TABLE OF CONTENTS

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Exhibit R.1

APPENDIX

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

TABLE OF AUTHORITIES

CASES

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

STATUTES

RULES

OTHER AUTHORITIES

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

I. STATEMENT OF CASE

A. Nature of the Land Use Decision; Relief Sought.

Petitioner appeals the decision of the Multnomah County hearings officer entitled "[a]n Appeal of the Denial of Applications for a Dwelling Customarily Provided in Conjunction with a Farm Use, Significant Environmental Concern for Wildlife Habitat permit, Erosion & Sediment Control permit, and an exemption from the Geologic Hazards permit requirements. Case File: T2-2021-14981." APP-1. As relevant to this appeal, the decision denies the applicant the right to build a farm dwelling on EFU land under the rarely-used "production capability test" set forth in OAR 660-033-0135(2).

Petitioner seeks a remand of the decision.

B. Standing.

Petitioner is the applicant and appeared below. Rec. 363.

C. Jurisdiction.

The decision under appeal is a statutory land use decision. ORS 197.825(1).

D. Summary of Arguments.

1. The hearings officer misconstrued applicable law by insisting that the applicant provide proof of past farm income to support an approval for a farm dwelling brought under the "production capability test" set forth at OAR 660-033-0135(2) and the corresponding county standards that implement the administrative

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

rule.

2. The hearings officer misapplied applicable law by effectively creating a new uncodified standard: he held that the only acceptable proof of current employment of farm use is an IRS Schedule F or a "sales report." This is contrary to OAR 660-033-0135(2)(a)(C) and MCC 39.4265(B)(3), neither of which specify the type of documentation, if any, that is needed to meet the applicant's burden of proof with regarding to the "current employment" criterion.

E. Summary of Facts.

Petitioner Scott Reed is a part-time affordable-housing developer and a full-time egg and goat farmer. Rec. 365. In his younger years, he took elective courses pertaining to avian science at U.C. Davis because of his interest in poultry. *Id*. His wife, Stacy Reed, is a dermatologist and works 10 hours a week on the farm. *Id.* Scott Reed is a member of both the Oregon Farm Bureau and the Multnomah County Farm Bureau, and serves on the Board of Directors of the latter organization. Rec. 339-40.

Petitioner would like to build a farm dwelling on the property. Rec. 488. Scott Reed has stated that his intention is to retire from development once his house is built, and "ramp up the livestock on the farm." Rec. 365.

Petitioner purchased an abandoned 84.43-acre dairy farm in 2014. Rec. 366. Since that time, he fixed up the property and raised over 20 cattle, over 40 hogs,

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

over 1,000 chickens, over 40 goats, and a handful of other farm animals. Rec. 366.

Petitioner has two current farm uses on the property, one involving the raising of chicken eggs and the other raising goats. Rec. 499. In his application, submitted in 2021, Petitioner described their farm operation, as it then existed, as follows:

> The subject tract currently has 133 Golden Bovan pasture raised layers which produce approximately 40,000 eggs per year. These eggs are collected, cleaned, inspected, packaged, refrigerated, and then delivered to customers every week. Residential customer[s] pay $6 per dozen and commercial customers pay $5 per dozen (when purchasing at least 5 dozen). The farm also currently breeds Boer goats for sale. The eggs alone produce over $16,625 in annual gross sales which exceeds the annual gross sales ($14,942.91)[1] required in subsection (b) of this section.

Id. In a submittal to the hearings officer, Petitioner summarized the level of farm activity as it existed in 2020:

> In 2020 schedule F, Springwood Acres Farm LLC produced $44,511 of farm income from egg sales ($43,386) and Boer goat sales ($1,125). The total pasture raised eggs produced was 93,299 (86,769 usable, 6,530 cracked/thin shelled) resulting in 7,231 dozen eggs sold.

Rec. 363. At the hearing, Petitioner submitted updated information about the farm:

> Original application was filed in August 2021 which was a slow year for the farm with the Covid-19 pandemic and

[1] This figure was later revised to $15,722.15 for technical reasons not relevant here. Rec. 361.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

> the surging cases in the state. The prior year of 2020 was much better for the farm before the [covid-related] limits on contact hurt sales. As of August 2022, the farm has over 300 [chickens] capable of producing over 90,000 eggs per year and we are working to get back to 2020 egg sales levels.

Rec. 362. He stated at the hearing that:

- ❖ he buys feed by the truckload, 10 tons at a time. Min Ctr. 1:15.52;
- ❖ his goal was to produce 500,000 eggs per year on the property. Min. Ctr. 1:05.00; and
- ❖ they still owned goats. Min Ctr. 1:06.45.

He also stated at the hearing that the County had inspected his farm 3 times in the past 5 years, so the County knows exactly what farm uses occur on the property. Min. Ctr 1:12.05. Petitioner submitted 15 photographs which show some of the chickens and goats, and provide a sense of how the operations looks on the ground. Rec. 323-338.

This is the second time that Petitioner has filed an application seeking a farm dwelling under the "production capability test" set forth at OAR 660-033-0135(2). The first application resulted in a land use approval in 2015. Rec. 290. APP-27. As Petitioner noted at the hearing, he had trouble getting the plans through the building permit process for reasons unrelated to the issues in this case, and the land use approval expired before they could establish a vested right. The details of the prior

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

land use saga are not relevant here, other than to note that the result Petitioner obtained via the 2015 land use approval stands in stark contrast to the decision under appeal.

II. FIRST ASSIGNMENT OF ERROR

The Hearings Officer Misapplied Applicable Law When He Interpreted the Production Capacity Test Set Forth at OAR 660-033-0135(2) as Requiring Proof of Past Farm Income. The Production Capacity Test is a Forward-Looking Test Which Seeks to Determine If A Property is Entitled to a Farm Dwelling Based on a Combination of the Subject Tracts Acreage and Soil Characteristics; None of the Test's Essential Calculations Require Proof of Past Farm Income, and the Hearings Officer Erred as a Matter of Law By Holding to the Contrary.

A. Standard of Review.

This assignment of error presents an issue of law. Multnomah County is entitled to no deference, both because the decision was made by a hearings officer,[2] and because the Code provision at issue is merely a restatement or codification of a state administrative rule.[3] Furthermore, the criteria for a principal farm dwelling are found in OAR 660-033-0135(2), which implements the allowance for a farm dwellings in ORS 215.283(1)(e). The criteria established by LCDC to implement the allowances in ORS 215.283(1) are exclusive; that is, the county may not add

---

[2] *See Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994); *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1988) (setting for the "reasonable and correct" standard of review).

[3] *See Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500, 519 (2006); *Burton v. Polk County*, 48 Or LUBA 440, 446, *aff'd* 199 Or App 270 (2005)

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

additional criteria or other restrictions not present in OAR 660-033-0135(2). *Brentmar v. Jackson County*, 321 Or 481 (1995).

B. Preservation.

Petitioner preserved error via multiple submittals:

First, the application itself makes clear that Petitioner was proceeding under the "production capability test" set forth at OAR 660-033-0135(2). Rec. 496-499. That in itself should be enough notice that no proof of past farm income is required, since the "production capability test" does not require the use of past farm income. OAR 660-033-0135(2)(a)(B), (C) & (H).

Second, Petitioner explained the operation of the "production capability test," both verbally and in writing. Aug 12, 2022 Hearing, Min. Ctr 52:00 to 59:39; 1:00.41 to 1:04.06. *See also* Rec. 355-360 (Explaining how potential income is calculated). Petitioner explained that the test relies on potential income calculations, which is in direct contrast to the concept of proof of past income. *Id.* Although Petitioner repeatedly offered to provide their Schedule F on condition that the county keep it confidential and not post it online like they did in 2014-2015, Petitioner concluded at the hearing by stating "[w]e can, by actual income [*i.e.* proof of past farm income] or by these [potential income] calculations, prove that we more than exceed the median of farms capable of producing $10,000.00 of gross annual income that are within a mile of the farm." *Id.* at Min. Ctr. 1:04.10.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Third, Petitioner also submitted a separate letter dated Aug. 12, 2022 where they cited to MCC 39.4265, the county code provision that implements OAR 660-033-0135(2), and described the test as the "farm income capable" test." Rec. 60. Petitioners stated that the "code standard is based on potential income." *Id*.

Fourth, Petitioner submitted a letter dated Sept. 8, 2022 in which they quoted OAR 660-033-0135(2)(a)(G) and stated that this administrative rule "provides that a farm use may be established in the future based on a condition that an applicant must demonstrate the existence of the farm use in the future." Rec. 34.

Finally, the first time the hearings officer stated that OAR 660-033-0135(2)(a)(G) did not apply to this case was after the record closed: in the final written decision. Rec. 17. This aspect of the decision was unexpected, because a prior 2015 staff decision had found that even though there was an existing farm use on the property, the applicant's farm management plan could propose a different farm use, and a condition of approval could be imposed requiring the applicant to implement the farm management plan before obtaining a building permit. Rec. 268. Issues that materialize for the first time after the record closes are not subject to raise-it-or-waive-it requirements. For example, petitioners are not required to have challenged issues that materialize for the first time in the findings. *See, e.g.*, *Washington Co. Farm Bureau v. Washington County*, 21 Or LUBA 51, 57 (1991); *DLCD v. City of Warrenton*, 40 Or LUBA 88, 95-96 (2001); *Fernandez v. City of*

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Portland, 73 Or LUBA 107 (2016).

C. Argument.

1. Background on the Applicable Law.

This case involves the "production capability test," which is one of the tests set forth at OAR 660-033-0135 for obtaining a farm dwelling on non-high-value farm land. To understand how the rule operates, some background pertaining to the farm dwelling statutes and administrative rules is required.

We begin with the statute, which sets forth little detail:

> ***215.283(1) The following uses may be established in any area zoned for exclusive farm use:***
>
> **** * * * *.***
>
> ***(e) Subject to ORS 215.279, primary or accessory dwellings and other buildings customarily provided in conjunction with farm use.***

The administrative rules set forth at OAR 660-033-0135 flesh out this statute. The goal of the administrative rule was to draw distinctions between commercial farmers operating significant "farms," versus the hobby farmer whose "farm use" is at a level which is not a "farm" and is therefore unworthy of the right to a farm dwelling. *See* DLCD Publication, Rules for Farm Dwellings, March, 1994. APP-51.

In creating the farm dwelling tests, LCDC created different criteria for "high

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

value farmland" and "non-high value farmland." The case at bar involves land that falls within the category of "non-high value farmland," Rec. 465, so the tests for high-value land need not be further considered, other than perhaps as context.

For non-high value farmland, OAR 660-033-0135 provides five separate "tests" or sets of standards for farm dwellings, three of which are relevant here. Note, in this regard, that two of the five tests only apply in specialized situations, and are not considered further here.[4]

The first of the three contextually-relevant tests is the "large tract" test, which grants a right to build a farm dwelling to farmers who own farm tracts over 160 acres in size. OAR 660-033-0135(1)(a)(1)(A). According to DLCD, these farms are, by their size:

> "large enough to demand the attention and labors of at least one household (the occupants of a farm dwelling). It includes enough farmland to make significant contributions to the area's agricultural economy."

See DLCD Publication, Rules for Farm Dwellings, March, 1994. APP-51. This is the easiest of the three tests in terms of the applicable criteria, but has limited applicability insomuch as it is hard to assemble that much vacant land.

The second test is "production capability" test, which applies to farmers who

---

[4]There are rules, not relevant here, for commercial dairies, OAR 660-033-0135(7), and for farmers who are relocating their operations. OAR 660-033-0135(9).

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

own tracts smaller than 160 acres but larger than the median size of farm tracts *capable of generating* at least $10,000.00 in annual gross sales, and which are producing *or capable of producing* at least the median level of annual gross sales of neighboring farms. OAR 660-033-0135(2). As DLCD has noted, the production capability test grants a farmer the right to build a farm dwelling on a tract that "has a combination of soils, water, and other features that makes capable of producing significant amounts of crops or other farm products *in the future*." *Id.* (Emphasis added). Generally speaking, a landowner will only find success under the "production capability" test if he or she has a *relatively* large tract of land with relatively decent non-high value soils. This is because the farm in question has to be above the median size for farms in a one-mile radius.

The third test, the "past farm income" test, is the most commonly used test. Arguably, perhaps the most difficult insomuch as it applies to lands whose size or physical characteristics make it less obvious, as compared to the lands covered by the first two tests, that the land can produce a significant enough quantity of farm income to warrant granting the farmer the right to a farm dwelling. On these smaller and less capable properties, the only way for a farmer to prove that they are worthy of a farm dwelling is to show proof of *past farm income* from that tract. We refer to this third test as the "past farm income" test because it applies to any property, regardless of size or soils status, where the farmer can show a proven

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

track record of generating gross annual income of at least $40,000.00 *or* the "gross annual income of at least the midpoint of the median income range of gross annual sales for farms in the county with gross annual sales of $10,000.00 or more according to the 1992 Census of Agriculture, Oregon." OAR 660-033-0135(3)(a).

To summarize the three tests in layperson terms: If the property is very large (160 acres), a farmer (*i.e*. someone who is "principally engaged" in a "farm use") will be granted the right to build a farm dwelling. Similarly, if the property is less than 160 acres, but nonetheless where its size combined with the physical characteristics of the soils and water availability make it clear that a farmer can *in the future* produce farm income that meets the thresholds set forth by the test, then the farmer gets a farm dwelling once the farm is up and running. Finally, a farmer that cannot qualify under the first two tests can only acquire the right to a farm dwelling after he or she has an established a proven track record of generating income from farm products.

In this case, Petitioner applied under the second test: the "production capability" test. Rec. 499. This test also just so happens to be the most obscure and most seldom-used of the three tests, so we discuss its particulars in more detail.

This little-used administrative rule provides:

> ***(2)(a) If a county prepares the potential gross sales figures pursuant to subsection (c) of this section, the county may determine that on land not identified as high-value farmland***

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

pursuant to OAR 660-033-0020(8), a dwelling may be considered customarily provided in conjunction with farm use if:

(A) The subject tract is at least as large as the median size of those commercial farm or ranch tracts capable of generating at least $10,000 in annual gross sales that are located within a study area that includes all tracts wholly or partially within one mile from the perimeter of the subject tract;

(B) The subject tract is capable of producing at least the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the tract size in paragraph (A) of this subsection;

(C) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in paragraph (B) of this subsection;

(D) The subject lot or parcel on which the dwelling is proposed is not less than 10 acres in western Oregon or 20 acres in eastern Oregon;

(E) Except for seasonal farmworker housing approved prior to 2001, there is no other dwelling on the subject tract;

(F) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the subject tract, such as planting, harvesting, marketing or caring for livestock, at a commercial scale; and

(G) If no farm use has been established at the time of application, land use approval shall be subject to a condition that no building permit may be issued prior to the establishment of the farm use required by

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

paragraph (C) of this subsection.

(H) In determining the gross sales capability required by paragraph (C):

(i) The actual or potential cost of purchased livestock shall be deducted from the total gross sales attributed to the farm or ranch tract;

(ii) Only actual or potential gross sales from land owned, not leased or rented, shall be counted; and

(iii) Actual or potential gross farm sales earned from a lot or parcel that has been used previously to qualify another lot or parcel for the construction or siting of a primary farm dwelling may not be used.

At the time the subject application was filed, the county's zoning code included a section titled MCC 39.4265(B), which directly implemented OAR 660-033-0135(2). This code has since been repealed by Ordinance 1304 (2022), but at the time of application it provided:

(B) Customary Farm Dwelling: A dwelling, including a mobile or modular home customarily provided in conjunction with a farm use as provided in MCC 39.4225(C) is not allowed unless the following standards are met:

**** * * * *.***

(3) Not high-value farmland soils, capable of producing the median level of annual gross sales. On land not identified as high-value farmland a dwelling may be considered customarily provided in conjunction with farm use if:

(a) The subject tract is at least as large as the median size

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

of those commercial farm or ranch tracts capable of generating at least $10,000 in annual gross sales that are located within a study area which includes all tracts wholly or partially within one mile from the perimeter of the subject tract [the median size of commercial farm and ranch tracts shall be determined pursuant to OAR 660-33-135 (3)]; and

(b) The subject tract is capable of producing at least the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the tract size in subsection (a) of this section; and

(c) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in subsection (b) of this section; and

(d) The subject lot or parcel on which the dwelling is proposed is not less than ten acres; and

(e) Except as permitted in ORS 215.283(1)(p) (1999 Edition) (i.e. seasonal farmworker housing), there is no other dwelling on the subject tract; and

(f) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale; and

(g) If no farm use has been established at the time of application, land use approval shall be subject to a condition that no building permit may be issued prior to the establishment of the farm use required by subsection (c) of this section." MCC 39.4265(f)

There are no functional or interpretational differences between OAR 660-033-0135(2) and MCC 39.4265(B)(3), the latter being a direct implementation of the

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

former with no operational modifications.

Perhaps the most important aspect about the "production capability" test is that it does not require the applicant to prove any particular level of *past* farm income. More to the point, subsection 0135(2)(a)(C) does not require the applicant to prove that the subject property is *currently* producing the annual gross sales required by Subsection (b). Rather, subsection 0135(2)(a)(C) requires that the farm use be *capable of* generating such future annual sales. In this regard, the "production capability" test is written in direct contrast to the "past farm income" test, which *does* require that the farmer prove that his or her actual *past farming activity* generated certain threshold levels of income before land use approval can be granted. OAR 660-033-0135(3)(a).

Further note that even the "principally engaged" criterion is written differently for the "production capability" test and the "large tract" test as compared to the "past farm income" test. OAR 660-033-0135(1)(c) sets forth the "principally engaged" criterion that applies to a large tract dwelling:

> ***(c) The dwelling will be occupied by a person or persons <u>who will be</u> principally engaged in the farm use of the subject tract, such as planting, harvesting, marketing or caring for livestock, at a commercial scale.***

Similarly, OAR 660-033-0135(2)(a)(F), which applies to the "production capability" test, also expresses its mandate in the future tense:

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

> ***(F) The dwelling will be occupied by a person or persons <u>who will be</u> principally engaged in the farm use of the subject tract, such as planting, harvesting, marketing or caring for livestock, at a commercial scale; and***

In direct contrast, OAR 660-033-0135(3)(c), which applies to the "past farm income" test, is both backward looking and creates a right that is personal to the person who previously farmed the property:

> ***(c) The dwelling will be occupied by a person or persons <u>who produced the commodities</u> that grossed the income in subsection (a) of this section; and***

This distinction in the wording is very intentional, and reflects the fundamental difference in the tests.

Ironically, Multnomah County staff previously recognized this reading of subsection 0135(2)(a)(C) and its county equivalent, when in a prior application submitted in 2014 the staff decision found that: "this criterion [referring to MCC 39.4265(B)(3)] requires that the property be <u>*capable of*</u> producing the median annual gross sales under section (b) above, <u>*but does not require that the Owner actually produce*</u> the median annual gross sales." (Emphasis added). Rec. 267, APP-39. The 2015 staff decision went on to find that Petitioner submitted a farm plan which demonstrated that the farm was "capable of producing the median income in the future, which is all what the rule and code require." *Id.*

Rather than focus on past income, the "production capability" test relies on a hypothetical income potential for a farm, based on soil type and tract size. OAR

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

660-033-0135(2). In what can only be described as a full employment act for land use planners, the subject property's hypothetical income potential is derived from data-driven estimates of what an acre of similar land can generate, assuming that land were to be growing one of three "indicator crops." The indicator crops are the three most common crops grown the county, based on data setting forth the number of acres in the County devoted to each type of crop. OAR 660-033-0135(2)(c)(A). Thus, the "production capability" test operates in a manner that makes the consideration of any existing farming activity being conducted on the subject farm at the time of application for the farm dwelling unnecessary, and only relevant at the applicant's option. Rather, the "production capability" test relies on three variables:

- ❖ Farm tract size (acreage);
- ❖ Soil types (with irrigation status factored in); and
- ❖ County-estimated potential sales per acre.

What's important is that applicants need to be able to show that they have enough acreage to both be: (1) larger than the median farm in the local one-mile area that make over $10,000 in farm sales annually; and (2) that the subject property is *capable, in the future, of* making more money than those "median" farms *based on its soils and size*. OAR 660-033-0135(2)(a)(A) and (B).

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Note that if an applicant has been farming a given tract long enough to meet the income requirements of "past farm income" test, then in many cases that is an easier path than trying to meet the more complicated and time-consuming "production capability" test. However, a person who is currently farming a tract of land, but does not have the two-year tract record of earnings, may have a limited opportunity to apply earlier pursuant to the "production capability" test. We say "limited opportunity" insomuch that the opportunity only extends to those situations where the tract at issue has a large enough tract size and good enough soil characteristics to exceed the median farms in the area.

So, in this regard, the "production capability" test favors: (1) a future farmer with no established farm use, and (2) current farmers who have not yet gotten to the point where they are bringing in the minimum gross income for the past two years or three of the past five years.

At this juncture, it is worth highlighting more details of the "production capability" test in order to show that the past farm income of the subject property is not a necessary (or even a relevant) component of the analysis. As alluded to above, the test requires the county to create a table of estimated potential gross sales per acre for irrigated and non-irrigated land in each soils class. OAR 660-033-0135(3)(c). To accomplish this, a county must follow a somewhat complicated methodology set forth at OAR 660-033-0135(3)(c)(B)-(D). It is not necessary to

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

understand the inner workings of the methodology to resolve this appeal.

Prior to Petitioner filing his earlier 2014 farm dwelling application, Multnomah County had never dealt with the "production capability" test. Nonetheless, after Petitioner filed his 2014 application seeking to use that test, the County hired CSA Planning, Ltd., a land use planning firm, to create the "Estimated Potential Gross Sales Per Acre For Each Land Class" for Multnomah County's three indicator crops (grain, hay and forage, and grass and legume seeds). CSA's table is found at Rec. 666, APP-101, and is reproduced below.

Description	Class	Percent of average	Combined weighted gross sales per acre	Estimated Potential Gross Sales Per Acre For Each Land Class
Dry	I	184%	$ 432	$ 795.16
Dry	II	132%	$ 432	$ 570.88
Dry	III	108%	$ 432	$ 468.94
Dry	IV	47%	$ 432	$ 203.89
Dry	V	28%	$ 432	$ 122.33
Irrigated	I	133%	$ 2,276	$ 3,019.08
Irrigated	II	86%	$ 2,276	$ 1,955.21
Irrigated	III	81%	$ 2,276	$ 1,854.58

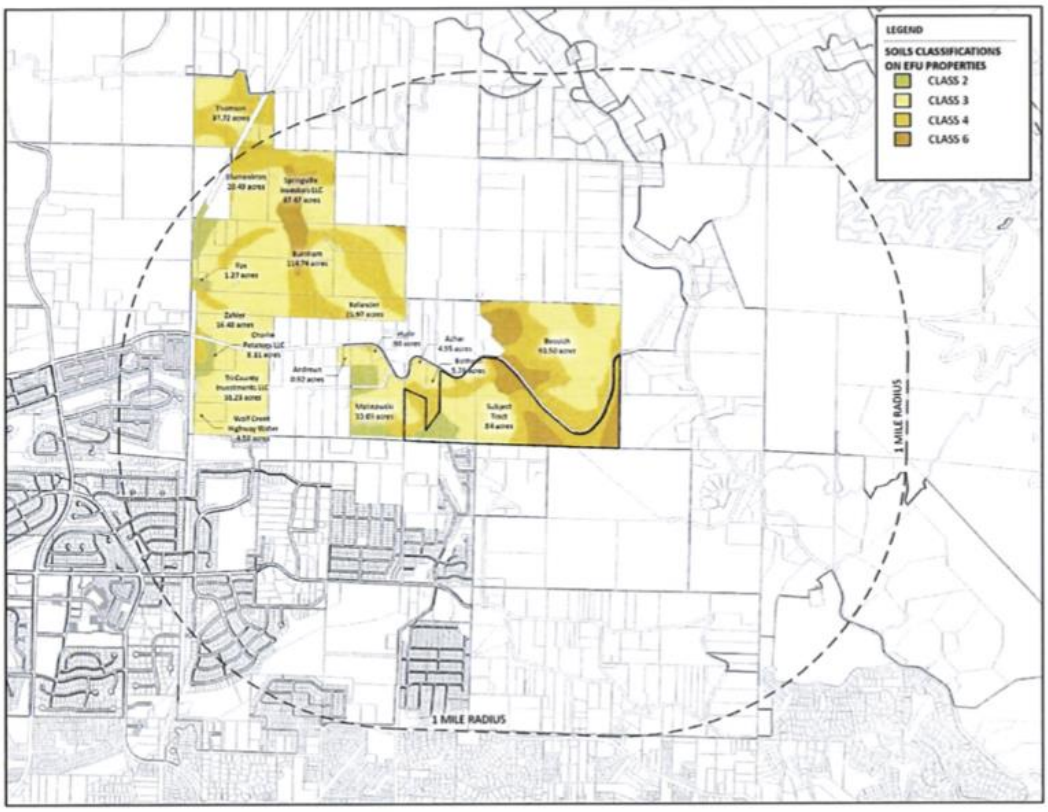
Note that the county's consultant used data from OSU and its own Dept. of Assessment and Taxation to create the key table set forth above. Rec. 663-666.

Once the county's consultant prepared the table, the remainder of the "production capability" test requires location-specific data. Using this case as an

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

example of how the process works, Petitioner hired a land use planning firm, 3J Consulting, Inc., to complete that site-specific aspects of the test. Rec. 576; APP-86. At the time of first (2014) application for the farm dwelling, Petitioner did not yet even formally own the subject property, so there was no way for them to show that proven track record of farm income. Rec. 576 (3J Consulting described its client as a "future owner" of the property.).

3J Consulting, Inc. determined the soil types of the subject property, boundaries of the one-mile study area, the size of all of the farms in the study area, etc. Rec.582; APP-92.



ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

After applying the Pease methodology[5] and the data from Multnomah County's consultant, 3J Consulting concluded that "the median tract size of the properties capable of meeting the income threshold in that study area was 37.47 acres, based on seven tracts. Rec. 580, 584; APP-90, 94. It further concluded that the median level of annual gross sales of county indicator crops of tracts within the study area is $23,540.24. Rec. 581, 584; APP-91, 94. 3J Consulting demonstrated based on indicator crops that the applicant could likely earn $37,473.78 on its 84 acres, assuming that it planted the indicator crops. *Id*. 3J Consulting concluded that "the applicant is clearly capable of generating farming income levels required by [MCC 39.4265(B)(3)][6] of the county code. Rec. 587; APP-97.

The numbers prepared by 3J Consulting, Inc. would be revised a few times over the years for technical reasons not relevant to this case, but the final set of numbers appear at Rec. 357; 361. Note that the "gross sales per acre by [soil] class" numbers all are derived from the table that CSA Planning Inc. prepared for

---

[5] *See* Rec. 578, APP-578. DLCD approved the use of the so-called "Pease methodology" as the official methodology for the production capability test. This is a document produced by Oregon State University. *See* James R. Pease, "Guidelines for Preparing Estimates for Potential Gross Sales For Farm Parcels by Oregon," Dept. of Geosciences, OSU (Aug. 15, 1996). Rec. 588. APP-53.

[6] The County code section was numbered "MCC 33.2625 (D)(3)" at the time the 3J Consulting report was written. In the quote above, we substituted the code section as it was numbered at the time of the 2021 application.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Multnomah County:

Table 2 - Potential Earning Capacity for Each Tract

Tract Name	Acres in Each Land Class				Gross Sales Per Acre By Class				Potential Earning Capability
	Class 2	Class 3	Class 4	Class 6	Class 2	Class 3	Class 4	Class 6	
Andrews	0.01	0.93	0	0	$570.88	$468.94	$203.89	$122.33	$441.82
Azhar	0	3.48	1.48	0	$570.88	$468.94	$203.89	$122.33	$1,933.67
Beovich	0	43.81	36.7	12.97	$570.88	$468.94	$203.89	$122.33	$29,613.64
Blumenkron	0	12.67	7.82	0	$570.88	$468.94	$203.89	$122.33	$7,535.89
Bothum	0.27	2.38	3.11	0	$570.88	$468.94	$203.89	$122.33	$1,904.31
Burnham	3.57	73.16	31.75	6.21	$570.88	$468.94	$203.89	$122.33	$43,578.87
Charlie Potatoes LLC	2.99	3.51	1.6	0	$570.88	$468.94	$203.89	$122.33	$3,679.13
Fox	0.7	0.44	0.14	0	$570.88	$468.94	$203.89	$122.33	$634.49
Hyde	0	0.91	0.07	0	$570.88	$468.94	$203.89	$122.33	$441.01
Kolander	0	8.85	7.11	0	$570.88	$468.94	$203.89	$122.33	$5,599.78
Malinowski	12.13	13.62	7.35	0	$570.88	$468.94	$203.89	$122.33	$14,810.33
Springville Investors LLC	0	17.75	10.19	9.53	$570.88	$468.94	$203.89	$122.33	$11,567.13
Thompson	0.06	17.62	20.04	0	$570.88	$468.94	$203.89	$122.33	$12,382.93
Tri-County	1.01	35.44	1.77	0	$570.88	$468.94	$203.89	$122.33	$17,556.71
Wolf Creek Highway Water	0	4.58	0	0	$570.88	$468.94	$203.89	$122.33	$2,147.75
Zahler	0.28	30.16	6.96	0	$570.88	$468.94	$203.89	$122.33	$15,722.15
								Median:	**$15,722.15**
Subject Tract	7.1	30.42	30.1	16.64	$570.88	$468.94	$203.89	$122.33	$26,491.06

In this table, the median gross income for the seven (7) farms identified as being located within one mile and capable of earning >$10,000 based on the county indicator crops is set forth as $15,722.15. Based on the same indicator crops, and using that same set of median gross income per acre figures, the subject property is capable of earning $26,491.06. That is not surprising, since Petitioner's farm is much bigger than the median farm and has similar soils.

The primary purpose of walking LUBA through the analysis set forth above is to show that the "production capability" test is not based on actual past farm income. Rather, the test is based on the hypothetical capability of the land to raise farm products, based on the state and county produced data, as discussed above.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Unfortunately, OAR 660-033-0135(2) is poorly written, and before getting into the specifics of this case, it is worth highlighting some of the confusing language.

At first glance, subsection 0135(2)(a)(C) and 0135(2)(a)(G) seem to directly contradict one another. Subsection 0135(2)(a)(C) requires that the tract be "*currently* employed for a farm use" (emphasis added), whereas subsection 0135(2)(a)(G) opens the possibility that the land use application for a farm dwelling can be approved even before the "farm use" is "established." In that circumstance, subsection 0135(2)(a)(C) states that the county needs to add a condition requiring that the farm use be "established" before the building permit for the dwelling is issued. How can you be "currently employed for a farm use" if "no farm use has been established"? The short answer is that the term "currently employed for a farm use" does not actually mean what it says, at least not with regard to the exact *timing* of the determination. This is further discussed below.

Here are the provisions set forth with the key language highlighted:

> ***(B) The subject tract is capable of producing at least the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the tract size in paragraph (A) of this subsection;***
>
> ***(C) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in***

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

paragraph (B) of this subsection;

* * * * *.

(G) <u>If no farm use has been established at the time of application</u>, land use approval shall be subject to a condition that <u>no building permit may be issued prior to the establishment of the farm use</u> required by paragraph (C) of this subsection.

Note that even Subsection 0135(2)(a)(G) never requires proof of actual past farm income. Rather, it requires that the farmer "establish the farm use" required by Subsection 0135(2)(a)(C). The confusing interplay between 0135(2)(a)(C) and 0135(2)(a)(G) at least partially explains why the hearings officer wrongly decided this case, as discussed in more detail below.

OAR 660-012-0135(2)(a)(C)'s "current employment" test is a law that was carried over from former OAR 660-05-030(4)[7] that applied in the Pre-HB 3661

---

[7] OAR 660-05-030, repealed August 7, 1993, provided in relevant part:

"(3) Dwellings proposed for parcels which satisfy the Goal 3 minimum lot size standard cannot be approved within an exclusive farm use zone without the county governing body or its designate first determining whether the dwelling satisfies the additional statutory standard in ORS 215.213(1)(g) or 215.283(1)(f). This standard requires a determination that the dwelling is 'customarily provided in conjunction with farm use.'

"(4) ORS 215.213(1)(g) and 215.283(1)(f) authorize a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than for farm use, a proposed dwelling would not be 'customarily provided in conjunction with farm

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

(1993) days of farm management plans. OAR 660-05-030 and the caselaw that interpreted it are good context for the meaning of OAR 660-033-0135(2) because LCDC chose to keep much of the same language for the production capacity test.

As written in 1986, OAR 660-05-030(4) stated that the parcel on which the dwelling was sought had to be "currently employed for farm use," and that "[a]t a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land." DLCD's 1986 formulation of the "current employment" test came on the heels of the *Matteo* cases. *See Matteo v. Polk County*, 14 Or LUBA 67 (1985), *aff'd w/o op*., 70 Or App 179 (1984) (*Matteo II*). The "current employment" test generated quite a bit of caselaw, which helped shape the current administrative rules. For example, in *Newcomer v. Clackamas County,* 92 Or App 174 (1988), *adhered to as modified*, 94 Or App 33 (1988), the Court of Appeals rejected LUBA's hardline decision in *Matteo II,* which had held that a tract must be "wholly-devoted" to farm use in order to qualify for a farm dwelling.

In *Forster v. Polk County*, 115 Or App 475 (1992), the Court of Appeals held that in cases where a conditional approval for a farm dwelling is granted contingent on the establishment of the farm prior to issuance of the building permit, the rule

---

use' and could only be approved according to ORS 215.213(3) or 215.283 (3). At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land." (Citations omitted.)

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

does not require the *full* establishment of *all* planned farm prior to issuance of the permit. After *Forster*, LUBA continued to hold that a county could comply with OAR 660-05-030(4) by determining the amount of farm use required by OAR 660-05-030(4), conditioning issuance of a building permit for the farm dwelling on the establishment of that amount of farm use on the property, and requiring that notice and an opportunity for a hearing be provided to all parties with regard to determining compliance with such condition. *Forster v. Polk County*, Or LUBA, 24 Or LUBA 481, 482 n9 (1993); *see also McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187, 198 (1992), *aff'd* 118 Or App 543, *rev den* 317 Or 272 (1993); *Miles v. Clackamas County*, 18 Or LUBA 428 (1989); *Fleck v. Marion County*, 25 Or LUBA 745 (1993). Under the old farm management plan caselaw, the farmer really did not have to be "currently employed for farm use" at the *time of land use application*, (despite the use of the term "currently,") so long as the farm use was "established" to a certain specified degree before the building permit was issued.

Together, these cases help understand the intended relationship between OAR 660-033-0135(2)(a)(C) and OAR 660-033-0135(2)(a)(G), because conceptually and operationally, the new test imports those old processes. Although OAR 660-033-0135(2)(a)(C) requires that the tract be "currently employed" for a farm use at a certain level of productivity, OAR 660-033-0135(2)(a)(G) allows that

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

farm use to be established at some time *after* the land use application is approved. This is same conceptual relationship that was established by cases such as *Forster, Miles,* and *Fleck, supra.*

The case of *Rebmann v. Linn County*, 19 Or LUBA 307 (1990) also informs the current rules insomuch it interpreted OAR 660-05-030(4). In *Rebmann*, LUBA held that where a parcel is "currently employed for farm use as defined in ORS 215.203," the requirement of OAR 660-05-030(4) that farm use of EFU-zoned property be established prior to approval of a farm dwelling is satisfied, even where the "current" farm use is not the same farm use which the proposed farm dwelling is to be "customarily provided in conjunction with." There is no reason to think that the flexibility allowed in *Rebmann* would not carry over the current rule, given the language of the "current employment" criterion in OAR 660-033-0135(2)(a)(C) did not change in any substantive manner from the old rule.

Finally, the "production capability" test can be used by a farmer even if there is an existing farm on the property that is not making enough money to meet the "past farm income" test. The law is not written in a way that prohibits a new, inexperienced farmer from obtaining a farm dwelling, if that farmer has a large tract of land with fairly decent (but not high-value) soils. That farmer need only show that the property is *capable of* making the income thresholds in the future, as opposed to proving that he or she has accomplished that level of farming in the past.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

2. The Hearings Officer Erred Because He Insisted on the Applicant Providing Proof of Past Income for Its Existing Farm Use, Even Though the Applicant Applied Under the "Production Capacity" Test, Which is a Test Grants the Right to Build a Farm Dwelling Based on Site Characteristics That Have Absolutely Nothing to Do With Past Farm Income.

With that understanding of the law in mind, we turn to the decision. The hearings officer errs because he confused the "production capability" test with the "past farm income" test, and essentially melded them into one single hybrid test.

The hearings officer's key findings begin at Rec. 15, where he states that having proof of past income is "crucial to the decision." To the contrary, proof of past income is completely unnecessary under the "production capability" test. This is due to the fact that OAR 660-033-0135(2)(a)(G) allows that farm use to be "established" at a time *after* the land use application is approved. An applicant can prove that their land is capable of earning the required income by showing that they have enough acreage of the right soils to generate income based on the county-derived tables, not Schedule Fs!

Having said that, if an applicant wants to show that his or her farm is capable of producing the annual gross sales figure required by OAR 660-033-0135(2)(a)(B) by providing one year of sales data or a Schedule F, then we believe the rule gives an applicant that flexibility. Stated another way, one way an applicant can show that they are "currently employed for farm use * * * at a level capable of producing

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

the annual gross sales required by paragraph B" is simply to show last year's sales data. However, some farmers do not have that luxury, and must prove that their farm is *capable of* achieving those gross sales figures via a farm plan.

Note, in this regard, that OAR 660-033-0135(2)(a)(G) requires the building permit be held until the farm is "established," a paradigm which anticipates that the land use decision set forth a benchmark explaining how much of the applicant's farm needs to be established for the building permit to be issued. That is the same process set forth in *Miles* and *Fleck, supra.*

For the same reason, the hearings officer also erred with regard to the related findings that:

> (1) the applicant needed to "verify the income" of the subject farm. Rec. 15,
>
> (2) "there is a specific dollar amounts that need to be earned," and
>
> (3) "[the hearings officer] cannot find any evidence in the record of the Schedule F or other sales reports to verify the income." Rec. 16.

Again, the correct way to interpret the "current employment" test in OAR 660-033-0135(2)(a)(C) is to understand that it is not meant literally from a timing standpoint, but that OAR 660-033-0135(2)(a)(G) allows for a contingent approval of a farm dwelling, subject to the farm use being established prior to the time the building permit for the farm dwelling gets issued.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Given that paradigm, there is simply no way that a Schedule F or any other proof concerning a *past* level of farming is required to obtain a land use approval issued under the "production capability" test. This is true regardless of whether the applicant has an existing "farm use" on the property. If the applicants had wanted to proceed under the third test (*i.e*. the "past farm income" test), they could have done so. But they applied under a different test: one not dependent on past farm income.

The hearings officer also wrongly found that and MCC 39.4265(B)(3)(G) (and, by extension, OAR 660-033-0135(2)(a)(G)), did not apply to the application:

> The Hearings Officer finds that this section is not applicable. This section is used for an applicant that has not begun a farm operation yet. Here we have an established farm use that should be able to produce definitive evidence through the submittal of its Schedule F.

Rec. 17. The hearings officer simply read the first clause of OAR 660-033-0135(2)(a)(G) in isolation and concluded that this subsection did not apply since the applicant clearly had an existing operational farm use. As seemingly straightforward as the hearings officer's reading of that provision might have been, it was incorrect. Petitioner therefore assigns error to this finding.

The hearings officer's primary error is that he fundamentally misunderstood how OAR 660-033-0135(2) operates. He read subsection 0135(2)(a)(G) in isolation, which unfortunately can lead to incorrect results. As Oregon courts have noted, "[i]t

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

is true that the context of a statute or statutory scheme can sometimes reveal an ambiguity in a particular phrase that, standing alone, appears to have a clear meaning. *See Dennehy v. City of Portland,* 87 Or App 33, 40 (1987)." *Southwood Homeowners Ass'n v. City Council of Philomath***,** 106 Or App 21, 24 (1991). The meaning of subsection 0135(2)(a)(G) only becomes clear when it is read in its broader statutory context, including the caselaw that interpreted their predecessor language.

Furthermore, the hearings officer read an unwarranted implied negative into OAR 660-033-0135(2)(a)(G). The hearings officer found that this section is used for an applicant that has not begun a farm operation yet, and since Petitioner has a farm operation, that this section simply does not apply. Rec. 17. In this regard, he viewed the operation of OAR 660-033-0135(2)(a)(G) as presenting a binary choice: either the applicant *does not* have an existing farm, in which case subsection 0135(2)(a)(G) applies, or the applicant *does* have an existing farm operation, in which subsection 0135(2)(a)(G) does not apply. In the latter situation, the hearing officer viewed OAR 660-033-0135(2)(a)(C) as requiring proof of past income to show that the "current employment" test is met.

It may be that the hearings officer was unwittingly attempting to apply the familiar interpretive principle of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). *See, e.g., Waddill v.*

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Anchor Hocking, Inc., 330 Or. 376, 381–82 (2000) (applying canon). *Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 353 (1995) (same). However, that negative inference is not compelled by the language when properly read in context, and the interpretive inference gives way to other, more direct, and contrary evidence of legislative intent.

The hearings officer lost sight of the fact that "[t]he cardinal rule for the construction of a statute is to ascertain from the language thereof the intent of the law makers as to what the purpose was to be served, or what the objective was designed to be attained." *Whipple v. Houser*, 291 Or 475, 632 P2d 291 (1981). The purpose of "production capability" test is to provide a limited opportunity to a certain class of farmer (*i.e*. one who owners less than 160 acres but more than the median acreage in his area) to obtain a farm dwelling before it has a proven track record of farm income. Most obviously, the purpose of OAR 660-033-0135(2) is not furthered by limiting the application of subsection 0135(2)(a)(G) to only the situations where no farm use is occurring on-site. Under the hearings officer's analysis, a farmer who puts one potato in the ground doesn't qualify, while a farmer who has yet to do so does. That interpretation does that advance any Goal 3 policy.

To the contrary, under the "production capability" test, the farm dwelling may be allowed even though the farm use is only partially up and running, when it is clear that that the property will support a higher level of operational capability.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Likewise, the farm dwelling may be allowed even though an existing farm use is operational, but the applicant proposes a different farm use to demonstrate the capability of meeting the "currently employed" criterion. *Compare Rebmann*, 19 Or LUBA at 310-11. (applying OAR 660-05-030(4), which was the version of the "currently employed" criterion in effect from 1986-1993).

The hearings officer's error comes into clear focus when you consider that if the law had intended that binary choice that he suggests, Petitioner could have simply stopped farm production prior to the submittal of the application, and thereby availed itself of subsection 0135(2)(a)(G). Of course, that would advance no apparent purpose, and it is more correct to interpret subsection 0135(2)(a)(G) as encompassing a situation where a farm use exists, but it is not yet at the level where it is "capable of producing the annual gross sales required by [OAR 660-033-0135(2)(a)(B)]."

Had the hearings officer understood the rule, he would have concluded that Petitioner's 84.43 acre property, which features mixed class II-VI soils, is a easy shoe-in approval under the production capacity test, because it is so much larger than the median farms in area capable of making over $10,000 in the sale of farm products.[8] Rec. 361 (showing the median gross income capability based on

[8] Petitioner adroitly noted that "if your subject farm is significantly bigger than neighboring farms, you are always going to pass the test." Min. Ctr. 52:00.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

indicator crops of farms in the area ($15,722.15) and comparing it to the applicant's tract ($26,722.14). He would have then determined the level of farm activity that would need to be "established" on the subject property to reach the level required by subsection 0135(2)(a)(B)&(C), and fashioned an appropriate condition requiring that level of farm establishment prior to the issuance of the building permit. That could have entailed a condition requiring some easily verified benchmark such as proof of the establishment of an egg farm capable of producing some set number of eggs, etc.

III. SECOND ASSIGNMENT OF ERROR

Even Assuming, *Arguendo,* that Some Proof of Past Farm Income is Required by the Production Capability Test, The Hearings Officer Added A Legal Requirement that Does Not Exist in the Code When He Stated that an IRS Schedule F Tax Return Form or Documented Sales Data is "Critical" To A Decision Made Pursuant to OAR 660-033-0135(2)(a)(C). The Applicant's Unrebutted Testimony and Photographs Constituted Substantial Evidence that Met the Applicant's Burden of Proof.

A. Standard of Review.

This assignment of error presents an issue of law as well as a question related to whether there is substantial evidence in the record to find that the applicant met its burden of proof.

B. Preservation.

The hearings officer was well aware of the issue of whether a Schedule F or similar "documentation" of past farm income is required to show that the property

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

is currently employed in farm use, as his decision makes clear:

> The Hearing Officer stated that this information was "crucial" for the decision. August 12, 2022, Hearing Tape at 1:53.
>
> This issue was raised in the [Staff Decision], Exhibit C.6. page 15. Furthermore, staff had specifically requested "sales reports" and a Schedule F. Staff's incomplete letter asked for:
>
> > Annual Gross Sales: Your application materials did not include any supporting documents for the annual gross sales figures noted in your narrative. Please provide sales reports (i.e. monthly printouts from a payment system such as 'Square') and certified Schedule F form(s) from your federal tax return for the year(s) associated with the sales figures noted in your narrative. [MCC 39 9.4265 (B)(3)(c)]" Exhibit C.1 Page 3.
>
> In response to this letter and this section specifically, Appellant replied:
>
> > "4a(i). Annual Gross Sales- Please provide code section that requires the types of farm income information requested." Exhibit C.3
> >
> > The Hearings Officer finds that staff's incomplete letter cited to the correct code section requiring income information. No response was needed.

Rec. 16. Although Mr. Reed did initially promise to provide the Schedule F, he had concerns about that his tax returns would be posted on the internet, and in his post-hearing submittal he stated:

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

> "The County's position that Mr. Reed must submit a Schedule F or demonstrate that he is currently principally engaged in the farm use is wrong as a matter of law. Petitioners submitted substantial evidence that demonstrates that (1) the property is being used for a farming and (2) he has attested in a signed affidavit that he is now (and will be in the future) principally engaged in farming activities on the property."

Rec. 34. He then brought the discussion back to the "production capability" test by pointing out that he did not even have to prove any "current" farm use at all, because OAR 660-033-0135(2)(a)(G) allows the hearings officer to impose a condition of approval instead:

> In summary, there is a preponderance of evidence in the record that Mr. Reed is now principally engaged in the ongoing farm activity. However, all Mr. Reed must demonstrate is that he will be principally engaged in a farm activity. If the Hearings Officer concludes otherwise, OAR 660-033-0135(F) and (G) allows the Reeds to prove up a farm use not yet established, and to the extent that the existence of that farm use determines their intention to be principally engaged in that farm use, such a showing can be a condition of approval.

Rec. 35.

C. Argument.

1. The Hearings Officer Created a New Uncodified Standard in Violation of ORS 215.416(8)(a) By Holding that the Only Acceptable Proof of Current Employment of Farm Use is an IRS Schedule F or a "Sales Report."

ORS 215.416(8)(a) states that "approval or denial of a permit application

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

shall be based on standards and criteria which shall be set forth in the zoning ordinance * * *." As LUBA noted in *Waveseer of Oregon LLC v. Deschutes County*, __ Or LUBA __ (2020-038, Aug. 10, 2020), *aff'd*, 308 Or App 494 (2021):

> The purpose of the codification requirement is to identify the standards and criteria that the county will apply to an application "to give the parties and the decision-maker an understanding of what proof and arguments are necessary to show that the application complies with those criteria and to make the outcome capable of prediction." [*Zirker v. City of Bend*, 233 Or App 601 (2010)]. Those statutes require that the criteria that form the basis for a land use decision be embodied in land use regulations.

Slip op at 24.

In this case, the hearings officer erred as a matter of law by creating a new uncodified standard by holding that the only acceptable proof of current employment of farm use is an IRS Schedule F or a "sales report." This is contrary to OAR 660-033-0135(2)(a)(C) and MCC 39.4265(B)(3), neither of which specify the type of documentation, if any, that is needed to meet the applicant's burden of proof with regarding to the "current employment" criterion. As alleged in the First AE, the "current employment" criterion can be met with a condition of approval. But even it did somehow require proof of past farm income, as it applied in the context of OAR 660-033-0135(2), it most certainly does not specifically require an IRS Schedule F, a sales reports, or similar documentation. The hearings office erred by holding otherwise.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

2. The Hearings Officer Erred By Holding that the Applicant Could Not Meet the Current Employment Criterion with Testimony and Photographs, and that Schedule F was "Critical" to Meeting the Applicant's Burden of Proof. The Applicant's Unrebutted Testimony and Photographs Constituted Substantial Evidence that Met the Applicant's Burden of Proof.

As noted in the facts, Petitioner testified in detail as to the scope of his farm operation. He testified as to the amount of gross sales of eggs, noting that customers pay between $5 to $6 per dozen. Rec. 499. He stated that that the farm sells all of the eggs direct to residential and commercial customers, and even has a delivery route for local customers. *Id.* He stated that eggs alone produced over $44,511.00 in annual gross sales in 2020. Rec. 363. In a Aug 12, 2022 submittal to the hearings officer, Petitioner summarized - in a detailed way - the level of farm activity as it existed in 2020:

> In 2020 schedule F, Springwood Acres Farm LLC produced $44,511 of farm income from egg sales ($43,386) and Boer goat sales ($1,125). The total pasture raised eggs produced was 93,299 (86,769 usable, 6,530 cracked/thin shelled) resulting in 7,231 dozen eggs sold.

Rec. 363. He further clarified that in 2021, his chicken flock was down to 133 birds. These birds brought in $16,625 in annual gross sales, which exceeds the $15,722.15 median annual gross sales figure required in subsection (2)(b)(B). Rec. 499, 361. He also noted that the farm had over 300 chickens in the summer of 2022, and that they were getting back to 2020 levels of production. Rec. 362. He

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

also stated at the Aug. 12, 2022 hearing that he still raises goats for sale as meat. Min. Ctr. 1:06.45

Petitioner also provided 15 photographs, Rec. 323-338, which show the farm activity, including the some of the chickens and goats, the new barn, the chicken coups, the goat enclosures, feed, the egg processing shop, and various other farm tasks. He further noted his professional memberships and the fact that he served on the board of Multnomah County Farm Bureau. Rec. 339-40.

All of that information set forth above was uncontested, and any reasonable decision-maker could have found that constituted substantial evidence. However, the hearings officer declined to consider it "evidence" at all.

The hearings officer had a singular focus: he wanted written documentation in the form of an IRS Schedule F, a sales report, or something similar.[9] He said that such information was "critical," and as his decision showed, he considered anything less than that to be insubstantial. In this regard, the hearings officer did not say that he found Scott Reed to be a non-credible witness, or that Mr. Reed's numbers just didn't add up for whatever reason. Rather, he just would categorically not accept anything less than a Schedule F or a sales report, etc. For the reasons discussed

[9] For purposes of this argument, we do not foreclose the possibility that the hearings officer would have accepted documentation similar in character to a Schedule F, such as a sworn statement of an CPA summarizing Petitioner's tax returns and/or sales reports, etc.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

below, this was an incorrect application of the applicants burden of proof as announced in *Morgan v. Jackson County*, 78 Or LUBA 188, 197 (2018).

As LUBA is well aware, courts frame the substantial evidence with slightly differing verbiage, but is generally understood to mean "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp v. City of Aurora*, 136 Or App 81, 901 P2d 258 (1995). This case brings into question the issue whether testimony by the applicant must be backed up by documentation to constitute substantial evidence. The hearings officer obviously believed that any testimony from any applicant which is not backed up by documentation will never meet the test. That is not the correct application of the substantial evidence test by a trier of fact.

Granted, a "county cannot expect that any unsupported assertion that is entered in the record can be used to justify a planning decision." *1000 Friends of Oregon v. LCDC (Lane Co.),* 305 Or 384, 405, 752 P2d 271 (1988). In this regard, LUBA has stated that an "unsupported" statement in an application or other document is not evidence. *Palmer v. Lane County*, 29 Or LUBA 436 (1995); *Calhoun v. Jefferson County*, 23 Or LUBA 436 (1992). For example, in *Palmer*, the application stated that "a total of 500,000 to 600,000 cubic yards of rock appears to be available at the site depending upon the non-exposed rock formation." *Id*. at 442-3. The Board in *Palmer* concluded that this statement was not "evidence"

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

because it was not supported in any way. *See also Worchester v. City of Cannon Beach*, 10 Or LUBA 307 (1983); *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

Similarly, LUBA has also stated that assurances by the applicant or the applicant's attorney that the proposed use will not violate an applicable standard are not substantial evidence that the standard will be met. *Wuester v. Clackamas County*, 25 Or LUBA 425 (1993); *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

But those aforementioned cases differ from the present situation because Petitioner did much more than simply make unsupported statements to the effect that "we meet the gross income requirement" or "we made $44,511 from farming." Rather, Petitioner provided pictures that show he has an egg production operation, stated very specifically how many chickens they have on the farm, as well as how many eggs the chicken lay a year and how much money the farm sells the eggs for. Even a decisionmaker who has no specialized knowledge of egg production could believe the numbers as asserted by Mr. Reed, as they are not outlandish or otherwise outside of the scope of credibility.

We understand and agree that there may be circumstances where an applicant's self-serving testimony is just not credible on its face. For example, in *Chapman v. Marion County*, 60 Or LUBA 377 (2010), a hearings officer rejected as

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

not credible testimony that a 19-acre farm produced over $80,000 in revenue from hay grown on the property, where the applicant provided no evidence of how much hay was grown on the property, or documentation distinguishing revenue from the sale of hay grown on the property from revenue derived from the resale of $83,000 in hay that the applicant purchased that year, and substantial evidence in the record indicated that to derive $80,000 in revenue solely from hay grown on the property would mean the applicant achieved yields and prices several times higher than average for the county.

But again, this case does not present a situation analogous to *Chapman*. For example, the idea that 133 chickens would produce approximately 40,000 eggs per year is not outlandish. (40,000 ÷ 365 = 109.58 eggs per day; 109.58 eggs per day ÷ 133 chickens = .82 eggs per chicken per day). Similarly, it is not outlandish to think that the sale of 40,000 eggs a year would bring in $16,625 in annual gross sales: 40,000 eggs equates to 3,333 dozen eggs (40,000 ÷ 12 = 3,333). 3,333 dozen multiplied by $6.00 = $20,000, and here we see roughly a 20% decrease due to thin shells, breakage, etc. Finally, $6 for organic free-range eggs in 2020-22 was hardly remarkable. So even a cursory review of Mr. Reed's numbers does not raise any red flags that would make a decision-maker think that they are not credible.

The hearings officer states that his understanding of the law was influenced by LUBA's decision in *Friends of Marion County v. Marion County (Jones)*, __ Or

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

LUBA __, LUBA No. 2021-088 (April 21, 2022). The hearings officer seems to interpret that case as creating a universal rule that an applicant must support any statement related to farm income with documentation such as an IRS Schedule F or a sales report. The hearings officer stated:

> Staff citation *Friends of Marion County vs. Marion County* * * * is well taken. LUBA found that an applicant simply testifying to their [farm use] production or sales is not substantial evidence to support a conclusion affirming the farm use. Schedule F is a common tool counties use to verify income in Oregon. Here, it is not just a case of determining a "commercial farm" but there is specific dollar amounts that need to be earned. Again, the Hearing Officer stated that this information was "crucial." The Hearing Officer finds that the applicant did not meet his burden of proof demonstrating "annual gross sales."

Rec. 16-17. As shown above, the hearings officer held that nothing less than documentation is going to meet with his approval.

The hearings officer reads *Friends of Marion County (Jones)* too broadly. In *Jones*, the applicant was required to prove that the field crops they were growing were planted for "the primary purpose of obtaining a profit." The applicant in *Jones* testified that they sold the field crops in 2020 and 2021, but provided no other documentation of their production or sale. LUBA held that the applicant's testimony (*i.e.* that crops were "sold") was not substantial evidence to support a conclusion that those field crops were sold for a profit or grown for the primary

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

purpose of obtaining a profit. That is certainly an understandable holding, but we do not think that LUBA was trying to create a universally applicable rule.

In *Friends of Marion County (Jones)*, LUBA cited to *Landwatch Lane County v. Lane County*, __ Or LUBA __ (LUBA No 2020-104, Mar. 19, 2021). LUBA described its decision in *Landwatch Lane County* as follows:

> In *[Landwatch Lane County]*, a local code provision required the applicant to establish that the subject tract was employed for farm use, under the same definition of farm use in ORS 215.203(2)(a). The applicant submitted testimony, aerial photos, tax filings, and a commodities report evidencing an existing cattle operation on the subject property. We reasoned that the testimony and aerial photos alone were not substantial evidence of farm use. However, we concluded that the tax filings and the commodities report constituted substantial evidence of the farm use.

We can understand why the hearings officer reading the passage quoted above as creating a rule of universal applicability, but a review of the facts of *Landwatch Lane County* does not suggest that LUBA was creating a universal rule in that case either. Rather, LUBA held that certain photographs submitted by the applicant did not constitute substantial evidence, either because they were too old in time, too blurry, or otherwise don't show proof of a cattle operation:

> Petitioner also argues that the hearings officer failed to address conflicting evidence. We deny this assignment of error.
>
> * * * * *.

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

The hearings officer found:

> "[Intervenor] has submitted reams of evidence, including tax filings, aerial photos, and testimony regarding the existence of a cattle operation on the subject tract. The Hearings Official determines that the opponent's assertions that a farm use does not exist on the tract are outweighed by the evidence supplied by the application. This approval criterion is satisfied." Record 6.

* * * * *.

> We agree with petitioner that the aerial photos would not be, without more, evidence a reasonable person would rely upon to make a decision. LC 16.212(7)(a)(iii) (Feb 15, 2016) requires consideration of the *current* use of the subject tract. The aerial photos that intervenor placed into the record and that the hearings officer referenced in their decision are subject-tract-specific, but the circled areas on the 2017 aerial photos do not offer a clear depiction of cattle. Moreover, the 2017 aerial photos are three years old and therefore not a contemporaneous representation of the use of the subject tract. By contrast, the 2020 photo placed into the record by petitioner is "current" and does not contain the blurry images which intervenor argued depicted cattle in the 2017 photos. Intervenor argued to the city that the 2020 photo was taken at a misleading angle, but the hearings officer does not explain whether they found that to be the case. (Emphasis in original).

Again, it seems unlikely that LUBA was trying to create a categorical rule that testimony and aerial photographs, with nothing more, is not substantial evidence of farm use. To the extent this was in fact LUBA's intent, it was wrong.

The "substantial evidence" inquiry necessarily is case specific. *Reguero v.*

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318

Teacher Standards and Practices, 312 Or 402, 417–18 (1991). It does not lend itself to universal rules of applicability. In this case, the applicant provided unrebutted evidence that showed both that he was principally engaged in farming and that the land was currently employed for a farm use that producing more than the median gross income figure of $15,722.15. Rec. 363, 499. The hearing officer erred by rejecting that evidence as categorically being insufficient to meet the burden of proof. Since the applicant's evidence was unrebutted, and the hearings officer did not indicate that the evidence was not credible, he erred by not accepting it as adequate to meet Petitioner's burden of proof.

IV. CONCLUSION

The County's decision is unlawful and must be remanded.

Dated: January 9, 2023.
Amended January ___, 2023.

ANDREW H. STAMP, P.C.

/s/ Andrew H. Stamp

Andrew H. Stamp, OSB No. 974050
Attorney for Petitioner

ANDREW H. STAMP, P.C.
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego, OR. 97035
Telephone: 503.675.4318