

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

Regarding an appeal by Jerome and Carole Rosa of an) **FINAL ORDER**
administrative decision denying an application for a farm)
dwelling on a 138-acre parcel located at 10654 S. Wildcat) **Z0485-23**
Road in unincorporated Clackamas County, Oregon) **(Rosa Farm Dwelling)**

A. SUMMARY

1. On December 14, 2023, Jerome and Carole Rosa (the “applicants”) filed an application for approval of single-family dwelling customarily provided in conjunction with a farm use on High Value Farmland. The applicants proposes to site the dwelling on a 138-acre parcel in the EFU (Exclusive Farm Use) district, located at 10654 S. Wildcat Road. The legal description of the site is tax lot 00100, Section 11, Township 6 South, Range 1 East of the Willamette Meridian (the “site”). If approved, the dwelling would be occupied by the applicants, who are the owners of site and the farm operators who generated the income for the farm operation.

2. On March 13, 2024, the planning director issued a written decision (Exhibit 1) concluding the applicants failed to bear the burden of proof that:

a. The site 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. (Section 401.05(C)(5)(a) of the Clackamas County Zoning and Development Ordinance, the “ZDO”); and

b. 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)).

3. On March 25, 2024, the applicants filed a written appeal of the planning director’s decision. (Exhibit 20).¹

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 summarized the director’s decision. The applicants and their representative testified at the hearing in support of the appeal. One person testified in writing in response to the appeal (Exhibit 11). 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));

¹ The appeal was not included in the Exhibit list prepared by the County. Therefore, the hearings officer added it as Exhibit 20.

- b. 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));
- c. Whether the applicants will reside on the site and operate the farm; and
- d. Whether a prior decision approving a land division to separate an existing residence from this site prohibits the proposed farm dwelling on this site.

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 Z0485-23 (Rosa Farm Dwelling) 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 May 9, 2024. 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 Joy Field summarized the Staff Report, the applicable approval criteria, and her PowerPoint presentation (Exhibit 18).

- a. She noted that the site is currently being farmed; it is leased for grazing cattle and cows are currently grazing on the property. This evidence is only provided to verify that the site is being farmed. Lease income does not constitute farm income for purposes of ZDO 401.05(C)(5)(a).

- b. The planning director determined that there is no evidence that the application complies with ZDO 401.05(C)(5)(a); that the applicants earned at least \$80,000 in gross annual income from the sale of farm products generated on the site. Evidence that the site produced grass and hay valued at more than \$80,000 that was used to feed cattle feed on the applicants' dairy farm is not evidence of the "sale of farm products." However, the applicants provided additional evidence regarding the sale of cattle in 2020. (Exhibit 14).

- c. The planning director also determined that the applicants failed to demonstrate compliance with ZDO 401.05(C)(5)(c), that the applicants do not own another dwelling on EFU zoned lands, as the applicants owned a dwelling on EFU zoned land in Marion County. The applicants provided a trust deed for the Marion County dated February 12, 2021. (Exhibit 2b). However, the deed lists the applicants as the "grantee" (buyer) of the property.

d. She noted that the “farm operator” as defined by ZDO 401.03.F is the person “[making the day-to-day decisions about such things as planting, harvesting, feeding, and marketing.”

3. Earl Kirk testified on behalf of the applicants, Jerome & Carole Rosa.

a. He testified that the applicants no longer own the Marion County property noted in the director’s decision. They conveyed ownership of that property via a 1031 exchange, which uses the terms “grantor” and “grantee” differently than a standard sale. Therefore, the application complies with ZDO 401.05(C)(5)(c).

b. The applicants submitted copies of their IRS “Schedule F” forms (attached to Exhibit 20) demonstrating that they meet the farm income standard of ZDO 401.05(C)(5)(a). They generated \$649,944 in farm income in 2020, \$1,225,714 in 2019, and \$1,217,219 in 2018. More than \$400,000 of those sales were from the sale of cattle raised on the site.

c. The applicants will record a deed restriction as required by ZDO 401.05.C(5)(j).

d. The applicant are managing the farm operation on the site. They plan to construct a residence on the site in order to manage the existing cattle stocking operation.

4. Applicant Jerome Rosa testified that they plan to construct a residence in the northeast corner of the site, not the “western corner” as stated on page 7 of the director’s decision. They sold \$372,200 worth of cattle in July 2020 and \$84,000 worth of cattle in August 2020. All of the cattle sold were raised on the site.

5. Applicant Carole Rosa noted that they submitted a copy of a wire transfer and cancelled check for the sale of cattle in 2020. (Exhibit 17). They need to live on the site in order to manage the cattle raised on the site. They plan to operate a “stocker operation” where they purchase calves in February, fatten them up by grazing them on the site, and sell them in November. Farming was their sole source of income for more than 35 years.

6. At the end of the hearing, the hearings officer held the record open for two weeks, until May 23, 2024, to allow the applicants alone an opportunity to submit testimony and evidence. No one else appeared at the appeal hearing and requested the opportunity to submit new evidence. Therefore, emails and other submittals received by the County during the initial open record period from anyone other than the applicant must be excluded from the record in this case. The applicants submitted their final argument and a letter from the Oregon Property Owners Association on May 21, 2024 (Exhibit 19). The applicants also submitted a letter from the Oregon Farm Bureau, which the Hearings Officer has labeled as Exhibit 25.

7. By order dated June 5, 2024, (Exhibit 21) the hearings officer reopened the record for the limited purpose of accepting additional testimony and evidence addressing whether the cost of purchased livestock was deducted from the total gross annual income attributed to the tract as required by ZDO 401.05(C)(5)(f). Exhibits 20, 22, and 23 were submitted during the reopened record period.

C. EVIDENTIARY ISSUES

1. As noted above, the hearing, the hearings officer initially held the record open for one week after the hearing to allow the applicants an opportunity to submit a final written argument as required by ORS 197.796(6)(e), which provides “Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant’s final submittal shall be considered part of the record, but shall not include any new evidence...” (Emphasis added).

2. The first document included in Exhibit 19 constitutes the applicant’s final argument and is allowed as part of the record of this proceeding.

3. However, the letters from the Oregon Property Owners Association and the Oregon Farm Bureau constitute new evidence. Therefore, these letters must be excluded from the record as they exceed the limited scope of the open record period allowed by ORS 197.796(6)(e).

D. 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 applicants 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 can be included to require compliance with this standard.

This criterion can be met with a 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:

(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 operated an organic dairy, Jer-Rosa Dairy, in Marion County from 1988 to 2020. They also owned the site, known as the “Ponderosa Ranch”, where they raised and harvested feed for their dairy cows on the Jer-Rosa Dairy property. They sold the Jer-Rosa Dairy in 2020, but continued to raise cattle on the site. (Exhibit 2 and applicant’s testimony). In 2020 the applicants generated \$649,944 in gross income from the “Sales of livestock, produce, grains, and other products...” (Exhibit 20 at 5). \$453,312 of that income was from the sale of cattle raised on the site (Exhibits 14, 15, and 17). Therefore, the hearings officer finds that 70% of the applicants’ 2020 gross farm income was generated by cattle raised on the site.² All of the cattle raised on the site were produced by the applicant’s dairy operation. The applicants did not purchase any cattle that were later sold to generate the farm income amounts noted above. (Exhibit 20).

In 2019 the applicants generated \$1,183,025 in gross income from the “Sales of livestock, produce, grains, and other products...” (Exhibit 20 at 6). In 2018 the applicants generated \$1,191,132 in gross income from the “Sales of livestock, produce, grains, and other products...” (Exhibit 20 at 7). The applicants also provided evidence demonstrating the total number of cattle they raised, the value of grazing those cattle, and the total value of feed they harvested and fed to their cattle in 2018, 2019, and 2020. (Exhibit 2 at 15). However, those values are for the applicant’s combined farm operations on the site (the Ponderosa Ranch) and on the Jer-Rosa Dairy property in Marion County. There is no evidence in the record regarding the sale of farm products (cattle and/or feed) produced on the site in 2019 and 2018.

However, the applicants’ farm operation was substantially the same in 2020, 2019, and 2018. The applicants used the site to generate feed (grazing and hay) for cattle that generated a portion of their income from the sale of farm products for all three years. The

² $\$453,312/\$649,944 * 100 = 70\%$.

applicants would meet the minimum \$80,000 farm income requirement if seven percent of the farm products sold in 2019 and 2018 was produced on the site.³

Given the evidence that 70% of the applicants' 2020 farm income was generated on the site, the hearings officer finds that the preponderance of the evidence in the record supports a finding that the applicants generated more than \$80,000 in gross annual income from the sale of farm products generated on the site in 2020, 2019, and 2018.

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: There are no existing dwellings on the site. The applicants previously owned additional EFU zoned property in Marion County, the Jer-Rosa Dairy property located at 8974 Mt. Angel Gervais Road NE and 9004 Mt. Angel Gervais Road NE, that has an existing residence. However, the applicants no longer own the Jer-Rosa Dairy property. They conveyed that property to George and Meggan Rae Kuschnick on February 12, 2021, via a 1031 exchange.

A 3.47 acre homestead lot containing an existing dwelling was previously partitioned from the site. (Land use file Z0507-81). However, condition of approval 4 of Z0507-81 provides "A single family residence may be established on the remaining parcel, if the applicant can demonstrate that the residence will be in conjunction with a principal use, pursuant to Section 401.09A." (Exhibit 11). The applicants do not own the existing residence that was previously partitioned from the site.

This criterion is met.

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

³ \$80,000/\$1,183,025 in 2019 gross income = 6.76% of the applicants' 2019 farm income.
\$80,000/\$1,191,132 in 2018 gross income = 6.72% of the applicants' 2018 farm income.

Finding: The site was divided in 1981 through land use file Z0507-81. That land use decision approved a land division for a 3.47 acre homestead lot and a 138 acre parcel that was also allowed to have a dwelling in conjunction with farm use as proposed in Z0485-23. Therefore the subject property is a lot of record that was created by a recorded deed in compliance with all applicable planning, zoning, and subdivision or partition ordinances and regulations, if any, in effect on the date the deed or land sales contract was signed by the parties to the deed or contract 1983- 1219 and subsequent deed 1992-72220 for the 3.47 acre parcel.

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 applicants state that they will occupy the dwelling, operate the farm, and be responsible for producing the income generated by the farm operation. As discussed in the findings above, the applicants were the farm operator that produced the commodities which were valued at more than 80,000 dollars in three of the five years preceding the application submittal.

The applicants were recently residing in Arizona but they intend to move back to the site and operate the farm once a farm dwelling is approved and constructed on the site.

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: As discussed above, all of the cattle raised on the site were produced by the applicant's dairy operation. The applicants did not purchase any cattle that were later sold to generate the farm income amounts noted above. (Exhibit 20). Therefore, no deductions from the total gross annual income attributed to the tract are required.

This criterion is met.

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

Finding: Only gross income from land owned was counted for the income generated and estimated in 2018, 2019, and 2020.

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: There is no evidence that income earned from the subject lot of record was used to qualify another lot of record for the construction or siting of a primary farm dwelling.

This criterion is met.

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 site is a lot of record in Clackamas County. The gross income noted in the application was generated from selling hay and the grazing of cattle on the site.

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 site. A condition of approval has been included with this decision to ensure compliance with this criterion.

As conditioned, this criterion is met.

E. 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 (Rosa Farm Dwelling), 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 December 14, 2023 (Exhibit 2) as supplemented by Exhibits 2a-2e, 12, and 14-17. 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 cattle operation. (ZDO 401.05(C)(5)(a)).
5. The permit for the dwelling shall only be issued to the farm operator, Jerome and Carole Rosa, and the residence shall be occupied by Jerome and Carole Rosa 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 2nd day of July 2024.



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

APPEAL RIGHTS

ZDO 1307.14(D)(6) 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).