

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JAMES F. ELLIOTT,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 91-217
10 JACKSON COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 PHILIP T. PADEN,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Jackson County.

22
23 James F. Elliott, Ashland, filed the petition for
24 review and argued on his own behalf.

25
26 No appearance by respondent.

27
28 John R. Hassen, Medford, filed the response brief and
29 argued on behalf of intervenor-respondent. With him on the
30 brief was Blackhurst, Hornecker, Hassen & Thorndike & Ervin
31 B. Hogan.

32
33 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
34 Referee, participated in the decision.

35
36 REMANDED 05/18/92

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision granting approval
4 for a dwelling customarily provided in conjunction with farm
5 use.

6 **MOTION TO INTERVENE**

7 Philip T. Paden, the applicant below, moves to
8 intervene on the side of respondent in this appeal. There
9 is no objection to the motion, and it is allowed.

10 **FACTS**

11 The subject property is zoned Exclusive Farm Use (EFU)
12 and includes two tax lots which encompass a total of
13 approximately 657 acres. The property is not presently
14 irrigated and has historically been used with adjoining
15 property for seasonal grazing of cattle. Intervenor, a
16 practicing eye surgeon, proposes to construct his primary
17 residence on the subject property. Intervenor proposes
18 initially to lease the property to its current owner, so
19 that the existing seasonal grazing of cattle will continue.
20 The record indicates intervenor plans to attempt to secure
21 water rights that would allow irrigation of the property and
22 more intensive agricultural use of the property in the
23 future.

24 **DECISION**

25 Dwellings "customarily provided in conjunction with
26 farm use" are allowable as permitted uses in the county's

1 EFU zone. Jackson County Land Development Ordinance (JCLDO)
2 218.030 provides, in pertinent part, as follows:

3 "The following uses shall be permitted [in the EFU
4 zone] subject to all other applicable rules,
5 standards, or statutes governing such uses * * *:

6 * * * * *

7 "4) Farm Dwellings as defined in Section
8 218.025,^[1] and other buildings customarily
9 provided in conjunction with farm use. * * *

10 "A dwelling may be considered to be in
11 conjunction with farm use or the propagation
12 or harvesting of a forest product when
13 located on a lot or parcel that is managed as
14 part of a farm operation or woodlot if the
15 farm operation or woodlot:

16 "A) Consists of 20 or more acres, is
17 appropriate for the continuation of
18 existing commercial agriculture of the
19 area, and is not smaller than the
20 average farm or woodlot in the county
21 producing at least \$2,500 in annual
22 gross income from the crops, livestock
23 or forest products to be raised on the
24 farm operation or woodlot[.]

25 * * * * *

26 "For purposes of this chapter, the term
27 annual gross farm income as used in Section
28 218.030 (4A) may be considered synonymous
29 with the terms 'gross annual income' used in
30 the Oregon State University Extension Service
31 Special Report #698 entitled 'Profiles of

¹JCLDO 218.025 defines "farm dwelling" as follows:

"FARM DWELLING: A dwelling customarily provided in conjunction with farm use if the dwelling is on a lot or parcel that is managed as part of a commercial farm operation. * * *"
(Emphasis added.)

1 Commercial Agriculture for Southern Oregon'
2 with 'gross farm sales' data contained in the
3 1978 Census of Agriculture for Jackson County
4 prepared by the U.S. Census Bureau.

5 " * * * * " (Emphasis added.)

6 Jackson County has not amended its comprehensive plan
7 or land use regulations to designate marginal lands.
8 Therefore, the county may apply either ORS 215.213(1) to (3)
9 or ORS 215.283 to land zoned for exclusive farm use.² ORS
10 215.288(1). The challenged decision expresses uncertainty
11 regarding whether the above quoted county EFU zone
12 provisions were adopted pursuant to ORS 215.213(1) to (3) or
13 pursuant to ORS 215.283. The county EFU zone provisions set
14 forth above appear to combine provisions of ORS
15 215.213(1)(g) (dwelling customarily provided in conjunction
16 with farm use), ORS 215.213(2)(a) (dwelling in conjunction
17 with farm use), and ORS 215.283(1)(f) (dwellings and other
18 buildings customarily provided in conjunction with farm
19 use).³

²Counties that designate marginal lands under ORS 197.247, or allow dwellings to be approved under ORS 215.213(4) to (8), must apply ORS 215.213(1) through (3), rather than ORS 215.283, to land zoned for exclusive farm use. ORS 215.288(2).

³ORS 215.213(1)(g) provides the following use may be established in an EFU zone, subject to the criteria in ORS 215.296:

"A dwelling customarily provided in conjunction with farm use if the dwelling is on a lot or parcel that is managed as part of a farm operation not smaller than the minimum lot size in a farm zone with a minimum lot size acknowledged under ORS 197.251." (Emphasis added.)

1 The county's EFU zone imposes requirements that differ
2 from those imposed by ORS chapter 215. Although the county
3 is free to adopt EFU zoning requirements that are more
4 stringent than the statutory requirements, the statute
5 controls where county requirements are less stringent.
6 Kenagy v. Polk County, 112 Or App 17, 20 n 2, ___ P2d ___
7 (1992). For purposes of this appeal we need not conduct a
8 comprehensive review of the county's EFU zone. As relevant
9 in this appeal, a dwelling may be allowed in the county's
10 EFU zone under JCLDO 218.030(4) if two requirements are met.
11 First, the dwelling must be "in conjunction with farm use."
12 Second, the dwelling must be "customarily provided" in
13 conjunction with such farm use. Although much of the
14 parties' argument concerns whether the county correctly
15 decided the first requirement is met, we conclude the

ORS 215.213(2)(a) provides the following use may be established in an EFU zone:

"A dwelling in conjunction with farm use * * * on a lot or parcel that is managed as part of a farm operation * * * if the farm operation * * *:

"(A) Consists of 20 or more acres; and

"(B) Is not smaller than the average farm * * * in the county producing at least \$2,500 in annual gross income from the crops, livestock * * * to be raised on the farm operation or wood lot."

ORS 215.283(1)(f) provides the following use may be established in an EFU zone:

"The dwellings and other buildings customarily provided in conjunction with farm use." (Emphasis added.)

1 county's findings are inadequate to demonstrate the second
2 requirement is met.

3 The challenged decision adopts the following finding:

4 "If the proposed use is a 'farm use,' 'farm
5 operation,' and a 'commercial farm operation,'
6 then the proposed dwelling is one that is
7 customarily provided in conjunction therewith. In
8 so holding, the Hearings Officer is equating
9 'customarily' with 'usual' and 'common.'
10 Certainly, it would not be 'unusual' or 'uncommon'
11 for the owners' dwelling to be provided in
12 conjunction with farm uses." Record 8.

13 The above finding apparently assumes the "customarily
14 provided" criterion is presumptively satisfied, so long as a
15 "farm use," "farm operation," and "commercial farm
16 operation" exists on the property. That assumption is
17 incorrect.

18 Clearly, the county may not assume that any dwelling
19 proposed for a parcel actually in "farm use" necessarily is
20 a dwelling "customarily provided" in conjunction with that
21 farm use. As the Court of Appeals explained in Doughton v.
22 Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986):

23 "[F]or a dwelling on EFU land to be a customary
24 conjunct of farm use, there must be a factual
25 demonstration that the land is used as well as
26 zoned for farm purposes, and there must be a
27 showing that the 'type of farm use is customarily
28 combined with a residence.'" (Footnote omitted.)

29 Even where it is shown that the farm use of a parcel
30 constitutes a "commercial farm use," it may or may not be
31 customary for dwellings to be provided in conjunction with
32 such commercial farm use. Newcomer v. Clackamas County, 92

1 Or App 174, 185-86, 758 P2d 369, modified 94 Or App 33
2 (1988)(Newcomer I). While it may be much more likely that a
3 dwelling will satisfy the "customarily provided" criterion
4 if it is to be provided in conjunction with a commercial
5 farm use, findings explaining that dwellings are
6 "customarily provided" in conjunction with the particular
7 commercial farm use are required. Doughton v. Douglas
8 County, supra.

9 As the Court of Appeals recently explained, "the words
10 'customarily provided' in ORS 215.213(1)(g) and
11 ORS 215.283(1)(f) introduce an undefined criterion into
12 [those EFU zoning statutory] provisions that is not present
13 in ORS 215.213(2)." McKay Creek Valley Assn. v. Washington
14 County, 104 Or App 690, 695, 803 P2d 753 (1990). OAR 660-
15 05-030, the Land Conservation and Development Commission's
16 (LCDC's) administrative rule explaining the requirements for
17 approval of dwellings customarily provided in conjunction
18 with farm use, includes the following:

19 * * * * *

20 "(3) Dwellings proposed for parcels which satisfy
21 the Goal 3 minimum lot size standard cannot
22 be approved within an exclusive farm use zone
23 without the county governing body or its
24 designate first determining whether the
25 dwelling satisfies the additional statutory
26 standard in ORS 215.213(1)(g) or
27 215.283(1)(f). This standard requires a
28 determination that the dwelling is
29 'customarily provided in conjunction with
30 farm use.'

1 "(4) ORS 215.213(1)(g) and 215.283(1)(f) authorize
2 a farm dwelling in an EFU zone only where it
3 is shown that the dwelling will be situated
4 on a parcel currently employed for farm use
5 as defined in ORS 215.203. Land is not in
6 farm use unless the day-to-day activities on
7 the subject land are principally directed to
8 the farm use of the land. Where land would
9 be principally used for residential purposes
10 rather than for farm use, a proposed dwelling
11 would not be 'customarily provided in
12 conjunction with farm use' and could only be
13 approved [as a nonfarm dwelling]." (Emphasis
14 added.)

15 OAR 660-05-030(4) codifies a principle first identified
16 in Matteo v. Polk County, 11 Or LUBA 259, aff'd 70 Or App
17 179 (1984); a dwelling cannot be "customarily provided in
18 conjunction with farm use" unless a farm use already
19 exists.⁴ See Newcomer v. Clackamas County, 94 Or App 33,
20 764 P2d 927 (1988) (Newcomer II). However, we see nothing
21 in OAR 660-05-030(4) to suggest that the county need not
22 also demonstrate the "customarily provided" criterion is
23 satisfied. To the contrary, OAR 660-05-030(3), quoted
24 supra, specifically requires such a determination.

25 The present use of the subject property is for seasonal
26 grazing of cattle. ORS 215.213(1)(g), 215.283(1)(f),
27 OAR 660-05-030(3), and JCLDO 218.030(4) all impose a

⁴In other words, the farm use must be established before a dwelling customarily provided in conjunction with the farm use may be approved. OAR 660-05-030(4) also provides that a "farm use" does not necessarily exist simply by virtue of the existence of some incidental level of farming activity. Rather, the "day-to-day activities" must be "principally directed to the farm use of the land."

1 requirement that the county demonstrate the proposed
2 dwelling is "customarily provided" in conjunction with farm
3 uses of the scale and nature occurring on the subject
4 property. The county failed to adopt such findings.
5 Therefore, even if we assume the seasonal grazing on the
6 property is sufficient to constitute current employment of
7 the property for farm use, as required by OAR 660-05-030(4),
8 the challenged decision must be remanded.

9 We address one additional point. Citing Newcomer I,
10 supra, 92 Or App at 182 n 3, intervenor argues the county
11 may, in applying the customarily provided in conjunction
12 with farm use standard, consider both the current farm use
13 of the property and farm uses that are planned for the
14 property in the future.

15 Although the Court of Appeals' Newcomer I decision
16 supports intervenor's argument, that decision was based
17 solely on the statutory language of ORS 215.213 and 215.283.
18 The Court of Appeals recognized in Newcomer II, 94 Or App at
19 39, that OAR 660-05-030(4) "states substantive policy as
20 well as a statutory interpretation." In Hayes v. Deschutes
21 County, ___ Or LUBA ___ (LUBA No. 91-218, April 6, 1992),
22 slip op 10-12, we interpreted OAR 660-05-030(4) to require
23 that in applying the "customarily provided in conjunction
24 with farm use" standard, the analysis must be limited to the

1 existing farm uses.⁵

2 The county's decision is remanded.⁶

3

4

⁵In Miles v. Clackamas County, 18 Or LUBA 428, 439 (1989) we determined a county may, consistent with OAR 660-05-030(4), approve a dwelling in conjunction with a proposed farm use described in a farm management plan, "so long as the county (1) determines the level of farm use proposed by the farm management plan satisfies OAR 660-05-030(4), and (2) insures through conditions that the farm dwelling cannot actually be built until after the county determines that the farm management plan has been carried out."

⁶We do not consider the remaining arguments raised in the petition for review. ORS 197.835(9)(a) requires that we decide all issues when reversing or remanding a decision to the extent we can do so consistent with the deadline established for issuing our final opinion and order. Resolution of the numerous remaining issues raised by petitioner would require further extensions of the statutory deadline for issuing our final opinion and order.