

BEFORE THE LAND USE HEARINGS OFFICER
CLACKAMAS COUNTY, OREGON

Regarding an Appeal of a Planning Director
Decision Denying an Application for a Dwelling
in Conjunction with Farm Use.

Case File No: Z0496-23
(Cassandra and Jason Franich)

A. SUMMARY OF FINDINGS, HEARING, AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony and evidence at the May 30, 2024 public hearing about this application. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. Notice of the public hearings was mailed on May 7, 2024 to Agencies, Community Planning Organization(s) and property owners within 2,640 feet of the subject property. The public hearing was conducted virtually over the Zoom platform, with the County providing an explanation for virtual participation. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the County’s staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. The applicants are Cassandra and Jason Franich. The applicants own an approximately 4-acre parcel of property located at 17683 S Harding Rd., Oregon City, OR 97045, also known as T2S, R3E, Section 34, Tax Lot 1100. Their property is zoned Exclusive Farm Use (EFU) and is designated as High Value Farmland due to its soil type consisting of Cottrell silty clay loam and Bornstedt silt loam. The applicants are requesting authorization to develop one single-family dwelling on the northeastern corner of their property due to having earned income from farming Christmas trees on the 40-acre site.
3. At the hearing, County Sr. Planner Melissa Lord discussed the application and related exhibits and the April 11, 2024 staff decision denying the application, sharing a PowerPoint presentation (Exhibit 9). Ms. Lord provided relevant background information concerning the criteria for approving the application, and the reasons for the denial. Ms. Lord pointed to the approval criteria of County Zoning and Development Ordinance (ZDO) Section 401.05(C)(a) providing for development of a single-family dwelling if the subject property is currently employed in farm use 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. [Emphasis by Ms. Lord].
4. Ms. Lord shared copies of the relevant portions of IRS Schedule F “Profit or Loss from Farming” for 2021 and 2022 submitted by the applicants in support of their proposal, together with photos of Christmas trees on the subject property. Ms. Lord pointed out that for the 2021 tax year, applicants’ Schedule F Part I, line 1a “Sales of purchased livestock and other resale items” states: “\$85,000” with an additional amount on applicants’ Schedule F Part I, line 8 “Other income, including federal and state gasoline or fuel tax credit” stating “\$2,200” for a total Gross Income amount of \$87,200. Ms. Lord pointed out that for the 2022 tax year,

applicants' Schedule F Part I, line 1a "Sales of purchased livestock and other resale items" states: "\$77,300" with an additional amount on applicants' Schedule F Part I, line 8 "Other income, including federal and state gasoline or fuel tax credit" stating "\$7,200" for a total Gross Income amount of \$84,500. Ms. Lord contends that the evidence submitted by the applicants for the 2022 tax year does not clearly show at least \$80,000 in gross annual income from the sale of farm products, as \$7,200 is listed as "Other income, including federal and state gasoline or fuel tax credit." Ms. Lord discussed how this was the only documentation submitted for her review and the reason for the denial as the documentation does not state that the other income is from the sale of farm products. Rather, Ms. Lord points out that the \$7,200 item appears to include federal and state gasoline tax credits or refunds. Ms. Lord stated that the applicants had not responded to her requests for clarification or provided any additional information concerning this income item, and she recommended denial consistent with her original decision.

5. The applicants explained that they were waiting for information from the CPA that prepared these tax returns, stating that this is a busy season for the CPA and it has taken more time than they expected. The applicants explained that the Schedule F Part I, line 8 "Other income, including federal and state gasoline or fuel tax credit" item of \$7,200 is from a purchase of their Christmas trees made by Lone Oak Farms, for which Lone Oak Farms provided a 1099-MISC putting the item in category "1 Rents." The applicants offered to submit this documentation to the record, and Ms. Lord stated she would review it and provide a memorandum for consideration.
6. The hearings officer asked whether any party or member of the audience wanted an opportunity to provide additional evidence, arguments, or testimony, and no one requested this opportunity. The applicants affirmed that they wished to waive the period for final written argument. The hearings officer closed the hearing, leaving the record open until 4:00 pm May 30, 2024 (the day of the hearing) to submit the exhibits and documents discussed at the hearing.
7. The applicants submitted a letter from their CPA stating that "The total 2022 JM Farms gross sales from Christmas Tree sales was \$84,500. Included in the total gross sales figure was a separate 1099-MISC in the amount of \$7,200 which was shown as "other income" on line 8 of the Schedule F. There would be no tax implications for amending their 2022 individual tax return as the \$7,200 is included in total gross income as show on line 9 of the Schedule F. We have attached a copy of the 1099-MISC for your review." The applicants submitted these items shortly after the hearing. Applicants also submitted a copy of the paid receipt for \$7,200 showing the sale of 360 Douglas Fir trees to Lone Oak Farms on November 1, 2022. (Exhibits 10, 13)
8. Ms. Lord submitted a memorandum following the public hearing on this appeal, reviewing the additional evidence submitted by the applicants. Ms. Lord discussed the instructions for the IRS forms and guidance related to the 1099-MISC, noting that one may file Form 1099-MISC "for each person in the course of [their] business to who [they] have paid the following during the year...at least \$600 in rent (box 1)." Ms. Lord also stated it is her understanding that one may "file Form 1099-MISC (box 7)... to report sales totaling \$5,000 or more of consumer products to a person on a buy-sell, a deposit-commission, or other commission basis for resale." Ms. Lord contends that Box 1 of Form 1099-MISC does not appear a logical place to report income earned from the sale of farm products. Ms. Lord points out that she lacks formal training in the use of IRS forms and reporting, simply noting she is uncertain whether the letter from the

accounting firm paired with a copy of form 1099-MISC provides clarity that over \$85,000 of income from the sale of farm products was earned in 2022. Ms. Lord also proposed several conditions of approval should the application be approved. (Exhibits 11, 13)

B. FINDINGS AND DISCUSSION

This case involves the appeal of a Planning Director decision denying an application for a Dwelling in Conjunction with a Farm Use on high or low value farmland in AG/F or EFU Districts. This type of application is subject to a Type II procedure, whereby the Planning Director makes the decision. The Planning Director¹ denied the application, and this appeal followed. The applicable Zoning and Development Ordinance and Comprehensive Plan Criteria to consider in reviewing this application include ZDO Sections 202, 401, and 1307.

The evidence presented is reliable, probative and substantial evidence upon which to base a determination in these matters. This application is subject to the standards and criteria of Clackamas County Zoning and Development Ordinance (ZDO) Section 1204. The application was initially processed by the County under ZDO Section 1307 as Type II procedure whereby the Planning Director is the initial decision review authority, and the Hearings Officer is the appeal review authority.² The appeal discussed below is reviewed subject to the appeal procedures contained in ZDO 1307.13. These procedures provide for de novo review of the application whereby all issues of law and fact are heard anew, and no issue of law or fact decided by the lower-level review authority is binding on the parties in the hearing. The record of the initial proceedings shall, however, be made a part of the record of the appeal. New parties may participate, and any party may present new evidence and legal argument by written or oral testimony.

The following findings and discussion are taken from the County's April 11, 2024 decision with original staff findings denoted by italics and additional findings and discussion by the Hearings Officer denoted by boldface type in italics:

The findings below identify the standards and criteria that are relevant to this decision, state the facts relied upon in rendering the decision, and explain the justification for the decision.

1. ***PROJECT OVERVIEW:*** *The applicant is requesting authorization to develop one single-family home in the northeastern corner of the property due to them having earned income from farming Christmas trees on the 40-acre site.*
2. ***ZDO SECTION 401: EXCLUSIVE FARM USE DISTRICT***

401.05(A)(3): The landowner for the dwelling shall sign and record in the deed records for the County a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.

¹ ZDO 1307.3(B) provides that the Planning Director includes "Any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]." Senior Planner Melissa Lord acted in this capacity.

² See Table 1307-1: Land Use Permits by Procedure Type.

*Finding: There is no evidence that a deed restriction as mentioned in the criterion has been recorded or submitted to this file. If the application were approved, this criterion could be met with a condition of approval; however, due to the denial of this application, no such condition is warranted. This criterion is not applicable due to the denial of this application. **The Hearings Officer finds this criterion can be met with a condition of approval, adopting the County's proposed related condition.***

401.05(C)(5): Dwelling in conjunction with a farm use on High Value Farm Land: A primary farm dwelling for the farm operator may be allowed subject to the following criteria:

*Finding: Staff confirmed the predominant soil types of the subject property by using the Clackamas County High Value and Low Value Farmland Soils mapping system by ArcGIS, where data is provided by the Web Soil Survey produced by the Natural Resources Conservation Service. The subject property contains a mix of soils, Cottrell silty clay loam and Bornstedt silt loam, which are both High Value farm land soils. The applicant has submitted the correct land use application type because the subject property consists of high value farmland soils. **The Hearings Officer concurs with these staff findings.***

401.05(C)(5)(a): The subject tract is currently employed in farm use 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.

Finding: The applicants Cassandra and Jason Franich (farm operators) submitted IRS Schedule 'F' Profit or Loss from Farming statements from 2021 and 2022 in order to demonstrate that they earned at least \$80,000 of gross annual income from the sale of farm products in each of the last two years.

The subject property was employed for farm use as a Christmas tree farm in 2021. The applicant, submitted a copy of their Schedule 'F' statement from 2021 which demonstrated that they earned \$85,000 of gross income from the sale of farm products. They submitted photos of the subject property showing that Christmas trees are planted on the property. The subject property was employed for farm use as a Christmas tree farm in 2022. The applicant, submitted a copy of their Schedule 'F' statement from 2022 which demonstrated that they earned \$77,300 of gross income from the sale of farm products. Additional income of \$7,200 was earned by the farm as reported on the Schedule 'F' as "other income, including federal and state gasoline or fuel tax credit". This "other income" such as gas or fuel tax credits is not the same as income earned from the sale of farm products and therefore cannot be "counted" towards the minimum \$80,000 requirement necessary to determine that this criterion is met.

Planning staff reached out to the applicant by email requesting further information or clarification on the income discrepancy shown on the 2022 Schedule 'F'. An email received from the applicant on April 10, 2024, the applicant stated that "the primary farm income from the Christmas trees is listed separately from the other farming which you referenced as Livestock income. That's related to misc animal farming, such as the sale of Beef, chickens/eggs, a horse, goats. It's smaller scale hobby farming within the guidelines that we didn't do the year prior so it was separated to a different column although all of the income on the schedule F is Farming". Until this email, no mention of any other farming activity was provided with the land use application materials; the only information and photos submitted pertain to a Christmas

tree farm. It is unclear to staff why income earned from farming, such as the sale of beef or eggs, would be reported on the Schedule 'F' form on Line 8 which is for "other income, including federal and state gasoline and fuel tax credit" rather than on Line 2 which is for the "sales of livestock, produce, gains, and other products you raised". A signed statement from a CPA was not provided with the application materials to provide clarification on this matter. Moreover, no evidence has been submitted to the record demonstrating that cows, chickens, a horse and goats are being raised on the subject property with the primary purpose of obtaining a profit in money [reference ORS 215.203, definition of "farm use"].

The applicant successfully demonstrated that they earned at least \$80,000 in gross annual income from the sale of farm products in 2021, but failed to demonstrate that this standard was met in 2022. This criterion is not met. **The Hearings Officer amends this finding based on new information submitted by the applicants, noting that on the day of the public hearing the applicants submitted a letter from their CPA stating that "The total 2022 JM Farms gross sales from Christmas Tree sales was \$84,500. Included in the total gross sales figure was a separate 1099-MISC in the amount of \$7,200 which was shown as "other income" on line 8 of the Schedule F." The CPA attached a copy of the 1099-MISC and the applicants submitted a copy of the paid receipt for \$7,200 showing the sale of 360 Douglas Fir trees to Lone Oak Farms on November 1, 2022. I agree with Ms. Lord that the transaction seems strange and note here that the applicants did not timely respond to her requests for clarification. Nevertheless, I find that the applicants had no control over the issuance of the 1099-MISC by Lone Oak Farms or how their CPA accounted for it. I am persuaded by the statement from applicants' CPA that their gross sales from Christmas Trees was \$84,500 in 2022 and thus applicants earned at least \$80,000 in gross annual income from the sale of farm products in both 2021 and 2022. This criterion is met.**

401.05(C)(5)(b): Lots of record in Eastern Oregon shall not be used to qualify a dwelling under this criterion.

Finding: A review of the application materials finds that none of the property is located in Eastern Oregon. This criterion is met. **The Hearings Officer concurs.**

401.05(C)(5)(c): Except for seasonal farmworker housing approved prior to 2001, there is no other dwelling on lands designated for exclusive farm use or for mixed farm/forest use owned by the farm or ranch operator or on the farm or ranch operation.

Finding: The subject farm operation does not include any dwellings. The applicant/farm operator owns approximately 70 acres on the east side of Harding Rd. (T2S R3E Section 34 Tax Lot 01300) which is in EFU district. This property does not contain a dwelling, only buildings accessory to farm uses (e.g. barns). Staff research of County Tax Assessment information found no evidence of another dwelling on lands designated for exclusive farm use or mixed farm/forest owned by the farm operator. This criterion is met. **The Hearings Officer concurs.**

401.05(C)(5)(d): The lot of record on which the dwelling will be sited was lawfully created.

Finding: Staff reviewed a Planning division research file from May, 2021 which found that the subject property is a separate lot of record created by deed recorded in Book 607, Page 189. This criterion is met. **The Hearings Officer concurs.**

401.05(C)(5)(e): *The dwelling will be occupied by a person or persons who produced the commodities which generated the income.*

*Finding: The applicant states that the dwelling will be occupied by Cassandra and Jason Franich, property owners and farm operators, who are responsible for producing the income generated by the farm operation. Compliance with this criterion is typically ensured by conditioning the land use decision. Due to the decision of denial, a condition requiring the person who produced the commodities shall be the person obtaining a building permit for the home is not necessary. **The Hearings Officer finds this criterion can be met with a condition of approval, adopting the County's proposed related condition.***

401.05(C)(5)(f): *In determining the gross income requirement, the cost of purchased livestock shall be deducted from the total gross annual income attributed to the tract.*

*Finding: The farm operators grow Christmas trees, and did not claim to earn income from the raising or selling of livestock. This criterion is not applicable. **The Hearings Officer concurs.***

401.05(C)(5)(g): *Only gross income from land owned, not leased or rented, shall be counted.*

*Finding: The subject property is the only land with farm income claimed by the applicant. The Assessment and Taxation Department shows the subject property has been owned by the applicant since December, 2020 (deed record number 2020- 109046). This criterion is met. **The Hearings Officer concurs.***

401.05(C)(5)(h): *Gross farm income earned from a lot of record which has been used previously to qualify another lot of record for the construction or siting of a primary farm dwelling may not be used.*

*Finding: No income was provided by the applicant that involved property that was previously used to qualify another lot of record for a primary farm dwelling. Staff reviewed land use file records on the subject property and did not find that this lot had been used to qualify another lot of record for a dwelling. This criterion is met. **The Hearings Officer concurs.***

401.05(C)(5)(i): *Only a lot of record zoned for farm use in Clackamas County or a contiguous county may be used to meet the gross income requirements.*

*Finding: The lot of record is located within Clackamas County and zoned Exclusive Farm Use (EFU), zoned for farm use as defined in ORS 215.203. No other lots of record are being used to meet the gross income requirements. This criterion is met. **The Hearings Officer concurs.***

401.05(C)(5)(j): *An irrevocable deed restriction shall be recorded in the County Clerk's Office acknowledging that all future rights to construct a dwelling on other properties used to qualify the primary farm dwelling is precluded except for accessory farm dwellings, accessory relative farm dwellings, temporary hardship dwelling or replacement dwellings, and that any gross farm income used to qualify the primary farm dwelling cannot be used again to qualify another parcel for a primary farm dwelling.*

*Finding: Currently, there is no evidence of a deed restriction of this nature existing on the subject property. If the application were approved, this criterion could be met with a condition of approval; however, due to the denial of this application, no such condition is warranted. This criterion is not applicable due to the denial of this application. **The Hearings Officer finds this criterion can be met with a condition of approval, adopting the County’s proposed related condition.***

C. CONDITIONS OF APPROVAL

The conditions listed are necessary to ensure that approval criteria for this land use permit are satisfied. Where a condition relates to a specific approval criterion, the code citation for that criterion follows in parenthesis. Approval of this land use permit is based on the submitted land use application received by the County December 20, 2023, requesting authorization to develop one single-family home on the property due to having earned income from farming, as supplemented February 12 and 14, and further supplemented by the additional attachments submitted by the applicants on May 30, 2024. The conditions listed are necessary to ensure that approval criteria for this land use permit are satisfied. It shall be the responsibility of the property owner(s) to comply with the limitation of any approval resulting from the decision described herein.

- 1. Prior to Land Use and Zoning approval of a building permit or septic permit, the applicant shall sign, notarize and record in the deed records for the County a document binding the landowner, and the landowner’s successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming and forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. A copy of the aforementioned recorded deed shall be submitted to this Land Use and Zoning file. (ZDO 401.05(A)(3))*
- 2. Prior to Land Use and Zoning approval of a building permit or septic permit, the applicant shall record an irrevocable covenants, conditions and restrictions in the County Clerk’s Office of Clackamas County for each lot or parcel subject to the application for the primary farm dwelling and shall preclude: 1.) All future rights to construct a dwelling except for accessory farm dwellings, relative farm assistance dwellings, temporary hardship dwellings or replacement dwellings allowed by ORS Chapter 215. 2.) The use of any gross farm income earned on the lots or parcels to qualify another lot or parcel for a primary dwelling. And; 3.) The covenants, conditions and restrictions are irrevocable, unless a statement of release is signed by an authorized representative of the County. A copy of the aforementioned recorded deed shall be submitted to this Land Use and Zoning file. (ZDO 401.05(C)(5)(j))*
- 3. The dwelling must be occupied by the person(s) who produced the commodities which generated the farm income. (ZDO 401.06(C)(5)(e))*
- 4. All development of the property shall meet the development standards of the EFU zoning district. (ZDO 401.0 7). Development permits (building, septic, driveway, etc.) shall be obtained prior to any construction.*
- 5. Approval Period: This approval is valid for four years from the date of the final written decision. Since the County’s final written decision was appealed, the approval period shall commence on the date of the final appellate decision. During this four-year period, the approval shall be implemented. “Implemented” means:*

A building permit for the dwelling or manufactured dwelling placement permit shall be obtained and maintained.

If the approval is not implemented within the initial approval period established by Subsection 401.10(A), a two-year time extension may be approved pursuant to Section 1310. (ZDO 401.10)

D. DECISION

Based on the findings, discussion, conclusions, and record in this matter, the Hearings Officer APPROVES application Z0496-23 (Dwelling in Conjunction with Farm Use), subject to conditions of approval.

Dated: June 5, 2024



Carl D. Cox
Clackamas County Hearings Officer

APPEAL RIGHTS

ZDO 1307.14(D) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer’s decision constitutes the County’s final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA “shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final.” This decision is “final” for purposes of a LUBA appeal as of the date of the decision appearing by my signature.