

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

CLIF KENAGY and LOIS KENAGY,)
)
 Petitioners,)
)
 vs.)
)
BENTON COUNTY,)
)
 Respondent,)
)
 and)
)
DENNIS RANTA and JUDY RANTA,)
)
 Intervenors-Respondent.)

LUBA No. 91-097
FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Peter Livingston, Portland, filed a memorandum on remand on behalf of petitioners.

Janet McCoy, Corvallis, filed a memorandum on remand on behalf of respondent.

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

REMANDED 6/05/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal a county order approving a farm related dwelling for a relative on a parcel zoned Exclusive Farm Use (EFU).

BACKGROUND

The subject parcel is approximately 37 acres in size. Currently, there is one dwelling on the parcel which is occupied by the property owner. Behind the existing residence there is a fenced pasture area consisting of approximately nine acres. At various times, the owner of the property has had cattle pastured in this area, and currently there is one horse pastured there. The property owner leases approximately 23 acres of the subject parcel to lessees who farm this portion of the property. The property owner retains authority to approve the kinds of crops the lessees plant on the 23 acre portion of the subject parcel.

The property owner wishes to establish a second dwelling on the subject parcel for his son and daughter-in-law. The county approved the request, and petitioners appealed to this Board.

ORS 215.283(1)(e) provides that within an EFU zone a county may permit:

"A dwelling on real property used for farm use if the property is:

"(A) Located on the same lot or parcel as the dwelling of the farm operator; and

"(B) Occupied by a relative * * * whose assistance in the management of the farm use is or will be required by the farm operator." (Emphasis supplied.)

In Kenagy v. Benton County, ___ Or LUBA ___ (LUBA No. 91-097, November 19, 1991) (Kenagy I), this Board determined the property owner was a "farm operator." We determined that because petitioners did not contend the relative's assistance was not required by the farm operator, it was unnecessary to reach that issue.

The Court of Appeals remanded our decision in Kenagy v. Benton County, 112 Or App 17, ___ P2d ___ (1992) (Kenagy II). The Court of Appeals determined that ORS 215.283(1)(e)(B) presents one question:

"* * * we have treated the involvement of a farm operator and his need for assistance as two sides of one coin * * *." (Kenagy II, supra, 112 Or App at 20-21.)

In Kenagy II, the Court of Appeals held that even if the issue of whether the relative's assistance was required was not specifically raised before this Board, this Board was not relieved from addressing that issue, where petitioners had questioned whether the property owner was a farm operator under ORS 215.283(1)(e). In Kenagy I, we determined the property owner was a farm operator, and we adhere to that determination here.

What this Board did not determine in Kenagy I, and what it must determine on remand, is whether the farm operator either currently requires, or will require in the future,

the assistance of a relative to operate the farm. Kenagy II; ORS 215.283(1)(e).

Petitioners' arguments concerning whether the relative's assistance is required are the following:

"The Court of Appeals noted [in Kenagy II] that the County had found that [the property owner's] relatives would assist him only in connection with the operations on the 9-acre unleased portion of the property. Even if one were to conclude [the property owner] is a farm operator, it is obvious his nominal responsibilities with respect to farm operations on the entire property do not justify the conclusion that he requires the assistance from a relative. [The property owner's] responsibilities with respect to the 9 acres are fewer and smaller. In fact, it is hard to imagine what they might be. At the time of application, the 9 acres were occupied by one horse (not a farm use), and had been otherwise vacant for over a year. '[Mere] convenience' is not enough to justify a finding that a relative's assistance is required.

"[The property owner] does not have any significant involvement with 'farm operations' on any property now. On the leased acreage, his involvement is limited to crop approval. He exercises that approval right less often than once a year. He has no involvement with 'farm operations' on the 9 unleased acres, since they are not in farm use. If he has assistance from a relative, his already insignificant involvement will become even more insignificant, and the Hopper test will not be met." Petitioners' Memorandum on Remand 14-15. (Footnote and citation omitted. Emphasis in original.)

Petitioners do not challenge the county's determination that the farm operator is unable, due to his physical condition, to perform all of the tasks necessary to establish and maintain the proposed cattle operation for the

nine acre portion of the subject parcel. Rather, petitioners allege that (1) the relative's assistance in the farm operations will be prospective and nominal, and (2) the assistance from the relative will render the property owner's involvement "insignificant."

Concerning petitioners' arguments that the farm use for which the relative's assistance is required is prospective, ORS 215.283(1)(e) allows a dwelling for a relative whose assistance either is or will be required by the farm operator. Therefore, that it is the proposed activities on the nine acre portion of the property for which the challenged decision determines the assistance of a relative is required does not provide a basis under ORS 215.283(1)(e) for reversal or remand of the challenged decision. Additionally, petitioners allude to OAR 660-05-030(4) as an applicable standard.¹ Under OAR 660-10-030(4), a dwelling "customarily provided in conjunction with farm use" pursuant

¹OAR 660-05-030(4) provides:

"* * * ORS 215.283(1)(f) authorizes a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not currently employed for farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than for farm use, a proposed dwelling would not be 'customarily provided in conjunction with farm use' and could only be approved according to * * * ORS 215.283(3). At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land (see Matteo v. Polk County, 11 Or App 259, [aff'd 70 Or App 179 (1984)] * * *."

to ORS 215.283(1)(f) may be approved only when the farm use that justifies the dwelling exists on the property. Hayes v. Deschutes County, ___ Or LUBA ___ (LUBA No. 91-218, April 6, 1992). However, OAR 660-10-030(4) is not applicable to the approval of a dwelling for the relative of a farm operator under ORS 215.283(1)(e). Further, there is nothing in ORS 215.283(1)(e) to support petitioners' position that the farm use of the subject property which justifies the need for a dwelling to house a relative to assist a farm operator, must be in existence at the time the application for such relative's dwelling is submitted. See also Hopper v. Clackamas County, 87 Or App 167, 170-71, 741 P2d 921 (1988).

Here, we view the subject 37 acre parcel in its entirety in determining whether the relative's assistance is required in conducting a farm operation on the subject parcel. Currently, 27 acres of the subject parcel are leased for the cultivation of row crops, and nine acres of the parcel (which in the past have served as pasture for cattle) currently provide pasture for one horse. The property owner proposes to enhance the farm use of the nine acre portion of the subject parcel by creating and maintaining a cattle operation, and also proposes to manage fruit trees which currently exist on the property. We believe the subject 37 acre parcel is properly considered a farm operation.

Concerning petitioners' argument that the relative's assistance will be nominal, the Court of Appeals made it clear in Hopper, that the issue is not the amount of work the relative is going to perform. Specifically, the Court of Appeals stated:

"The critical criterion under ORS 1215.283(1)(e)(B) is whether the accessory dwelling is sought for a relative 'whose assistance is required by the farm operator.' We do not construe that phrase to mean that the amount of the required assistance is the determinant of whether there may be a relative's dwelling, so long as the 'farm operator' continues to have some significant involvement in the farm operations. Nothing in the statutory language suggests the permissibility of the accessory dwelling is inversely proportional to the level of assistance the relative provides. Indeed, if the level of assistance could be regarded as a determining factor consistently with the statutory language, its relevance would seem to us to cut in the opposite direction from the one petitioners suggest: the more assistance the farmer requires, the greater would be the justification for allowing farm land to be used for a dwelling to house the person whose assistance is required."
87 Or App at 172.

The unchallenged facts reflected in the appealed decision are that the farm operator requires assistance to perform the tasks necessary to carry out the cattle operation on the nine acre portion of the parcel due to his physical condition. As pointed out in Hopper, petitioners' arguments that the proposed assistance of the farm operator's relatives is "nominal" do not provide a basis for reversal or remand of the challenged decision.

However, the county's findings are silent on the issue of whether the farm operator will continue to have significant involvement in the farm operations. The findings state that the farm operator's relatives will, in addition to other activities, "manage contract negotiations." Record 9. It is not clear whether this refers to contract negotiations associated with the leased portion of the property, which are currently managed by the farm operator, or to some other aspect of the farm operation. If this reference in the findings refers to the leasing operation on the subject parcel, then it appears the farm operator will relinquish all involvement in the farm operations and, thus, will no longer have a "significant involvement" in the farm operations. The challenged decision does not determine that, after the relative's assistance is obtained, the farm operator will continue to have "significant involvement" in the farm operations on the subject parcel, and this is error.

This subassignment is sustained.

The county's decision is remanded.