

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding an appeal by Kip Tipikin of an administrative) **FINAL ORDER**
decision denying an application for a farm dwelling on a)
40-acre parcel located east of S. Dryland Road, south of) **Z0337-21-AD**
S. Hwy 211 in unincorporated Clackamas County, Oregon) **(Radiant Homes LLC)**

A. SUMMARY

1. On July 12, 2021, Radiant Homes LLC (the “applicant”) filed an application for approval of single-family dwelling customarily provided in conjunction with a farm use on High Value Farmland. The applicant proposes to site the dwelling on a 40-acre parcel in the EFU district, located east of S. Dryland Road, south of S. Hwy 211. The legal description of the subject property is tax lots 00101 and 00201, Section 14, Township 5 South, Range 1 East of the Willamette Meridian (the “subject property”). If approved, the dwelling would be occupied by Kiprian Tipikin, registered owner and sole member of Radiant Homes, LLC, the property owner of tax lots 101 and 201. The farm operator who generated the income for the farm operation is Countryside Acres, LLC, and Kiprian Tipikin is also the registered owner and sole member of the LLC.

2. On November 9, 2021, the planning director issued a written decision concluding the applicant failed to bear the burden of proof that:

a. There is no other dwelling on lands owned by the farm operator that are designated exclusive farm use or for mixed farm/forest use (ZDO 401.05(C)(5)(c)_; and

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

3. On November 22, 2021, the applicant filed a written appeal of the planning director’s decision. (Exhibit 12).

4. County Hearings Officer Joe Turner (the "hearings officer") conducted a duly noticed public hearing to receive testimony and evidence regarding the application. County staff recommended the hearings officer grant the appeal, reverse the director’s decision, and approve the application subject to conditions set out in Exhibit 18. The appellant testified at the hearing in support of the appeal. No one else testified orally or in writing in response to the appeal, other than County staff. Contested issues in this case include:

a. Whether the farm operator owns another dwelling on lands designated for exclusive farm use or for mixed farm/forest (ZDO 401.05(C)(5)(c)); and

b. Whether the lot of record on which the dwelling will be sited (tax lots 101 and 201) was lawfully created, as required by ZDO 401.05(C)(5)(d).

5. Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer grants the appeal, reverses the director's decision, and approves casefile Z0337-21-AD (Radiant Homes LLC) subject to conditions of approval included in this Final Order.

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at a public hearing about this application on July 14, 2022. All exhibits and records of testimony are filed at the Clackamas County Department of Transportation and Development. 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 following is a summary by the hearings officer of selected testimony offered at the public hearing.

2. County planner Melissa Lord summarized the Staff Report, the applicable approval criteria, and her PowerPoint presentation (Exhibit 19).

a. She noted that the applicant is seeking approval of a farm dwelling on the subject property, consisting of tax lots 101 and 201. However, the 40-acre subject property (tax lot 101 and 201) was divided by deed from its parent parcel (tax lot 100) in 1982 without County approval. Therefore, at the time of the director's decision tax lots 100, 101 and 201 combined formed a single lot of record.

b. After the director's decision the applicant sought, and the County approved, an application to validate the prior land division, as the division met the applicable criteria of the zoning district at the time it was created. (File No. Z0564-21, Exhibit 15). Therefore, tax lots 101 and 201 now qualify as a separate lot of record and the farm dwelling application complies with ZDO 401.05(C)(5)(c).

c. The application complies with all of the remaining approval criteria for a farm dwelling, based on the findings in the Staff Report. Therefore, she recommended the hearings officer approve the application subject to the conditions of approval in Exhibit 18.

3. Kiprian Tipikin testified on behalf of the applicant, Radiant Homes LLC. He agreed with the County's recommendation of approval.

4. At the end of the hearing, the hearings officer held the record open for one week, until July 21, 2022, to allow the applicant an opportunity to review and comment on the proposed conditions of approval (Exhibit 19). Mr. Tipikin reviewed and accepted

the conditions of approval and requested the hearings officer close the record as of July 14, 2022 (Exhibit 20).

C. FINDINGS

1. ZDO Table 1307-01 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), an appeal of an administrative decision is reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The applicant must carry the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence.

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.*

Finding: There is no evidence that a deed restriction as mentioned in the criterion has been recorded and submitted to this file. A condition of approval has been included in this decision to require compliance with this standard. As conditioned, this criterion is met.

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 using the Natural Resources Conservation Service Web Soil Survey for Clackamas County. The subject property contains predominantly Aloha silt loam soil, a high-value soil. The primary farm dwelling is proposed on High Value Farm Land and is therefore subject to the following criteria.

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 applicant submitted documentation from years 2019 and 2020 to satisfy the "each of the last two years" income qualification.

The applicant has submitted “load tickets” and “purchase by vendor details” that describe the sales and deliveries/shipments of blackberries from the Countryside Acres, LLC business as a whole. Additionally, the applicant provided a letter from California Splendor, Inc. that states they purchased berries from Countryside Acres, LLC from a farm located at 51E14 00101 and 00201 (the subject property). The applicant’s written narrative details the price per pound of blackberries and states that 20 of the 40 acres are Columbia Star blackberries and 20 of the 40 acres are Black Diamond blackberries. Staff reviewed the Oregon Department of Agriculture’s “Oregon Agricultural Statistics & Directory 2020” publication which describes the price per pound and yield of blackberries. The values and price per pound information provided by the applicant corresponds, within reason, to the statistics provided in the State’s publication.

Source: Applicant-provided data	Year	Price per pound	Average yield
Columbia Star blackberries	2020	\$0.92	12,000 pounds/acre
	2019	\$0.78	
Black Diamond blackberries	2020	\$0.84	8,000 pounds/acre
	2019	\$0.65	

Source: Oregon Agricultural Statistics & Directory 2020	Year	Price per pound	Average yield
(estimates discontinued in 2018)	2017	\$0.81	7,320 pounds/acre
	2016	\$0.49	8,990 pounds/acre
	2015	\$0.76	8,830 pounds/acre
	2014	\$1.13	9,650 pounds/acre

The applicant has provided substantial evidence demonstrating that the subject property produces more than \$80,000 of gross annual income from farming and harvesting blackberries. 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.

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: 660-033-0135(8)(b) provides “Farm or ranch operation’ means all lots or parcels of land in the same ownership that are used by the farm or ranch operator for farm use as defined in ORS 215.203.” Tax Lot (TL) 100 is owned by Kiprian and Anna

Tipikin and TL101/201 is owned by Radiant Homes, LLC. The farm operator of TL101/201 is Countryside Acres, LLC.

The subject property, tax lots 101 and 201, is not developed with any dwellings. Staff's research of Clackamas County's Tax Assessment information found no evidence of another dwelling on lands designated for exclusive farm use or mixed farm/forest owned by Radiant Homes, LLC or Countryside Acres, LLC.

Kiprian and Anna Tipikin own a dwelling on EFU land, located on 51E11 01102 (address: 31900 S Dryland Rd). This property is also part of a farm, but neither Radiant Homes, LLC nor Countryside Acres, LLC is the farm operator. This criterion is met.

4. **401.05(C)(5)(d):** *The lot of record on which the dwelling will be sited was lawfully created.*

Finding: Staff reviewed the lot of record status of the property by examining the property ownership book pages, deeds, and land use history files and found that the subject property (tax lot 101 and 201) was not a lot of record that was created lawfully. At the time of the director's decision, the lot of record included tax lot 100, the approximately 40-acre parcel to the west of the subject property, and tax lots 101 and 201. The subject property (TL101/201) was split from TL100 in 1982 by deed; however the EFU District standards of the Zoning & Development Ordinance in effect in 1982 required land use approval for any partition or subdivision. Staff reviewed land use history files and was unable to find any record of a partition application approving a land division between TL100 and TL101/201.

However, the County subsequently approved an application to validate the prior land division, as the division met the applicable criteria of the zoning district at the time it was created. (File No. Z0564-21, Exhibit 15). Therefore, tax lots 101 and 201 now qualify as a separate lot of record and the farm dwelling application complies with ZDO 401.05(C)(5)(c). This criterion is met.

- 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 Kiprian Tipikin, owner and sole member of Countryside Acres, LLC who is the farm operator. Countryside Acres, LLC produced the income generated by the farm operation and so this criterion can be met. A condition of approval is warranted requiring that the residence shall be occupied by the person who produced the commodities, the registered agent and immediate family of Countryside Acres, LLC. As conditioned, this criterion is met.

- 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 subject property is currently employed for farm use as a blackberry farm. The applicant does not claim to have any income derived from the farm operation to be from the sale of livestock and there is no evidence that would suggest otherwise. This criterion is met.

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

Finding: The applicant submitted documentation of income earned from the sale of blackberries that were produced by Countryside Acres, LLC. Staff verified the deed for the land, and confirmed that the applicant, Radiant Homes, LLC, has owned the property since 2017 (deed number 2017-078335). The gross income claimed in this application is from the sale of blackberries that were produced by the farm operation. This criterion is met.

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: Staff was not able to identify any land use records showing that the income earned from the subject property was used to qualify another property for a dwelling. There are no dwellings on the subject property. This criterion is met.

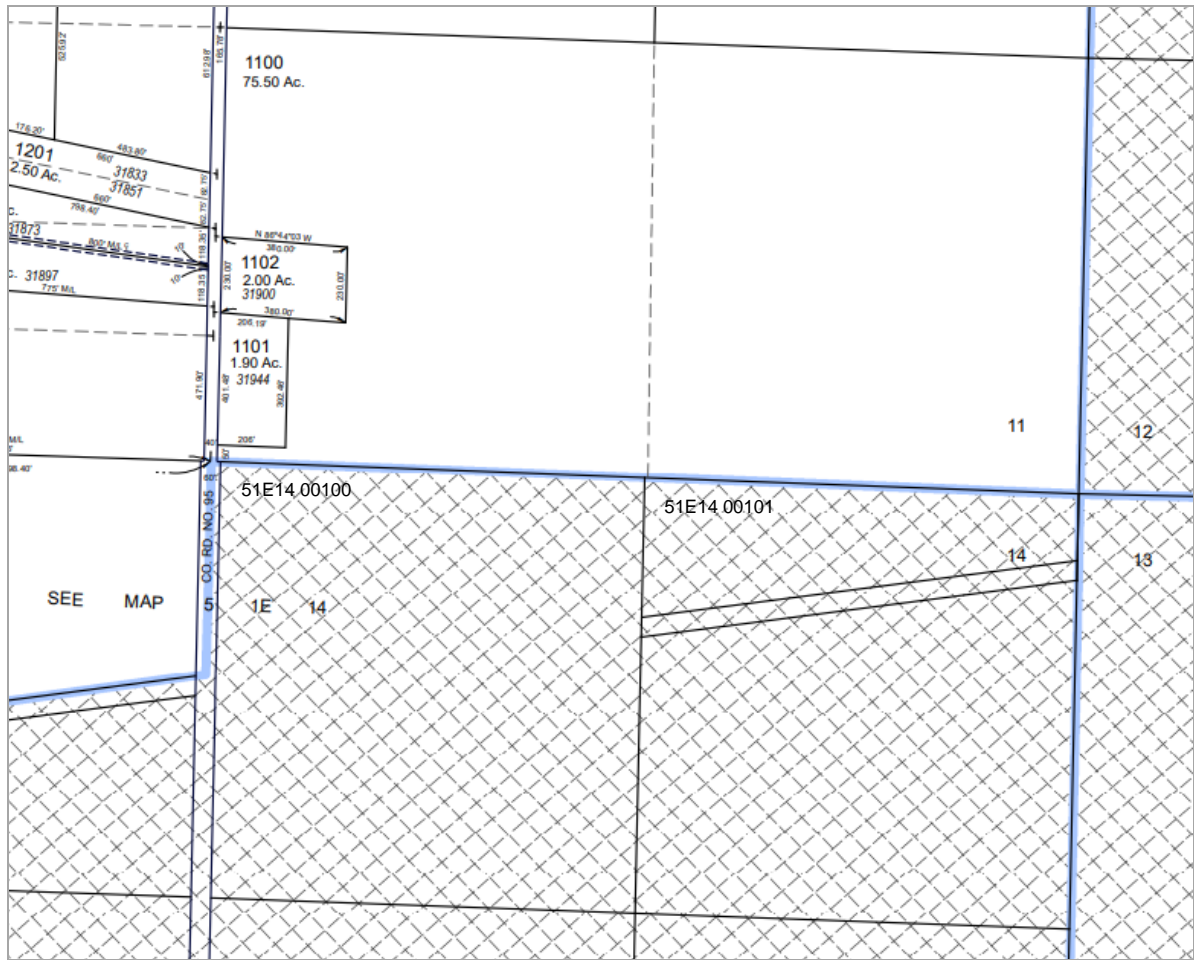


Figure 1 Copy of the Tax Assessor's Map showing the location of 51E11 01100 and 01102 in relation to the subject property.

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 subject property (TL101/201) is a lot of record located entirely within Clackamas County and the Exclusive Farm Use (EFU) zoning district, zoned for farm use as defined in ORS 215.203. The lot of record is comprised of two (2) tax lots, 51E14 00101 and 00201. The entire lot of record is zoned EFU and is within Clackamas County. This criterion is met.

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. A condition of approval has been included with this decision to ensure compliance with this criterion. As conditioned, this criterion is met.


D. CONCLUSION AND DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby grants the appeal, reverses the planning director's decision, and approves casefile Z0166-20-AFD (Radiant Homes LLC), subject to the following conditions of approval:

1. Approval of this land use permit is based on the submitted written narrative and plan(s) filed with the County on July 12, August 26, and September 14, 2021, and submitted to the Hearings Officer heard on July 14, 2022. No work shall occur under this permit other than which is specified within these documents, unless otherwise required or specified in the conditions below. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of any approval resulting from the decision described herein.
2. 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)).
3. 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:
 - a. 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;
 - b. The use of any gross farm income earned on the lots or parcels to qualify another lot or parcel for a primary dwelling; and;
 - c. 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)).

4. This approval is to establish a primary farm operator dwelling in conjunction with a commercial berry farm operation. (ZDO 401.05(C)(5)(a)).
5. The permit for the dwelling shall only be issued to the farm operator and the residence shall be occupied by Countryside Acres, LLC [their registered agent and immediate family] or a subsequent farm operator. (ZDO 401.05(C)(5)(e)).
6. All development of the property shall meet the development standards of the EFU zoning district. (ZDO 401.07).
7. 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. A building permit for the dwelling or manufactured dwelling placement permit shall be obtained and maintained.
 - b. If the approval is not implemented within the initial approval period established by Subsection 401.11(A), a two-year time extension may be approved pursuant to Section 1310. (ZDO 401.10).

DATED this ___ day of July 2022.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Joe Turner'.

Joe Turner, Esq., AICP
Clackamas County Land Use Hearings Officer

ENDANGERED SPECIES ACT NOTICE

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating, and maintaining the activities allowed by an

approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants, and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

APPEAL RIGHTS

ZDO 1307.10(F) 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 an 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 will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).