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. 2019-140

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, P.C.

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

AFFIRMED 07/28/2020

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

Opinion by Ryan.

NATURE OF THE DECISION

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

FACTS

The challenged decision is a decision on remand from *Wachal v. Linn County*, 78 Or LUBA 227 (2018), *aff'd*, 295 Or App 668, 433 P3d 787 (2019) (*Wachal I*). The facts remain largely unchanged, except as we explain below. We take the facts from *Wachal I*:

> "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. 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.
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> "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 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. 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." *Id.* at 228-29 (footnotes omitted).[1]

OAR 660-033-0130(9)(a) is the administrative rule that implements ORS 215.283(1)(d) and Statewide Planning Goal 3 (Agricultural Land), and provides:

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

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."[2]

In *Wachal I*, we sustained petitioner's second subassignment of error under the third assignment of error that argued that intervenor had failed to establish that intervenor engaged in a "commercial farming operation" as that term is used in OAR 660-033-0130(9)(a). We noted that "[t]he applicable LCDC rule does

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[1] The dwelling that the county approved in 2018 has been built and is a manufactured home. Record 388-403.

[2] Linn County Code (LCC) 933.420 implements OAR 660-033-0130(9) and contains substantially the same language as the rule.

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)." *Wachal I* at 240. We held that the county improperly equated the term "farm use" with the term "commercial farming operation" in concluding that the hay and other activities occurring on the subject property qualified as a "commercial farming operation."[3] *Id.* at 241.

As noted, our decision in *Wachal I* was appealed to the Court of Appeals, which affirmed it. 295 Or App 688. After the appellate judgment was issued, the county commenced proceedings on remand.

In the intervening years between the time that intervenor first filed its application in 2017 and the proceedings on remand commenced, intervenor established a hemp-growing operation on approximately 25 acres of the subject 40-acre property, containing over 48,000 hand-planted hemp starts. Record 252-53. The hay production activity that was occurring on the farm, which intervenor originally relied on to qualify for a farm relative dwelling, continues. Record 17-19. Intervenor works between six and eight hours a day, seven days a week, tending the hemp crop. Record 253. Intervenor's son works assisting intervenor with the crop. *Id.*

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[3] We also concluded that 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. *Id.* at 243.

The county held proceedings on remand, and intervenor and petitioner appeared and provided evidence and testimony. At the conclusion of the remand hearing, the board of county commissioners voted to approve the application, based on its conclusion that the hemp operation qualified as a commercial farming activity on the subject property and that intervenor had demonstrated that a relative's assistance was needed for the operation. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In two subassignments of error under his first assignment of error, petitioner argues that the text of OAR 660-033-0130(9)(a) requires the county to consider only intervenor's former hay operation in determining whether the subject property includes an "existing commercial farming operation," and that the county improperly construed the rule in considering intervenor's hemp operation that was established after the original application was submitted, and after our decision in *Wachal I*. Petitioner also argues that LCC 921.160(B) and (C) require submittal of a new application because the hemp operation is a "substantial[] change" to the original application, and that absent a new application, the county is precluded from considering evidence regarding the hemp operation. Finally, petitioner also argues that the county is precluded under the holding in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) from considering the hemp operation because, according to petitioner, LUBA's decision in *Wachal I* conclusively limited the "existing commercial farming

operation" to intervenor's then-existing hay operation. The two subassignments of error contain related and overlapping arguments and we address them together.

A. *Beck v. City of Tillamook*

In *Beck*, the Oregon Supreme Court held that matters "conclusively " before LUBA cannot be re-litigated in subsequent proceedings on remand. *Id* at 150. We disagree with petitioner's premise that our decision in *Wachal I* conclusively resolved that the county could only consider the farm operation that intervenor relied on in its original 2017 application, or foreclosed the county from considering intervenor's hemp operation during the proceedings on remand. Nothing in our decision in *Wachal I* addressed the issue of whether intervenor could, while the county's decision travelled up and down the appellate ladder, plant a new crop that differed from his existing hay crop, or precluded the county from considering whether a new crop, either alone or in combination with the hay operation, was an "existing commercial farming operation" within the meaning of the rule. Rather, our conclusion that the county erred in equating whether the hay operation was a "farm use" with whether the hay operation was an "existing commercial farming operation" was directly related to the arguments presented to us by the parties and to the evidence in the record of the original proceeding. *Beck* does not preclude the county from considering, during the proceedings on remand, evidence regarding a new crop planted after our decision in *Wachal I* or from relying on that evidence to conclude that the hemp operation is an "existing commercial farming operation."

B. OAR 660-033-0130(9)

We disagree with petitioner that LCDC's use of the word "existing" in the phrase "existing commercial farming operation" in OAR 660-033-0130(9)(a) limits the county's consideration of the question to the commercial farming operation occurring on the property on the date the application is filed. The text of the rule does not tie the phrase "existing commercial farming operation" to any particular date or event. The text of the rule also does not tie the phrase "existing commercial farming operation" to the application date. Rather, the rule appears intended to reflect that in order to qualify for a relative farm help dwelling, the relative must be currently assisting or intends in the future to assist the farmer with a commercial farming operation that is currently occurring on the farm, rather than one that the farmer plans to establish at some unspecified time in the future. OAR 660-033-0130(9)(a) ("[t]o 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 farm operation *is* required by the farm operator.") (Emphases added.)

C. LCC 921.160(B) and (C)

LCC 921.160(B) requires the county to make a decision based "on the application as deemed complete, the evidence and testimony in the record, and any information that is customarily received by judicial notice." LCC 921.160(C) provides that:

> "The decision maker may not receive into the record or consider any evidence, argument, or testimony that would substantially change

> the application as deemed complete when rendering a decision on the application. The decision maker must so inform the applicant and allow the applicant an opportunity to withdraw the application. If the applicant does not voluntarily withdraw the application then the decision maker shall render a decision on the application as deemed complete."

Petitioner argues that intervenor's reliance on the hemp operation that he established after the application was deemed complete "substantially change[s] the application as deemed complete" and that LCC 921.160(C) prohibits the county from relying on the new evidence introduced on remand regarding the hemp operation now existing on the property.

The board of county commissioners addressed the issue and found that the application has not "substantially change[d]":

> "This is not a review of a permit to grow hay or any other specific crop. Under Board review is an application for a dwelling on farm land, specifically a 'farm relative dwelling.' Neither the proposed dwelling use, nor the location of the proposed dwelling use, nor the decision criteria affecting the proposed dwelling use have changed since the County deemed the application complete.
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> " * * * The Board reasons that the submittal of additional evidence in support of the application to demonstrate [that] the applicant has maintained and expanded his existing commercial farm operation does not violate LCC 921.160(C) because the application is for a farm relative dwelling." Record 22-23.

ORS 197.829(1) requires LUBA to affirm the city council's interpretation of the LCC if the interpretation is not inconsistent with the express language, purpose, or policy of the city's comprehensive plan or land use regulations. We agree with intervenor that the board of county commissioners' interpretation of

LCC 921.160(C) is not inconsistent with the express language of the provision, and is plausible. ORS 197.829(1)(a); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). We affirm it.

Finally, in a footnote in the first assignment of error, we understand petitioner to assert that intervenor's farm use on the property is actually a marijuana crop, and that OAR 660-033-0130(9) accordingly prohibits the relative farm help dwelling because the rule prohibits that dwelling type in connection with farming of a marijuana crop. Petition for Review 17-18 n 5. LUBA does not consider arguments in footnotes that set out a different legal theory than that presented in the assignment of error itself. *Frewing v. City of Tigard*, 59 Or LUBA 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19, *aff'd*, 223 Or App 761, 197 P3d 1151 (2008), *rev den*, 346 Or 10 (2009). We do not consider here petitioner's argument that intervenor's crop is actually a marijuana operation and not a hemp farming operation. However, petitioner presents the same argument in a portion of the second assignment of error, and we address it below.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error includes three subassignments of error that we address here.

A. "Existing Commercial Farming Operation"

The board of county commissioners adopted findings that respond to our decision in *Wachal I*, and concluded that intervenor's hay operation is an "existing commercial farming operation" within the meaning of OAR 660-033-0130(9)(a). Record 17-19. The board of county commissioners also adopted independent, alternative findings that intervenor's hemp farming operation is an "existing commercial farming operation" within the meaning of the rule. Record 19-20. In a portion of petitioner's second assignment of error, he challenges the board of county commissioners' conclusion that the hay operation is an existing commercial farming operation. However, petitioner does not challenge the board of county commissioners' conclusion that the hemp operation is an existing commercial farming operation. Because the board of county commissioners determined that the hemp operation is an "existing commercial farming operation" on the property, and petitioner does not challenge those findings, petitioner's arguments that the board of county commissioners erred in concluding that the hay operation occurring on the property is not a "commercial farming operation" provide no basis for reversal or remand.

The first subassignment of error is denied.

B. "Predominant Role" of the Farm Operator

OAR 660-033-0130(9)(a) requires in relevant part that "[t]he farm operator shall continue to play the predominant role in the management and farm use of the farm." We understand petitioner to argue that there is not substantial evidence

in the whole record that intervenor plays the predominant role in the management and farm use of the farm, and points to a "Hemp Cultivation Agreement" with Richardson Gap Farms, LLC (RGF) that intervenor submitted into the record during the remand proceedings as evidence that RGF plays the predominant role. Record 281.

The board of county commissioners concluded that the Hemp Cultivation Agreement with RGF did not demonstrate that intervenor failed to continue to play the predominant role, but rather was evidence that intervenor hired RGF to prepare the farm land for planting hemp seed and to provide consultation to intervenor regarding hemp growing. Record 25.

Intervenor responds that the board of county commissioners reasonably relied on intervenor's testimony regarding his activities managing the farm and his status as the state license holder for an industrial hemp growing operation to conclude that intervenor is the farm operator and continues to play the predominant role in management of the farm. Record 115, 250-55. We agree with intervenor that a reasonable person would rely on intervenor's testimony and his status as state license holder to reach that conclusion, and that the Hemp Cultivation Agreement does not so undercut that testimony and evidence such that a reasonable person could not reach that conclusion. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)) ("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.").

This subassignment of error is denied.

C. Hemp or Marijuana

OAR 660-033-0130(9)(a) provides in relevant part that "farming of a marijuana crop may not be used to demonstrate compliance with the approval criteria for a relative farm help dwelling." In this subassignment of error, petitioner argues that the evidence in the record fails to establish that intervenor is growing hemp and not marijuana. Intervenor responds that nothing in the record suggests that intervenor's crop is not a hemp crop, and the evidence in the record that intervenor is a state-licensed industrial hemp growing operation supports a conclusion that intervenor grows hemp, not marijuana. We agree.

The third subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

LCC 933.310(B)(2) requires the county to determine that "[t]he development will not be located within a * * * 100-year floodplain unless it is demonstrated that the proposal can be designed and engineered to comply with accepted hazard mitigation requirements." In *Wachal I*, we sustained petitioner's assignment of error that argued that the driveway, waterlines, and septic system were partially located in the floodplain, and concluded that the county's findings were inadequate to demonstrate that those components were engineered to

comply with accepted hazard mitigation requirements. On remand, the county concluded that intervenor demonstrated that "the proposal can be designed and engineered to comply with accepted hazard mitigation requirements," based on evidence of permits issued by the county health department and the county road department in accordance with LCC Chapter 870, which contains development standards for development in the 100-year floodplain. Record 15.

Petitioner's third assignment of error argues that the county improperly relied on the permits issued by the county health department and the county road department because, according to petitioner, those permits were issued without complying with procedural requirements in LCC 921.115(C), which petitioner maintains applied to the permit applications. According to petitioner, in *Wachal I* we concluded that the county could not defer finding compliance with LCC 933.310(B)(2) to a later proceeding that does not include the opportunity for public participation, and the county's procedure that did not involve public participation fails to comply with our holding.

While petitioner's summary of our holding in *Wachal I* is accurate as far as it goes, it is not particularly relevant here, because the county did not defer a finding of compliance with LCC 933.310(B)(2) in the present case. Rather, the county made a current finding of compliance with the criterion, based on evidence in the record consisting of the two permits that have been issued by other county departments. Petitioner does not dispute that he was provided an opportunity in the proceeding in the present case to present evidence and

argument that the development cannot be "be designed and engineered to comply with accepted hazard mitigation requirements." LCC 933.310(B)(2). Petitioner also does not argue that the permits are not sufficient to demonstrate that the development "can be designed and engineered to comply with accepted hazard mitigation requirements." Instead, petitioner challenges the process that the county followed in issuing those permits, but those permits are not the subject of this appeal, and any challenges to the county's procedure followed in issuing those permits are not properly before us here. Accordingly, petitioner's arguments under the third assignment of error do not provide a basis for reversal or remand.

The third assignment of error is denied.

The county's decision is affirmed.