the farm operator "is substantially employed off the farm and does not  
33 have enough time to do the work." *Id.* (slip op at 13).

1 On remand, the applicant did not submit any testimony quantifying or  
2 comparing the number of hours the farm operator would contribute to the  
3 operation, compared to the relative, and in its findings the county did not rely  
4 upon any such quantification or comparison. Instead, the county simply found:

5 “The Board finds that Jeff DuPont plays and will continue to play  
6 the predominant role in the farm operation. He makes the day to  
7 day decisions on the farm. He takes the risks of the farm operation.  
8 He provided testimony as to his activities on the farm (day to day  
9 decision-maker, equipment and crop decisions, instructing son)  
10 establishing his predominant role. He testified to the fact that he  
11 would continue to play the predominant role in the farm operation.  
12 The Board heard testimony as to Applicant’s additional  
13 commercial activities outside of the farm operation and found that  
14 many of those activities were related to his farm operation.”  
15 Record 3.

16 Petitioner and COLW argue that this finding is inadequate in a number of  
17 respects and not supported by substantial evidence. First, petitioner and COLW  
18 argue that the finding seems to count the time Jeff DuPont spends on his off-  
19 farm businesses toward establishing that Jeff DuPont plays the “predominant  
20 role” in the farm operation on the subject property. The county made a similar  
21 finding in addressing whether Jeff DuPont is the farm operator, finding that Jeff  
22 DuPont “has vertically integrated his activities on the farm into his other  
23 businesses.” Record 3. Petitioner argues that these findings are not supported  
24 by the record and, even if they were supported by the record, they erroneously  
25 consider non-farm activities off the property for purposes of determining

1 whether Jeff DuPont is the farm operator and continues to play the predominant  
2 role in the farm operation on the property.

3 We agree with petitioner. Neither intervenors-respondents nor the county  
4 cite any evidence in the record supporting the findings regarding the nature of  
5 Jeff DuPont's businesses. Even if those findings were supported by substantial  
6 evidence, that those businesses are in some unspecified way related to the farm  
7 operation on the subject property has no bearing on whether Jeff DuPont  
8 continues to play the predominant role in the farm operation. The focus of  
9 these elements of OAR 660-033-0130(9) and JCZO 301.6(F) is on the farm  
10 operation on the subject property. See OAR 660-033-0135(8)(b) (for purposes  
11 of OAR chapter 660, division 033, "[f]arm or ranch operation" means "all lots  
12 or parcels of land in the same ownership that are used by the farm or ranch  
13 operator for farm use as defined in ORS 215.203"). Consequently, time and  
14 effort spent on Jeff DuPont's cattle operation on leased lands in Grass Valley  
15 cannot be counted toward establishing any element of OAR 660-033-0130(9)  
16 and JCZO 301.6(F). And, even if it is assumed that some of Jeff DuPont's  
17 other off-site businesses are related in some way to his cattle operation or the  
18 hay operation on the subject property, Jeff DuPont's involvement in those  
19 businesses do not help establish any element of OAR 660-033-0130(9) and  
20 JCZO 301.6(F).

21 Indeed, as we noted in *Richards I*, Jeff DuPont's involvement in off-farm  
22 businesses are relevant to establishing the elements of OAR 660-033-0130(9)

1 and JCZO 301.6(F) only in the sense that time spent on those businesses and  
2 away from the farm operation might undermine the claim that Jeff DuPont will  
3 continue to play the predominant role in the farm operation, and requires  
4 assistance in running the farm operation. \_\_ Or LUBA at \_\_ (LUBA No 2017-  
5 103, Jan 3, 2018) (slip op at 12-13). The county’s findings do not address that  
6 question, and instead erroneously appear to conclude that Jeff DuPont’s  
7 involvement in off-site businesses somehow counts toward establishing the  
8 farm operator and predominant role elements. Record 3.

9 Second, the above-quoted finding concludes that Jeff DuPont plays the  
10 predominant role in part because he “takes the risks of a farm operation,” by  
11 which we understand to mean the financial risks. *Id.* However, such a financial  
12 role is assumed by the owner of any farm, even an absentee land owner who  
13 otherwise has nothing to do with the farm operation. Absent a better  
14 explanation on this point, we conclude that Jeff DuPont’s assumption of the  
15 financial risks of the farm operation is not a factor that helps to establish that he  
16 plays the “predominant role” for purposes of OAR 660-033-0130(9) and JCZO  
17 301.6(F).

18 Third, petitioner and COLW argue that the findings fail to quantify or  
19 substantiate in any way the conclusion that Jeff DuPont will play the  
20 “predominant role” in the farm operation, compared to Jeremy DuPont’s role.  
21 It appears the county evaluated the “predominant role” element based not on a  
22 quantified comparison of how much time the farm operator and relative put into

1 the farming operation, the approach its application form suggests the county  
2 would follow, but instead based on a *qualitative* assessment of the relative value  
3 of Jeff DuPont’s contributions versus Jeremy DuPont’s contributions. In a  
4 finding addressing the “requires assistance” element, discussed below, the  
5 county found that Jeff DuPont’s physical limitations make it difficult to perform  
6 all of the physical tasks required, suggesting that the division of labor between  
7 Jeff and Jeremy DuPont falls mainly between physical and non-physical tasks,  
8 with the non-physical tasks focused on making various kinds of decisions and  
9 supervising execution of those decisions. Record 3. We understand the county  
10 to conclude that Jeff DuPont’s role is “predominant” vis-à-vis Jeremy DuPont’s  
11 role because he is the one making most of the executive farming decisions, even  
12 if Jeremy DuPont’s subordinate role in carrying out those decisions may  
13 represent the majority of the work hours needed for the farm operation as a  
14 whole.

15 We do not understand petitioner or COLW to dispute that a legitimate  
16 reason under OAR 660-033-0130(9) and JCZO 301.6(F) for which a farm  
17 operator may require relative assistance is the farm operator’s physical  
18 disabilities, due to age, illness, etc., that prevent the farm operator from  
19 performing *some* physical farm operations or tasks. We also do not understand  
20 petitioner to dispute that time spent making executive decisions regarding farm  
21 operations and supervising the physical tasks needed for the farm operation  
22 count toward a determination of the “predominant role.” Nonetheless, we



1 understand petitioner and COLW to argue that even in that circumstance the  
2 applicant must still demonstrate that the farm operator plays the “predominant  
3 role” in the farm operation, and that the only way to make the demonstration is  
4 to submit evidence that in some way quantifies and compares the amount of  
5 work each contributes.

6 We partially agree with petitioner. In a more typical case involving a  
7 relative farm help dwelling, the dwelling would be justified based on claims  
8 that the scale or intensity of the farm operation requires more work than a single  
9 farmer engaged in a commercial farming operation can reasonably perform. In  
10 that case, some quantification and comparison of hours worked by the farm  
11 operator and relative would probably be necessary to show that the farm  
12 operator continues to play the predominant role. In the present case, the  
13 applicant and the county are not—or are no longer—proceeding on the theory  
14 that there is too much work for one farm operator, but rather that Jeff DuPont’s  
15 physical limitations prevent him from performing some of the physical work  
16 required by the farm operation. In those circumstances, a quantification and  
17 comparison of hours worked is less important for purposes of the “predominant  
18 role” element. In such circumstances, we do not think it is inconsistent with  
19 OAR 660-033-0130(9) and JCZO 301.6(F) to assign more weight to the fact  
20 that the farm operator will continue to perform the executive or decision-  
21 making functions, even if it is the case that most of the physical tasks or the  
22 majority of all farm tasks viewed as a whole are performed by the relative. As

1 noted above, the definition of “farm operator” requires not only that the  
2 operator “do the work,” but makes particular reference to “making the day-to-  
3 day decisions about such things as planting, harvesting, feeding and marketing.”

4         Nonetheless, we agree with petitioner that *some* details or breakdown and  
5 comparison of the respective roles of the farm operator and relative must be in  
6 the record to support an adequate finding that the farm operator continues to  
7 play the predominant role. If the record includes such evidence, no party cites  
8 to it. And the county’s above-quoted finding on this point is conclusory and  
9 wholly inadequate.

10         The sub-assignments of error directed at the “predominant role” element  
11 are sustained.

### 12         **C. Requires Assistance**

13         With respect to the “requires assistance” element of OAR 660-033-  
14 0130(9) and JCZO 301.6(F), the county found:

15         “In finding that the farm operator requires the assistance of a  
16 relative in the management of the existing commercial farming  
17 operation, the Board accepted Mr. DuPont’s testimony that his  
18 health challenges made it difficult to perform all of the physical  
19 work required on the farm, which was supported by a letter from  
20 his treating physician as to his physical conditions that supported  
21 the Applicant’s position that his physical conditions hinder his  
22 ability to do some of the physical activities involved in the daily  
23 management of his farming operation.” Record 3-4.

24         As noted, petitioner does not dispute that physical disability is a potentially  
25 legitimate basis for finding that a farm operator requires the assistance of a

1 relative. However, petitioner argues that in the present case the findings and  
2 evidence fail to establish that the farm operator requires any assistance with the  
3 farm operation on the subject property. Petitioner cites to evidence that  
4 opponents submitted that the relatively small size of the subject property and  
5 the limited nature of the farm operation requires only a modest amount of total  
6 hours worked on an annual basis, at most only approximately 975 hours, or  
7 18.75 hours per week. Petitioner argues that working 18.75 hours per week is  
8 well within one farm operator's ability to handle without assistance, presumably  
9 even a farm operator who has some physical limitations.

10 Jeff DuPont submitted a declaration, supported by a letter from his  
11 physician, testifying to multiple physical limitations due to age and injury.  
12 Record 125-27. Petitioner cites no evidence in the record suggesting that Jeff  
13 DuPont can, despite those limitations, perform all the physical tasks required by  
14 the farm operation. Petitioner may be correct that the farm and the farm  
15 operation are not large or intensive enough to occupy a farmer full-time, and if  
16 so that might well be fatal to an application based solely on the claim that there  
17 is too much work for the farm operator to do. However, on remand the county  
18 proceeded under the theory that Jeff DuPont requires assistance due to his  
19 physical limitations, rather than under the theory that there is too much work for  
20 Jeff DuPont to do. In such circumstances, the scale and intensity of the farm  
21 operation, while pertinent to the "commercial farming operation" element of  
22 OAR 660-033-0130(9) and JCZO 301.6(F), are not particularly pertinent to the

1 “requires assistance” element. We do not understand petitioner to dispute that  
2 OAR 660-033-0130(9) and JCZO 301.6(F) are intended in part to facilitate  
3 relative assistance for an otherwise qualified operator of a commercial farming  
4 operation who, due to age or illness, is unable to perform all the tasks required  
5 by the farming operation. That the farming operation is relatively small in size  
6 and intensity, and would not fully occupy the work hours of either the farmer or  
7 the relative, does not necessarily preclude a finding that the farm operator  
8 requires assistance.

9 The sub-assignments of error directed at the “requires assistance”  
10 element are denied.

11 Petitioner’s second assignment of error and COLW’s third assignment of  
12 error are sustained in part.

13 The county’s decision is remanded.