

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JERRY STRATTON,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2021-044

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Gary G. Linkous filed the petition for review and reply brief and argued on behalf of petitioner.

Nathan K. Boderman filed a response brief and argued on behalf of respondent. Also on the brief was Stephen L. Madkour.

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

ZAMUDIO, Board Chair, concurring.

AFFIRMED

08/30/2021

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

NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision denying their application for a relative farm help dwelling.

FACTS

Petitioner's property is 55.92 acres, is zoned exclusive farm use (EFU), and includes an existing dwelling. Petitioner applied to the county to site a relative farm help dwelling on the property for their son to live in, so that their son could help on the farm. Petitioner previously planted and harvested raspberries. In 2017, petitioner ended that crop and leased 35 acres of the property to a nearby farmer, who farmed wheat. The lease arrangement ended and, in 2020, petitioner planted 2,300 Christmas trees on the property. As we explain in more detail below, the farm is not currently generating any income from farming. However, the record includes evidence that the net income from the Christmas tree production could be \$48,000 per year beginning in five or six years after an additional 4,000 trees are planted, when the trees mature and are harvested and sold. Record 229.

The planning director denied the application, and petitioner appealed the decision to the hearings officer. The hearings officer upheld the planning director's decision and denied the application. This appeal followed.

1 **ASSIGNMENT OF ERROR**

2 Petitioner's single assignment of error includes what we characterize as
3 two subassignments of error. We begin with a fairly detailed description of the
4 relevant statute, the Land Conservation and Development Commission (LCDC)
5 administrative rule that implements that statute, and the relevant Clackamas
6 County Zoning and Development Ordinance (ZDO) provisions.

7 ORS 215.283(1)(d) authorizes the county to approve an accessory
8 dwelling on EFU-zoned land to be occupied by a relative of the farm operator if
9 "the farm operator does or will require the assistance of the relative in the
10 management of the farm use." OAR 660-033-0130(9), an administrative rule that
11 implements ORS 215.283(1)(d) and Statewide Planning Goal 3 (Agricultural
12 Lands), adds several qualifications. As relevant here, the rule requires that the
13 relative's assistance be necessary for the management of the "existing
14 commercial farming operation." OAR 660-033-0130(9)(a).¹

¹ OAR 660-033-0130(9)(a) 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. * * * 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."

1 *Former* ZDO 401.05(C)(12) (Oct 2, 2018) provides the applicable criteria
2 for a relative farm help dwelling:

3 “A relative farm help dwelling for a relative of the farm operator
4 may be allowed subject to the following criteria:

5 “* * * * *

6 “c. The accessory farm dwelling shall be occupied by child,
7 parent, stepparent, grandchild, grandparent, stepgrandparent,
8 sibling, stepsibling, niece, nephew or first cousin, of the farm
9 operator or the farm operator’s spouse, whose assistance in
10 the management and farm use *of the existing commercial*
11 *farming operation*, such as planting, harvesting, marketing or
12 caring for livestock, is required by the farm operator.

13 “* * * * *

14 “f. The net income derived from the farm products shall be
15 significant and products from the farm unit shall contribute
16 substantially to the agricultural economy, to agricultural
17 processors and farm markets.” (Emphasis added.)²

18 The hearings officer found that petitioner failed to establish that a commercial
19 farming operation currently exists on the property and that petitioner derives
20 significant net income from farm products. Stated differently, the hearings officer
21 found that, although 2,300 Christmas trees are planted and growing, a
22 “commercial” farming operation does not currently exist on the property because
23 it is undisputed that no net income is currently derived from farming on the

² In October 2020, *former* ZDO 401.05(C)(12) (Oct 2, 2018) was renumbered as ZDO 401.05(C)(11) and amended in a way that does not affect the issues in this appeal.

1 property. In determining whether a commercial farming operation currently
2 exists on the property, the hearings officer relied on ZDO 401.03(D), which
3 defines “commercial farm” as

4 “[a] farm unit with all of the following characteristics:

5 “1. The land is used for the primary purposes of obtaining a profit
6 in money from farm use;

7 “2. The net income derived from farm products is significant; and

8 “3. Products from the farm unit contribute substantially to the
9 agricultural economy, to agricultural processors, and to farm
10 markets.”

11 The hearings officer found that the evidence in the record failed to demonstrate
12 that “the net income derived from farm products is significant” because petitioner
13 failed to demonstrate that the farm currently produces an annual net income of
14 \$10,000.³

³ In *Richards v. Jefferson County*, we explained that counties have some discretion to determine the thresholds for a “commercial farming operation” since LCDC has not adopted a definition of that phrase or provided any guidance on applying it:

“It is difficult to fault the county for the paucity of its analysis, given that [LCDC] has not seen fit to provide any definition or guidance on what constitutes a ‘commercial farming operation’ for purposes of OAR 660-033-0130(9). Nonetheless, it is the county’s obligation, when addressing an application for a relative farm help dwelling under OAR 660-033-0130(9), to attempt to articulate the thresholds that separate a ‘commercial’ from a non-commercial farming operation. Because it is an undefined term, counties have some discretion to determine the thresholds for a ‘commercial farming

1 In this case, the hearings officer found that ZDO 401.03(D)'s definition of
2 "commercial farm" is relevant context for determining whether a farm is an
3 "existing commercial farming operation" within the meaning of *former* ZDO
4 401.05(C)(12) (Oct 2, 2018), and they relied on what they described as a "well
5 established" interpretation of ZDO 401.03(D) to mean that the net income from
6 a farm is not "significant," and the farm therefore does not qualify as
7 "commercial," unless the net income is more than \$10,000 annually. Record 8.
8 The hearings officer cited *Kunze v. Clackamas County*, 27 Or LUBA 130, *rev'd*
9 *on other grounds*, 129 Or App 481, 879 P2d 1311 (1994), in support of that
10 interpretation. We do not understand petitioner to challenge the \$10,000
11 threshold *per se*.

12 The hearings officer also found that the potential future income from the
13 sale of Christmas trees after they mature does not qualify the farm as an
14 "existing" commercial farming operation because the trees are not currently
15 generating any annual net income. The hearings officer interpreted the word
16 "existing" in *former* ZDO 401.05(C)(12) (Oct 2, 2018) (and OAR 660-033-
17 0130(9)(a)) as requiring that the commercial nature of the farming operation on
18 which the applicant is relying to qualify for a relative farm help dwelling be
19 established at the time of application.

operation' as applied within the county or within a particular local
area or agricultural sector." 79 Or LUBA 171, 179 (2019) (citing
Harland v. Polk County, 44 Or LUBA 420, 435 (2003)).

1 **A. First Subassignment of Error**

2 In the first subassignment of error, we understand petitioner to challenge
3 the hearings officer's interpretation of "existing" as requiring annual net income.
4 We understand petitioner's first subassignment of error to be that the hearings
5 officer improperly construed the word "existing" when they concluded that, in
6 order to satisfy the relative farm help dwelling administrative rule and
7 implementing ZDO provisions, an applicant must demonstrate *current* annual net
8 income above \$10,000. In support of this subassignment of error, petitioner
9 argues that the county's decision in *Kunze* does not support the hearings officer's
10 interpretation of the word "existing" but, rather, supports petitioner's
11 interpretation.

12 As we discuss in more detail below, *Kunze* involved an appeal of the
13 county's approval of a primary farm dwelling. The county found that the
14 applicant's farm management plan, with blueberry bushes already planted and an
15 existing hay operation, established that the future farming operation would
16 produce more than \$10,000 of net income. According to petitioner, *Kunze*
17 supports an interpretation of *former* ZDO 401.05(C)(12)(c) (Oct 2, 2018) to mean
18 that the county must consider future income from crops that are already planted
19 but not yet generating income in determining whether a commercial farming
20 operation is "existing" on the property.

21 The county responds that *Kunze* is distinguishable and, for that reason,
22 does not compel the county to consider petitioner's future income from the sale

1 of already-planted Christmas trees in determining whether petitioner’s farm is an
2 “existing” commercial farming operation. In addition, the county argues that,
3 even if *Kunze* was not distinguishable, the county is not bound to follow prior
4 interpretations made in a quasi-judicial land use proceeding. We agree on both
5 points.

6 *Kunze* involved an application for a primary farm dwelling. The criteria
7 that applied at that time required the county to determine that there was “an
8 existing commercial farm use” and that the property was “currently used for
9 commercial farm use.” *Kunze*, 27 Or LUBA at 132.⁴ The criteria also required
10 the submission of a farm management plan. *Id.*⁵ The county interpreted the

⁴ Former ZDO 401.04A provided:

“A permanent principal dwelling may be established in conjunction with *an existing commercial farm use* on a legal lot of record larger than five (5) acres in size, subject to review with notice, pursuant to [ZDO] 1305.02, *when the applicant provides a farm management plan* as provided under [ZDO] 401.10 and other evidence as necessary to demonstrate that all the following criteria are satisfied:

- “1. The land is *currently used for a commercial farm use* and such use will be continued or intensified with the addition of a permanent dwelling.” *Kunze*, 27 Or LUBA at 132 (emphases in *Kunze*).

⁵ Petitioner and the county agree that no *applicable criterion* requires the submission of a farm management plan in connection with a relative farm help dwelling, but petitioner points out that the *application form* used by the county for that type of dwelling does include such a requirement. Record 180 (“This information must clearly demonstrate that the farm operation constitutes an

1 requirements for “existing” and “current” commercial farm use and concluded
2 that they would be satisfied when the farm management plan was implemented
3 to the extent that (1) perennials capable of producing at least \$10,000 in annual
4 net income were planted on the subject property and (2) the subject property was
5 “used for the primary purpose of obtaining a profit in money from” farm use. *Id.*
6 at 136. LUBA concluded that the county’s interpretation was correct and that the
7 county could issue a building permit for the primary farm dwelling when the farm
8 management plan was “substantially implemented, including a situation where
9 perennial crops capable of producing the level of income required for commercial
10 farm use have been planted on the subject property.” *Id.* at 138.

11 Here, petitioner argues that the county’s decision in *Kunze* compels the
12 county to interpret the word “existing” in *former* ZDO 401.05(C)(12)(c) (Oct 2,
13 2018) in the same way that it interpreted the word “existing” in the criteria that

existing commercial farm operation, OAR 660-033-0130(9)(a). A commercial farm operation is a farm that has and is currently **generating \$10,000 net income** per year which is the threshold for identifying a commercial farm operation. *Complete the attached farm management plan information sheet describing the specific characteristics of the farm operation, including types of crops or livestock, acres in production, density of crop, yield per acre, and income.*” (Boldface and underline in original; italics added.)) Petitioner submitted a farm management plan. Record 228-37.

1 applied to primary farm dwelling applications at the time of that decision.⁶ The
2 hearings officer addressed this argument:

3 “[U]nlike the farm dwelling at issue in *Kunze*, this is an application
4 for a farm help dwelling on an existing operating farm. In *Kunze*,
5 the farm dwelling was necessary to allow the farm operator to live
6 on the property in order to implement the farm plan and establish an
7 entirely new farm operation. As the hearings officer noted in *Kunze*,
8 requiring the applicant to meet the income test prior to building a
9 farm dwelling ‘[i]s extremely burdensome,’ presumably because
10 this would require that the farm operator establish and operate the
11 farm and meet the net income requirement while living offsite. In
12 this case, unlike in *Kunze*, the farm operator is currently living on
13 the subject property and operating the farm.”⁷ Record 9 (quoting
14 *Kunze*, 27 Or LUBA at 135).

15 We review the hearings officer’s interpretation of *former* ZDO
16 401.05(C)(12) (Oct 2, 2018), which implements OAR 660-033-0130(9), to
17 determine whether it is correct. *Gage v. City of Portland*, 319 Or 308, 877 P2d
18 1187 (1994); *McCoy v. Linn County*, 90 Or App 271, 276, 752 P2d 323 (1988).
19 We conclude that it is. First, we disagree with petitioner’s argument that the
20 county’s interpretation of the word “existing” in the criteria that were at issue in
21 *Kunze* compels the county to interpret the word “existing” in *former* ZDO
22 401.05(C)(12)(c) (Oct 2, 2018) in the same way. As the hearings officer

⁶ The county points out that, after *Kunze* was decided, the legislature adopted clear income standards for primary farm dwellings. Response Brief 16 n 8 (citing ORS 215.279).

⁷ OAR 660-033-0130(9) requires the farm operator to be living on the farm.

1 explained, the application in *Kunze* was an application for a primary farm
2 dwelling, and different considerations were at issue, including the consideration
3 that the county did not intend to burden an owner of farmland with living off of
4 the property while establishing a *new* farm use. In the context of a relative farm
5 help dwelling, however, OAR 660-033-0130(9)(a) contemplates that the
6 relative's help must be needed for a commercial farming operation that is
7 *currently* occurring on the farm. *Wachal v. Linn County*, ___ Or LUBA ___, ___
8 (LUBA No 2019-140, July 28, 2020) (slip op at 7), *aff'd*, 307 Or App 500, 475
9 P3d 947 (2020) (“[OAR 660-033-0130(9)] appears intended to reflect that in
10 order to qualify for a relative farm help dwelling, the relative must be currently
11 assisting or intends in the future to assist the farmer with a commercial farming
12 operation that is currently occurring on the farm, rather than one that the farmer
13 plans to establish at some unspecified time in the future.”). *Kunze* does not assist
14 petitioner.

15 Second, absent any code provision requiring it, the county is not bound by
16 prior interpretations in quasi-judicial land use decisions. *Greenhalgh v. Columbia*
17 *County*, 54 Or LUBA 626, 640-41 (2007), *aff'd*, 215 Or App 702, 170 P3d 1137
18 (2007) (citing *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004), *aff'd*, 197 Or
19 App 124, 107 P3d 83, *rev den*, 339 Or 66 (2005)). Given the discretion allowed
20 counties—in the absence of LCDC guidance on the issue—to determine whether
21 an “existing commercial farming operation” is present on a farm, and absent any

1 argument from petitioner identifying any additional or alternative basis for why
2 the hearings officer's decision is not correct, we agree with the county that it is.

3 The first subassignment of error is denied.

4 **B. Second Subassignment of Error**

5 We also understand petitioner to argue that the hearings officer's
6 interpretation of the phrase "existing commercial farming operation" in OAR
7 660-033-0130(9) and *former* ZDO 401.05(C)(12)(c) (Oct 2, 2018) is inconsistent
8 with ORS 215.283(1)(d) and Goal 3. Petition for Review 11, 13-14, 22. Petitioner
9 argues that the county's interpretation "results in a significant adverse effect on
10 the accepted farm practice of allowing relatives to help with farming." Petition
11 for Review 11. We understand petitioner to argue that the purpose of ORS
12 215.283(1)(d) and Goal 3 is to ensure the continuation of farming by allowing a
13 relative to live on the farm and assist with farming operations while the
14 management of the farm is transitioned to that relative.⁸ Petition for Review 14.
15 However, even if petitioner is correct about the purpose of ORS 215.283(1)(d),
16 petitioner does not develop any argument explaining why the county's
17 interpretation of the phrase "existing commercial farming operation" is
18 inconsistent with that statute or Goal 3. Absent a developed argument explaining

⁸ The decision suggests that petitioner could apply for temporary hardship dwelling approval under ZDO 401.05(C)(14), which implements ORS 215.283(2)(L). Record 3 ("[G]iven [petitioner's] health issues, [petitioner] can apply for a temporary care dwelling.").

1 why the statute and the goal compel the county to interpret OAR 660-033-
2 0130(9) in the way that petitioner urges, petitioner's argument provides no basis
3 for reversal or remand of the decision. *Deschutes Development v. Deschutes Cty.*,
4 5 Or LUBA 218, 220 (1982) ("It is not our function to supply petitioner with
5 legal theories or to make petitioner's case for petitioner.")

6 The second subassignment of error is denied.

7 The assignment of error is denied.

8 The county's decision is affirmed.

9 Zamudio, Board Chair, concurring.

10 I agree with the disposition of this appeal because I agree that petitioner's
11 sole assignment of error relies on an incorrect premise that the county is bound
12 to follow a prior interpretation of a local code provision made in a quasi-judicial
13 land use proceeding. I agree that is not a legal basis to reverse or remand the
14 challenged decision. I also agree that petitioner does not adequately develop any
15 argument that the hearings officer's application of the ZDO significant net
16 income requirement is inconsistent with applicable state law. Accordingly, I
17 concur in the disposition of this appeal. I write separately to explain why I do not
18 think that current annual net income is or should be dispositive for purposes of
19 determining whether an existing farming operation is commercial.

20 ORS 215.283(1)(d) authorizes in the EFU zone

21 "[a] dwelling on real property used for farm use if the dwelling is
22 occupied by a relative of the farm operator * * * if the farm operator
23 does *or will* require the assistance of the relative in the management

1 of the farm use and the dwelling is located on the same lot or parcel
2 as the dwelling of the farm operator.” (Emphasis added.)

3 In my view, that statute contemplates looking at a farmer’s need for help over
4 time with respect to the existing farming operation.

5 OAR 660-033-0130(9) implements ORS 215.283(1)(d) and requires an
6 “existing commercial farming operation.” It is undisputed here that petitioner has
7 an existing farming operation. The issue is whether the farming operation is
8 commercial. It is also undisputed that petitioner has demonstrated a current need
9 for help tending a long-term crop, Christmas trees, which is not going to mature
10 or turn a profit for five to six years but that requires farm work in the meantime.⁹
11 It is also undisputed that petitioner’s son is currently assisting or intends in the

⁹ Petitioner testified that “[t]he trees will not be large enough to sell for five to six years. However, [petitioner] will need to weed, spray, trim, and otherwise maintain the trees during that time.” Record 4. The hearings officer found:

“[Petitioner] has demonstrated a need for assistance and management of a farm use on the property. [Petitioner’s son] will assist in managing the recently planted Christmas tree farm including the following types of work: farm equipment maintenance, farm infrastructure installation, ground clearing, cultivating, planting, fertilizing, spraying, mowing and weeding and harvesting for the Christmas tree farm. [Petitioner’s son’s] physical assistance is required by the farm operator due to health reasons and the anticipated level of work associated with taking over the existing wheat farming on a portion of the subject property and continuing and expanding Christmas trees production on the remainder of the subject property.” Record 7.

1 future to assist petitioner with the farming operation that is currently occurring
2 on the subject property.

3 I tend to agree with petitioner's policy-based arguments that the
4 legislature's allowance of relative farm help dwellings acknowledges and
5 preserves the common practice of intergenerational family farming and that
6 practice serves the Goal 3 purpose of maintaining agricultural land in farm use. I
7 also agree with petitioner that imposing a current annual net income requirement
8 ignores some of the practical realities of farming, including natural disasters,
9 market fluctuations, crop rotations, and longer-maturing crops—all of which can
10 result in annual losses or no current annual net income for an existing commercial
11 farming operation.

12 In the absence of controlling statute or administrative rule, the county has
13 some discretion to define what constitutes an existing commercial farming
14 operation. However, I do not think that current annual net income is dispositive
15 for purposes of determining whether an existing farming operation is
16 "commercial" for purposes of OAR 660-033-0130(9). In my view, a farmer could
17 show that their farming operation is commercial if it is of such a scale and
18 intensity that it does *or will* obtain a significant profit, even if it is not currently
19 profitable as demonstrated by current annual net income. *See Richards v.*
20 *Jefferson County*, 79 Or LUBA 171, 179 (2019) ("[A]s a legal matter, what
21 distinguishes an existing 'commercial' farming operation from its
22 noncommercial counterparts is largely a matter of scale and intensity.").

1 Notwithstanding the foregoing, I concur in the disposition of this appeal
2 because petitioner has not argued, let alone established, that the hearings officer's
3 application of the ZDO significant net income requirement as requiring current
4 annual net income violates state law.