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VIA EMAIL

July 7, 2023

P18377-001

Hearings Officer Alan Rappleyea
C/o Multnomah County Land Use Planning Dept.
1600 SE 190th Ave.
Portland, OR 97231

Re: *File No. T2-2021-14981 (12424 NW Springville Road Hearing)*
Applicant's First Open Record Submittal

Dear Mr. Rappleyea,

As requested, we have submitted a draft of the 2022 Schedule F, along with a letter from Mr. Reed's accountant stating that he used the same income figures that we submitted to you to arrive at the \$44,493 figure shown in Line 2 of the Schedule F. Exhibit 1.

You will note that the farm had a high number of one-time expenses in 2022. In particular, in 2022, the farm constructed 146,000 square feet of farm roads and 6,700 linear feet of fences, non-recurring expenses that were needed because the property had not been actively farmed in thirty years.

You will also note that raising chickens and goats is quite expensive – the farm purchased \$9,529 in feed (mostly chicken feed; the goats mostly browse on grass and leafy greens), and spent \$11,428 on utilities (mostly electricity from PGE, which averages \$1,200 per month in the winter and \$500 per month in the summer). Mr. Reed is currently trying to figure out ways to reduce these expenses and thereby increase profitability.

As we have previously indicated, Mr. Reed has documented the production of 86,444 marketable eggs in 2022, which equates to ~7,204 dozen eggs. Most of those eggs are priced at \$6.00 per dozen. If all the eggs were sold at \$6.00 per dozen, that would equate to \$43,224. Mr. Reed's actual sales figures are slightly less than this: \$42,478.

Further note that \$6.00 per dozen for delivered organic, pasture raised chicken eggs is a relative bargain (see Exhibit 2). Just yesterday, I was in New Seasons, and I noticed that the organic pasture raised eggs were priced at \$7.49 - \$8.99 (see Exhibit 3). The current average price of eggs in Portland, Oregon is \$5.29 according to www.expatisitan.com (see Exhibit 4).

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Response to Chesarek Letter Dated June 23, 2023.

Opponent Carol Chesarek argues that “the applicant argues that they need only show potential, not current commercial farm income, but this would render [OAR 660-033-0135(2)(f) and its County counterpart at MCC39.4265(b)(3)] meaningless.” *See* Chesarek Letter dated June 23, 2023 at p. 2. Her arguments are not well taken because she confuses and conflates the requirements of the three different farm dwelling tests.

To summarize the three tests in layperson terms:

- ❖ “Large tract” dwelling test. 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. Land use approval can be authorized so long as the land is primarily being used for farming, and there is no need to prove any specific present, past, or future farm income.
- ❖ “Production capacity” dwelling test. 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 the building permit for the farm dwelling once the farm is up and running.
- ❖ “Past farm income” dwelling test. A farmer that cannot qualify under the first two tests because the land at issue is too small can only acquire the right to a farm dwelling after he or she has an established a proven track record of generating specific levels of past income from farm products.

To understand the true meaning of OAR 660-033-0135(2)(f), the rule must be read in context of the other two key farm dwelling tests. With regard to so-called “large tract dwelling test,” OAR 660-033-0135(1)(c) discusses the occupation of the dwelling in the future tense.

(1) On land not identified as high-value farmland pursuant to OAR 660-033-0020(8), a dwelling may be considered customarily provided in conjunction with farm use if:

* * * *

(1)(c) 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.

In direct contrast to the test applicable to large tract dwellings, the “farm income test” is written in the past tense with regard to the occupancy issue. OAR 660-033-0135(3)(c) states:

(3) On land not identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:

* * * * *

(c) The dwelling will be occupied by a person or persons who produced the commodities that crossed the income in subsection (a) of this section; and

This difference in language goes to the heart of the difference between these two tests: A person that qualifies under the large tract dwelling test can obtain land use approval prior to commencing farm operations. In contrast, a person whose farm is so small that he or she can only qualify under the farm income test is required to show past income, which necessarily means that the farm must be at partially in operation.

Recall that the applicant in this case did not apply under either of the two tests. Rather, the applicant applied under the “production capacity” test. This test applies to farmland that is not big enough to qualify for a large tract dwelling test, but is big enough that resort to the farm income test is unwarranted. OAR 660-033-0135(2)(f) states as follows:

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

* * * * *

(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

Thus, OAR 660-033-0135(2)(f) is written in the future tense, which is exactly the same as the language used for the “large tract dwelling” test. It is also in direct contrast used with the “past income” test. As we previously explained, the “production capacity” test does not require the farm to be established at the time of land use approval. Ms. Chesarek is also wrong when she suggests “anyone can promise future income, but the dwelling can’t be removed if the commercial farm, income is never realized.” What Ms. Chesarek apparently does not comprehend is that OAR 660-033-0135(2)(g) prohibits the issuance of a building permit for the dwelling until “the establishment of the farm use.” So Ms. Chesarek’s concern is both imaginary and unfounded.

Ms. Chesarek also quotes *Forester v. Polk County*, 24 Or LUBA 476 (1993), a case that addresses an older version of the past farm income test. Note that the production capacity test at issue in this case was not enacted until after the *Forester* case was decided. To recap: in *Forester v. Polk County*, 115 Or App 475 (1992), the Court of Appeals held that in cases where a conditional land use approval for a farm dwelling is granted contingent on the establishment of the farm prior to issuance of the building permit, the rule does not require the *full* establishment of *the entire* planned farm prior to issuance of the permit. After *Forester*, 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 said condition. *Forster v. Polk County*, 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.

So Ms. Chesarek confuses the time requirement when she states that “[f]uture promise of farm income is not adequate.” First of all, she again confuses the requirements of the past farm income test and the production capacity test. Second, and more importantly, she confuses the burden of proof needed for land use approval versus that needed for the building permit.

Ms. Chesarek also fails to comprehend the nature of the substantial evidence test when she states that “[a]nyone can invent a table of egg production.” *See* Chesarek Letter dated June 23, 2023 at p. 2. In this case, the “table” of egg production is un rebutted by any other non-speculative testimony. The table is also fully corroborated by other evidence, including receipts for multiple purchases of hundreds of chicks as well as vaccinations for those chicks, photographs of the farm and chicken coops, the applicant’s testimony, and now, the draft Schedule F for 2022. The schedule F shows that he spent almost \$10,000 on animal feed in 2022. Exhibit 1. Mr. Reed also provided evidence that he owns extensive medical equipment for goats. Exhibit 6. This is the only evidence in the record, and Ms. Chesarek offer nothing to the contrary except hot air and indignation.

The rest of Ms. Chesarek’s letter is simply speculation and white noise not worthy of a response. However, we do wish to point out that Ms. Chesarek is being untruthful when she claims that the roads on the farm are “paved.” In truth, only the apron to the main entrance is paved, which is a County requirement.

Ms. Chesarek also misstates the truth when she states that “the applicant has consistently refused to provide proof of commercial farm income for years.” To the contrary, the applicant provided his 2014 Tax Return. Exhibit 5. The County posted that information online without any redactions. Even Mr. Reed’s social security number was left for the world to see. This was an obvious breach of security protocol, which explains why Mr. Reed has been reluctant to provide sensitive information to the County.

Finally, Ms. Chesarek states her opinion that “[t]his looks like a hobby farm operated for income tax deductions and pretty pictures for family Christmas cards, not a commercial farm.” This statement is highly offensive, especially coming from someone who contributes nothing to the agricultural economy of the County. More importantly, however, it is beyond the scope of the remand.

CONCLUSION.

The applicant has herein provided a copy of the draft Schedule F for 2022, including a letter from his CPA stating that the CPA has used the same data that Mr. Reed provided to the Hearings Officer as the basis for Line 2 of the Schedule F. Even though none of this is required for the production capacity test, we trust that this information provides the Hearings Officer the evidence needed to get Mr. Reed an approval.

Sincerely,

VIAL FOTHERINGHAM LLP

/s/ Andrew H. Stamp

Andrew H. Stamp
Attorney

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Enclosures
cc : Client

Exhibits:

1. Letter from Taylor Bethell, CPA with Draft 2022 Schedule F.
2. Koin Article: "A dozen eggs now cost more than a gallon of gas," Jan 20, 2023.
3. Photographs taken at Happy Valley New Seasons, July 6, 2023.
4. Price of Eggs in Portland, Oregon, from www.expatisitan.com.
5. 2014 Schedule F.
6. Photo of Medical equipment for Goats.