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

FRIENDS OF MARION COUNTY,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

DUSTIN BARTH and KANOE BARTH,
Intervenors-Respondents.

LUBA No. 2023-013

FINAL OPINION
AND ORDER

Appeal from Marion County.

Andrew Mulkey filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was F. Blair Batson.

Cody Walterman filed the joint respondent's and intervenors-respondents' brief and argued on behalf of respondent.

Wendie L. Kellington filed the joint respondent's and intervenors-respondents' brief and argued on behalf of intervenors-respondents. Also on the brief was Kellington Law Group PC.

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

RUDD, Board Member, did not participate in the decision.

AFFIRMED 07/31/2023

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 county board of commissioners decision approving an application for a primary dwelling in conjunction with farm use (farm dwelling).

FACTS

The subject property is 20 acres, is zoned Exclusive Farm Use (EFU), and contains high-value farmland. Intervenors-respondents (intervenors) acquired the subject property in 2019. In March 2021, intervenors purchased 3,000 Christmas tree seedlings and planted them on approximately 1.5 acres of the subject property (March 2021 planting). Record 329-30. Eleven months later, in February 2022, intervenors purchased another 6,300 seedlings and sometime after, planted them on approximately 3.5 acres of the subject property (2022 planting). Record 331-33.

On November 4, 2021, intervenors entered into a verbal contract to provide 1,500 mature trees to a buyer for $80,250. The agreement requires intervenors to raise the trees on the property until maturity. Intervenors received payment on November 26, 2021. Record 334-35. On January 3, 2022, intervenors entered into another verbal contract to provide another 1,500 trees to the same buyer, also for

$80,250, also to be raised by intervenors on the subject property until maturity. Intervenors received payment on January 3, 2022. Record 337-38.[1]

On January 6, 2022, intervenors filed an application with the county for a farm dwelling. The county planning director denied the application. Intervenors appealed the planning director's decision to the county hearings officer. The hearings officer conducted a hearing and also denied the application but for different reasons than the planning director. Intervenors appealed the hearings officer's decision to the board of commissioners, which conducted a *de novo* hearing and, on January 4, 2023, approved the application. This appeal followed.

BACKGROUND

We first set out the applicable law before turning to petitioner's assignments of error. State law restricts the uses that are allowed on agricultural land to farm uses and specified nonfarm uses. *See* ORS 215.203(1) (generally requiring that land within EFU zones be used exclusively for "farm use"); ORS 215.203(2)(a) (defining "farm use"); ORS 215.283 (identifying permitted uses on EFU land).

ORS 215.283(1)(e) allows on EFU land, "[s]ubject to ORS 215.279, primary or accessory dwellings and other buildings customarily provided in conjunction with farm use." ORS 215.279 provides, in part:

---

[1] On September 12, 2022, intervenors signed a written Christmas Tree Sales Agreement with the buyer, memorializing the prior verbal contracts. Record 167-70.

"In any rule adopted by the Land Conservation and Development Commission [(LCDC)] that establishes a farm income standard to determine whether a dwelling is customarily provided in conjunction with farm use on a tract, *the commission shall allow a farm operator to satisfy the income standard by earning the required amount or more of farm income on the tract*:

"* * * * *

"(2) *In each of the last two years*[.]" (Emphases added.)

LCDC has adopted such a rule at OAR 660-033-0135. OAR 660-033-0135(4) provides, in part:

"On land identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:

"(a) The subject tract is currently employed for the farm use, as defined in ORS 215.203, on which *the farm operator earned at least $80,000 in gross annual income from the sale of farm products in each of the last two years* or three of the last five years, or in an average of three of the last five years; and

"* * * * *

"(c) *The dwelling will be occupied by a person or persons who produced the commodities that grossed the income in subsection (a) of this section*[.]"[2] (Emphases added.)

To summarize those requirements, a county may approve a farm dwelling on high-value farmland if (1) the farm operator "earned" at least $80,000 from the "sale of farm products" in "each of the last two years" and (2) the proposed

---

[2] Marion County Code (MCC) 17.136.030(A) implements OAR 660-033-0135(4) and because there is no material difference between the rule and the MCC provisions, we address only the rule here.

farm dwelling will be occupied by a person or persons who "produced" the farm products whose sale generated the requisite income.

FIRST ASSIGNMENT OF ERROR

The board of commissioners found that intervenors' application complies with OAR 660-033-0135(4)(a). Petitioner challenges that conclusion in two subassignments of error under the first assignment of error.

A. First Subassignment of Error

In the first subassignment of error, petitioner argues that the board of commissioners' conclusion that intervenors' application complies with OAR 660-033-0135(4)(a) misconstrues the rule. We will reverse or remand a decision that improperly construes the applicable law. ORS 197.835(9)(a)(D). We review the county's interpretation of state law and local law that implements state law to determine whether the county's interpretation is correct, affording no deference to the county's interpretation. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992).

In interpreting a statute, we examine the statutory text, context, and legislative history with the goal of discerning the enacting legislature's intent. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). In interpreting an administrative rule, we employ essentially the same framework that we employ when interpreting a statute with the goal of divining the drafter's intent. *Noble v. Dept. of Fish and Wildlife*, 355 Or 435, 448, 326 P3d 589 (2014).

1. The trees are "farm products."

Petitioner relies on the express language of the rule, context provided by statutes, and administrative rulemaking history to support its argument that the 3,000 trees that intervenors are contractually obligated to provide to the buyer at maturity are not "farm products." Petitioner first points to one of the dictionary definitions of "product," which is "something *produced*," phrased in the past tense, and argues that the trees are not a "farm product" because they are not *yet* "produced." *Webster's Third New Int'l Dictionary* 1810 (unabridged ed 2002) (emphasis added). Petitioner also argues that the board of commissioners misconstrued OAR 660-033-0135(4)(a) because its interpretation is inconsistent with context provided in the statutory policies at ORS 215.243(2) and ORS 215.700(2). ORS 215.243(2), part of the state's agricultural land use policy, provides, in part, "The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources * * *." ORS 215.700(2), part of the state's resource land dwelling policy, is to "[l]imit the future division of and the siting of dwellings upon the state's more productive resource land."

Finally, petitioner relies on administrative rule history. LCDC first adopted an income requirement for farm dwellings on high-value farmland in 1992. OAR 660-033-0130(1) (Aug 7, 1993).[3] Prior to that time, many counties decided

[3] That provision was renumbered in 1994. OAR 660-033-0135 (Mar 1, 1994).

whether to approve a farm dwelling based on a farm management plan submitted by the applicant. *Forster v. Polk County*, 115 Or App 475, 839 P2d 241 (1992). Citing portions of the minutes of two LCDC meetings during the 1994 rulemaking process, as well as portions of a law review article discussing the same, petitioner argues that in adopting the income requirement at OAR 660-033-0135(4)(a), LCDC intended to prohibit the approval of farm dwellings based only on such "promises to farm."[4] Petition for Review 30. Petitioner argues that intervenors' contracts to raise 3,000 trees until maturity are essentially promises to farm. Accordingly, petitioner argues that the board of commissioners misconstrued OAR 660-033-0135(4)(a) in finding that those contracts satisfy the income requirement.

The county and intervenors (together, respondents) respond that petitioner's argument is essentially that the trees must be mature and ready to be harvested or actually harvested in order to qualify as "farm products," and that nothing in OAR 660-033-0135(4)(a) requires that planted crops be *harvested* in order for them to qualify as "farm products" under the rule. Respondents respond, and we agree, that, while it is the policy of the legislature to preserve agricultural

---

[4] Respondents respond that the law review article cited by petitioner does not constitute rulemaking history because it was published in 2009 and was therefore not considered by LCDC during the 1994 rulemaking process. We agree. The article does not itself constitute rulemaking history. However, it does discuss and provide citations to other sources of rulemaking history. The cited portions of the article are also included in the record. Record 59-68.

land and limit the siting of dwellings thereon, the legislature has also expressly authorized farm dwellings in certain circumstances. ORS 215.283(1)(e); ORS 215.279. Those circumstances are detailed, in relevant part, at OAR 660-033-0135(4)(a). Respondents point to subsection (1)(c) and paragraph (11)(a)(A) of OAR 660-033-0135, which use the term "harvesting." Respondents argue that LCDC's use of the term "harvesting" in those provisions but not in subsection (4)(a) indicates that LCDC knows how to use the word "harvest" when it means harvest. Joint Respondent's and Intervenors-Respondents' Brief 24 (citing *Jordan v. SAIF Corp.*, 343 Or 208, 217-18, 167 P3d 451 (2007)).

Respondents also respond that the rulemaking history cited by petitioner is not particularly helpful and, ultimately, does not assist petitioner. Even if LCDC intended for the income requirement at OAR 660-033-0135(4)(a) to prohibit the approval of farm dwellings based on farm management plans and mere "promises to farm," respondents argue that intervenors have not merely "promised" to farm the subject property. They have purchased and planted the trees and are contractually obligated to provide the buyer with 3,000 mature trees.

It is undisputed that the 3,000 mature trees that intervenors are contractually obligated to deliver to the buyer are planted on the property, even though, like most planted crops, they will not be ready for delivery until the trees are mature. The 3,000 trees that are planted on the property and that intervenors are contractually obligated to provide to the buyer are "farm products," regardless of whether those planted trees are still growing, are ready for harvest, or have

been harvested. Petitioner's interpretation inserts the word "harvested" into those provisions, contrary to ORS 174.010.[5] We also agree with respondents that the rulemaking history cited by petitioner does not demonstrate that LCDC intended that farm products must be harvested before the gross income derived from the sale of those farm products can support the approval of a farm dwelling.

Petitioner also argues that the trees have not actually been "sold" because they have not been delivered. However, we agree with respondents that petitioner has not established that intervenors' contract with the buyer does not constitute a "sale" simply because delivery of the farm product will occur in the future. We conclude that the board of commissioners did not misconstrue OAR 660-033-0135(4)(a) in finding that the $160,500 that intervenors received is derived from the "sale of farm products."

2. "Earned"

Petitioner similarly argues that intervenors have not yet "earned" the $160,500 that they received because intervenors have not yet raised the 3,000 trees to maturity. Petitioner points to one of the ordinary meanings of the verb "earn"—"to receive as equitable return for work *done* or services *rendered*," and

---

[5] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

argues that the definition refers to actions that have occurred in the past. *Webster's* at 714 (emphases added). Petitioner also points out that OAR 660-033-0135(4)(a) uses the term "earned," phrased in the past tense. Petitioner also argues that according to *Black's Law Dictionary*, there is a difference between the phrase "earned income," which is defined as "[m]oney derived from one's own labor or active participation; earnings from services," and the phrase "unearned income," which is defined as "[i]ncome received but not yet earned; money paid in advance." *Black's Law Dictionary* 831, 832 (8th ed. 2004). In other words, petitioner argues, because intervenors have not rendered the services from which the $160,500 is derived, *i.e.*, raising 3,000 trees until maturity, the $160,500 is actually "unearned income." Accordingly, petitioner argues that the board of commissioners misconstrued OAR 660-033-0135(4)(a) in finding that intervenors have "earned" the $160,500 that they received.

Respondents respond that intervenors have "earned" the $160,500 that they received because they have purchased and planted the trees, and are contractually obligated to deliver the trees at maturity. We conclude that the board of commissioners did not misconstrue OAR 660-033-0135(4)(a) in finding that intervenors have "earned" the $160,500 that they received. Intervenors have "earned" the $160,500 by receiving the money and accepting contractual responsibility to deliver mature trees.

3. "Each of the last two years"

Petitioner argues that "the last two years" were 2021 and 2020 because intervenors filed their application in 2022. Petitioner argues that because intervenors received payment on the contracts in 2022 and 2021, the board of commissioners misconstrued OAR 660-033-0135(4)(a) in finding that intervenors earned the requisite income in "each of the last two years."

Respondents respond that the issue raised in this portion of the first subassignment of error is waived because no party raised it below. Issues before LUBA on review "shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.797, whichever is applicable." ORS 197.835(3). To be preserved for LUBA review, an issue must "be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." ORS 197.797(1).

In its petition for review, petitioner identifies its first assignment of error as having been preserved in petitioner's written testimony below. Petition for Review 9 (citing Record 56-58, 70-71, 77-83, 148-149, 248, 297-302, and 353-355). We have reviewed the cited record pages, and we agree with respondents that they do not demonstrate that the issue raised in this portion of the first subassignment of error was preserved. Petitioner has not otherwise responded to respondents' waiver argument. Accordingly, we conclude that the issue raised in this portion of the first subassignment of error is waived.

The first subassignment of error is denied.

B. Second Subassignment of Error

In the second subassignment of error, petitioner argues that the board of commissioners' findings that intervenors' application complies with OAR 660-033-0135(4)(a) are inadequate and not supported by substantial evidence. ORS 215.416(9) requires that "approval or denial of a permit * * * shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth." 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). In addition, findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

LUBA shall reverse or remand a decision that is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

Many of the findings and evidentiary challenges in the second subassignment of error are derivative of the interpretational arguments in the first subassignment of error. That is, petitioner argues that the board of commissioners' findings that intervenors' application complies with OAR 660-033-0135(4)(a) are inadequate and not supported by substantial evidence under petitioner's interpretation of those provisions. We rejected petitioner's interpretational arguments above, and we reject petitioner's derivative findings and evidentiary challenges here for the same reasons.

However, some of petitioner's findings and evidentiary challenges are not derivative. That is, we understand petitioner to argue that the board of commissioners' findings that that intervenors' application complies with OAR 660-033-0135(4)(a) are inadequate and not supported by substantial evidence even if the board of commissioners did not misconstrue those provisions.

1. The Trees Are Growing on the Property

Petitioner argues that the board of commissioners' findings that intervenors earned the requisite income from the sale of farm products are not supported by substantial evidence. Petitioner observes that staff testified that neighbors informed them that the 3,000 trees planted in March 2021 died during the 2021 summer drought. Audio Recording, Marion County Board of Commissioners, Sept 14, 2022, at 1:00:12 (statement of Marion County Planning Division representative Austin Barnes) ("[T]he guarantee from being able to actually sell these trees in six years, that's, like, potentially a tough guarantee

* * *. They haven't submitted comments, so this isn't technically in the record, it's just in phone calls to me, but a lot of the neighbors have called me to state that *they think* most of the seedlings died from the droughts last year. They *don't think* they're going to actually survive to maturity to make this money.") (Emphases added.) Petitioner also points out that the planning director found that staff saw no trees during a January 2022 site visit. Record 350 ("A site visit was performed at the property, but the rolling hills topography prevented staff from being able to see over the hill of grass to be able to confirm whether trees had been planted or not."). While intervenors testified that trees were growing on the subject property, petitioner argues that those assertions are unsubstantiated and that it is not clear whether those trees were the 3,000 trees planted in the March 2021 planting or the 6,300 trees planted in the 2022 planting.

Respondents observe that, in response to the staff testimony, intervenors submitted photographs showing trees growing on the subject property. Record 266-67 (photographs); Audio Recording, Marion County Board of Commissioners, Sept 14, 2022, at 1:41:12 (statement of intervenor-respondent Kanoe Barth) ("Now, if you need any photos, I know it was mentioned that we didn't have any trees, but we do, and, actually, they look really good, and we're kind of excited about them. So, I have just some pictures and aerial shot of the five acres that was already planted."). Respondents argue, and we agree, that a reasonable person could rely on the photographs and testimony provided by intervenors to find that trees are growing on the subject property, over speculative

comments from neighbors and an incomplete site visit. Accordingly, we conclude that the board of commissioners' findings that intervenors earned the requisite income from the sale of farm products are supported by substantial evidence.

This portion of the second subassignment of error is denied.

2. The Findings Are Adequate

Petitioner argues that the board of commissioners' findings are inadequate because they address neither the staff testimony nor the planning director findings referred to above. Petitioner also argues that the board of commissioners' findings are inadequate because they do not indicate whether the board of commissioners relied on trees from the 2022 planting in finding that intervenors earned the requisite income from the sale of farm products. In other words, petitioner argues that the findings are inadequate because they do not explain specifically which trees constitute the "farm products," the "sale" of which generated the requisite income.

Respondents respond that the board of commissioners expressly found that 3,000 trees are still growing on the subject property. Record 6 ("[T]he Board finds that the buyers now own the 3,000 trees sold that are still growing to maturity on [intervenors'] farm."). Respondents further respond that "there is no uncertainty about the trees that were sold—they are the initial 3,00 trees planted on the subject property, which [intervenors] testified 'look really good.'" Joint Respondent's and Intervenors-Respondents' Brief 40 (citation omitted).

We conclude that the board of commissioners' findings are adequate. While findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below, petitioner has not established that the board of commissioners was required to explain why it chose to rely on certain evidence instead of other evidence.

While we tend to agree with petitioner that the September 12, 2022 written sales agreement is ambiguous regarding whether intervenors are obligated to provide the buyer with trees from the March 2021 planting or the 2022 planting, and that intervenors' testimony that the trees "look really good" was related to the five total acres of the subject property that are planted with both plantings, petitioner does not explain why that ambiguity renders the board of commissioners' findings inadequate. The board of commissioners found that intervenors' application complies with OAR 660-033-0135(4)(a) because intervenors sold 1,500 trees for $80,250 in 2021 and another 1,500 trees for another $80,250 in 2022. Petitioner does not dispute that intervenors are contractually obligated to provide the buyer with 3,000 mature trees, regardless of whether they come from the March 2021 planting or the 2022 planting. Petitioner's argument provides no basis for reversal or remand.

The second subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under OAR 660-033-0135(4)(c), a county may approve a farm dwelling on high-value farmland if the proposed farm dwelling will be occupied by a person or persons who "produced" the farm products sold to generate the requisite income. The board of commissioners found that intervenors' application complies with those provisions:

> "The proposed dwelling would be occupied by [intervenors], who are the persons who operate the Christmas tree farm that produced the required income.
>
> "Opponents assert that [intervenors] have not satisfied MCC 17.136.030(A)(1)(d). The Board disagrees. *The Board interprets this standard to mean that it is directed at insuring that the person or persons who live in the farm dwelling are the actual farm operators. Thus, the Board finds that this provision merely requires that the people who satisfied the farm income test, must be the people who occupy the dwelling.* The Board finds that the credible and persuasive evidence is that [intervenors] are the people who generated the income to satisfy the farm income test, and that [intervenors] are the people who would occupy the farm dwelling. The Board rejects the claim to the contrary." Record 25 (emphasis added).

In the second assignment of error, petitioner argues that the decision misconstrues OAR 660-033-0135(4)(c), and that the findings are inadequate and are not supported by substantial evidence.

Petitioner points out that OAR 660-033-0135(4)(c) uses the term "produced," in the past tense. Similar to its argument in the first assignment of error, petitioner argues that intervenors have not "produced" the 3,000 trees that

intervenors are contractually obligated to provide the buyer because the trees are not mature and have not been harvested. Accordingly, petitioner argues that the board of commissioners misconstrued OAR 660-033-0135(4)(c) in finding that the proposed farm dwelling will be occupied by a person or persons who "produced" the farm products whose sale generated the requisite income.

We agree with respondents that OAR 660-033-0135(4)(c) requires merely that the people who sold the farm products that generated the requisite income be the people who will occupy the proposed farm dwelling. The farm products that intervenors are contractually obligated to deliver to the buyer—3,000 mature trees—are planted and currently growing. For the reasons explained above, we reject petitioner's argument that "produced" is equivalent to "harvested."[6] Accordingly, we conclude that the board of commissioners did not misconstrue OAR 660-033-0135(4)(c).

Petitioner's findings and evidentiary challenges are derivative of petitioner's interpretational challenges. We rejected petitioner's interpretational

---

[6] The record contains various estimates of how long Christmas trees take to mature. However, all those estimates are more than two years. We observe that, if we agreed with petitioner's interpretation of OAR 660-033-0135(4)(c), then the result would be that in the same year, one farmer who planted their property with Christmas trees and another farmer who planted their property with an annual crop would not both qualify to develop a farm dwelling after two years—the second farmer could potentially qualify to develop a farm dwelling and the first could not. That difference would be due solely to the farmers' choices of crop.

challenges above, and we reject petitioner's derivative findings and evidentiary challenges here for the same reasons.

The second assignment of error is denied.

The county's decision is affirmed.