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

LINDA HORACEK and )  
EDWIN A. HORACEK, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
YAMHILL COUNTY, )  
 )  
Respondent, )  
 )  
and )  
 )  
ROBERT W. DARM, )  
 )  
Intervenor-Respondent.)

LUBA No. 88-052  
FINAL OPINION  
AND ORDER

Appeal from Yamhill County.

Kent Hickam, Albany, filed the petition for review and argued on behalf of petitioners.

John M. Gray, Jr., McMinnville, filed the response brief and argued on behalf of respondent.

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

REMANDED 10/19/88

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioners appeal Yamhill County Board of Commissioners  
4 Order 88-291 allowing a secondary dwelling in conjunction with  
5 farm use on a 131 acre parcel zoned Exclusive Farm Use (EF-40)  
6 and Agriculture/Forestry (AF-20).

7 FACTS

8 Approximately 80 acres of the subject property are zoned  
9 EF-40 and 51 acres are zoned AF-20. Intervenor-respondent  
10 (intervenor) owns and operates a commercial mushroom growing  
11 operation on this property. The mushroom operation occupies  
12 approximately ten acres. The remainder of the property is  
13 leased to neighboring farmers and is used to grow wheat and hay  
14 and to graze cattle.

15 There are already three mobile home dwellings on the  
16 property. The owner/operator occupies the principal dwelling.  
17 The two secondary dwellings are occupied by his secretary and  
18 mechanic, both of whom are employed in the mushroom operation.  
19 A mobile home storage building and a stored mobile home to be  
20 used as the farm office are also situated on the subject  
21 property. Record 20, 22, 39.

22 Intervenor applied for approval of a third secondary  
23 dwelling on the property in order to provide an on-site  
24 residence for a manager of the mushroom farm. Intervenor's  
25 application was administratively approved by the county  
26 planning director. This approval was appealed to the board of

1 commissioners by petitioners. The board of commissioners  
2 conducted a de novo review and, on June 8, 1988, issued its  
3 order affirming the decision of the planning director. This  
4 appeal followed.

5 FIRST ASSIGNMENT OF ERROR

6 "The findings of fact in support of the decision are  
7 legally inadequate."

8 Yamhill County Zoning Ordinance (YCZO) 402.02.E.2 provides  
9 that secondary dwellings shall be permitted in the EF-40 zone,  
10 subject to the standards and limitations set out in  
11 YCZO 402.08, if the following standard is satisfied:

12 "The dwelling is customarily provided in conjunction  
13 with farm use, and is located on a lot or parcel that  
14 is managed as part of a farm operation not smaller  
than 40 acres."

15 YCZO 403.02.E.2 contains identically worded provisions with  
16 regard to secondary dwellings in the AF-20 zone, save that the  
17 lot or parcel must be managed as part of a farm operation not  
18 smaller than 20 acres.<sup>1</sup>

19 Petitioners argue that the county's findings are inadequate  
20 because "they fail to demonstrate \* \* \* that a secondary  
21 dwelling for a manager is customarily provided in conjunction  
22 with a mushroom growing operation."<sup>2</sup> Petition for Review 6.  
23 Petitioners claim the only applicable finding of fact states:

24 "4. The proposed farm dwelling is to be occupied by  
25 the manager of the mushroom farm. The applicant  
26 has indicated that the manager will work  
approximately 60 hours per week running the  
farm. The applicant submitted the following

1 justification to substantiate that the proposed  
2 dwelling will be in conjunction with farm use:

3 'Because of the many difficulties in growing  
4 mushrooms and the immediate attention  
5 frequently needed, we feel it necessary to  
6 have our manager live at the farm to be  
7 ready at a moment's notice when problems  
8 occur. We check the houses every six hours  
9 and also have various alarms that go off  
when a room is not within the proper  
parameters. This also requires immediate  
attention. The manager's name is Mickey  
Foley who we were fortunate to get from  
another farm and we expect him sometime in  
June.'" Record 3.

10 Petitioners argue the above-quoted finding is merely a  
11 statement of evidence rather than a finding of fact. It  
12 recites the contents of a letter sent to the county by the  
13 applicant and does not disclose what the decision maker  
14 believes to be the relevant facts. For that reason, according  
15 to petitioners, the finding fails to set out facts and reasons  
16 adequate to demonstrate that the applicable criteria are  
17 satisfied.

18 We agree with petitioners that the above-quoted "finding"  
19 is actually a recitation of evidence, not a statement of the  
20 facts the county found to be true. See Norvell v. Portland  
21 Area LGBC, 43 Or App 849, 852-855 (1979); Hershberger v.  
22 Clackamas County, 15 Or LUBA 401, 403 (1987). However, there  
23 are other findings set out in the county's order which also  
24 address the "customarily provided in conjunction with farm use"  
25 standard of YCZO 402.02.E.2 and 403.02.E.2. These provide:

26 "1. The proposed dwelling is to be occupied by the

1 mushroom farm manager who is to work on the 131  
2 acre farm property approximately 60 hours per  
3 week. Therefore, the dwelling will be  
4 customarily provided in conjunction with farm use  
5 on a farm operation not smaller than 40 acres  
6 consistent with ORS 215.283(1)(f), and  
7 402.02(E)(2) and 403.02(E)(2) of the Zoning  
8 Ordinance.

9 \* \* \* \* \*

10 "4. In that the proposed secondary farm dwelling is  
11 to be occupied by the manager of the existing  
12 mushroom farm, and considering that the manager  
13 will work approximately 60 hours per week to  
14 assist in the growing and harvesting of  
15 approximately 30,000 pounds of mushrooms that are  
16 grown on the subject property each week, the  
17 proposed dwelling is considered to be customarily  
18 provided in conjunction with farm use consistent  
19 with OAR 660-05-030(3)." Record 4.

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Petitioners did not specifically cite these findings in  
their argument challenging the adequacy of the county's  
findings to satisfy the "customarily provided in conjunction  
with farm use" standard. We will consider petitioners'  
challenge to encompass these findings as well since they are in  
substance the same as the "finding" petitioners did cite.

Kellogg Lake Friends v. City of Milwaukie, \_\_\_ Or LUBA \_\_\_  
(LUBA No. 88-022; June 24, 1988), slip op. 10.

These findings do not suffer from the defect which  
petitioners identified in the previously quoted finding; they  
are not recitations of evidence. Rather, they are statements  
of what the decision makers believed to be true. Petitioners  
make no other argument as to why these findings are not  
adequate to satisfy the "customarily provided in conjunction

1 with farm use" standard. We will not develop a legal theory  
2 for petitioner. Deschutes Development v. Deschutes Cty., 5 Or  
3 LUBA 218, 220 (1982).

4 The first assignment of error is denied.

5 SECOND ASSIGNMENT OF ERROR

6 "Yamhill County erred in that the proposed secondary  
7 dwelling is not in conjunction with farm use."

8 Petitioners argue that the county erred in making the  
9 following finding:

- 10 3. "The mushroom farm, for which the secondary farm  
11 dwelling has been requested, involves the  
12 raising, harvesting and selling of approximately  
13 30,000 pounds of mushrooms per week and,  
therefore, is considered to be a farm use as  
defined in ORS 215.203(2)(a)." Record 4.

14 Petitioners argue that intervenor's mushroom operation is  
15 not a "farm use" as defined in ORS 215.203(2)(a)<sup>3</sup>, because it  
16 merely "converts" harvested agricultural crops into a new  
17 product. Petitioners liken the mushroom operation to a winery  
18 which converts grapes through fermentation into wine.  
19 According to petitioners, the Oregon Tax Court has ruled that a  
20 winery is not a farm use under this statute. Sokol Blosser  
21 Winery v. Department of Revenue, 8 OTR 196 (1979). Petitioners  
22 contend, because the mushroom operation is not a "farm use,"  
23 there is no basis for the county to allow a secondary dwelling  
24 in conjunction with farm use on the property.

25 The county replies that intervenor's mushroom growing  
26 operation falls squarely within the statutory definition of

1 "farm use" as it is a current use of the land for the primary  
2 purpose of obtaining a profit through "raising, harvesting and  
3 selling crops" or "any other agricultural or horticultural  
4 use." The county points out, in a more recent case, the tax  
5 court held that mushroom growing was an "agricultural or  
6 horticultural use" within the meaning of ORS 310.608(2) (now  
7 ORS 307.400(3)) relating to tax exemptions for farm equipment  
8 and machinery. West Foods v. Dept. of Rev., 10 OTR 7, 8  
9 (1985). The court stated that it saw no difference between  
10 growing mushrooms and any other farm crop, except that  
11 mushrooms are grown indoors. Id.<sup>4</sup>

12 The process carried on in intervenor's mushroom operation  
13 involves the preparation of compost from wheat straw and  
14 manure, pasteurization of the compost, inoculation of the  
15 compost with mushroom spores, and the raising, harvesting,  
16 packing and transporting of approximately 30,000 pounds of  
17 mushrooms per week. Record 23, 39. We agree with the county  
18 that this activity constitutes the raising, harvesting and  
19 selling of a crop and, therefore, is a "farm use" within the  
20 meaning of ORS 215.203(2)(a) and the YCZO.

21 The second assignment of error is denied.

22 THIRD ASSIGNMENT OF ERROR

23 "There is not substantial evidence to support the  
24 first and second 'conclusionary findings' concerning  
density standards."

25 YCZO 402.02.E.2 provides that in the EF-40 zone a secondary  
26 dwelling is permissible if "[t]he dwelling is customarily

1 provided in conjunction with farm use and is "located on a lot  
2 or parcel that is managed as part of a farm operation not  
3 smaller than 40 acres." (Emphasis added). The county's  
4 application of the emphasized portion of YCZO 402.02.E.2 is  
5 challenged under this assignment of error. The evidentiary  
6 basis for the county's finding that the proposed dwelling is  
7 properly viewed as a dwelling customarily provided in  
8 conjunction with farm use is challenged under the fourth  
9 assignment of error.

10 Petitioners argue there is not substantial evidence in the  
11 record to support a finding that at least 40 acres of the  
12 subject property is devoted to the mushroom operation.

13 Petitioners point out that intervenor testified below that the  
14 mushroom operation occupies only ten acres. Record 35.  
15 According to petitioners, there is no evidence in the record to  
16 support findings that the proposed secondary dwelling would  
17 comply with the YCZO density standard quoted above.

18 The county admits the record does not contain evidence that  
19 at least 40 acres is devoted to the mushroom operation.  
20 However, the county contends that such a determination is not  
21 required by the applicable standards. According to the county,  
22 what it must determine under YCZO 402.02.E.2 is that the 131  
23 acre parcel is being managed as part of a farm operation of at  
24 least 40 acres. The county maintains there is ample evidence  
25 in the record to support such a determination.<sup>5</sup>

26 Although petitioners label this assignment of error as a

1 substantial evidence challenge, the assignment actually is a  
2 challenge to the county's interpretation of its density  
3 standards for secondary dwellings in the EF-40 zone.  
4 Petitioners believe that YCZO 402.02.E.2 must be interpreted to  
5 require that the farm use (in this case, the mushroom  
6 operation) in conjunction with which a secondary dwelling is  
7 customarily provided is an operation not smaller than 40  
8 acres. The county, on the other hand, interprets these  
9 ordinance provisions to require that the parcel (in this case,  
10 the 131 acres) on which the secondary dwelling is located is  
11 part of a farm operation not smaller than 40 acres. In  
12 determining the size of the "farm operation," the county  
13 apparently considered all of the farming operations occurring  
14 on the property, not just the mushroom operation to which the  
15 secondary dwelling would relate exclusively.

16 The meaning of local legislation is a question of law for  
17 us to determine. McCoy v. Linn County, 90 Or App 271, 275, 752  
18 P2d 323 (1988). In this case, a portion of the language of the  
19 ordinance is ambiguous. The ordinance clearly says that it is  
20 the lot or parcel on which the secondary dwelling be located  
21 which must be managed as part of a farm operation not smaller  
22 than 40 acres. However, YCZO 402.02.E.2 does not specify  
23 whether farm operations, occurring on the parcel but unrelated  
24 to the secondary dwelling, may be considered in determining  
25 whether the farm operation on the 131 acre parcel exceeds 40  
26 acres. In other words, although the county's broader

1 construction of "farm operation" finds no express support in  
2 the ordinance, neither does that broader construction do  
3 violence to the ordinance language. In these circumstances we  
4 find the county's broader reading of the farm operation to  
5 include all farm operations occurring on the parcel to be  
6 reasonable and correct.<sup>6</sup>

7 The third assignment of error is denied.

8 FOURTH ASSIGNMENT OF ERROR

9 "There is not substantial evidence to support the  
10 finding that the proposed dwelling is considered to be  
11 customarily provided in conjunction with the  
applicable farm use."

12 Petitioners argue that YCZO 402.02.E.2 requires the county  
13 to determine that a secondary dwelling is "customarily provided  
14 in conjunction with farm use." Petitioners argue there is no  
15 substantial evidence in the record to support a determination  
16 that mushroom operations customarily provide on-site residences  
17 for their managers. Petitioners testified that it is not  
18 customary in the mushroom business to have employees living  
19 on-site, based on communications with several mushroom  
20 producers in the area, including representatives of Mushroom  
21 King, Mushroom Unlimited and Valley Mushrooms. Record 25.

22 The county responds there is sufficient evidence in the  
23 record to support its determination that an on-site dwelling  
24 for a mushroom farm manager is customarily provided in  
25 conjunction with mushroom growing operations similar in size to  
26 intervenor's. The county points out that intervenor testified

1 that "smaller size" mushroom farms typically have a manager  
2 living on site. Record 37. Intervenor also testified that  
3 Country Fresh Mushrooms, in Washington, is the same size as his  
4 and has a live-on residence for its manager. Record 36-37.  
5 Finally, intervenor testified that there is a small mushroom  
6 farm, Kalapooia Mushrooms, which is run by two brothers who  
7 live on site. Record 29, 36. The county also points out that  
8 one of the mushroom operations to which petitioners refer,  
9 Mushroom King, is the largest mushroom operation in Oregon and  
10 may not need resident employees because of its "ability to  
11 employ personnel to manage the operation around the clock."  
12 Respondent's Brief 10.

13 The county also points to intervenor's testimony that, from  
14 the beginning of his mushroom growing operation, he had a  
15 manager living on-site. Record 28. In fact, the record  
16 indicates that one of the existing secondary dwellings on the  
17 property was initially approved in 1982 for occupancy by the  
18 plant manager. Record 59. The record does not indicate the  
19 basis for the 1980 approval of the other secondary dwelling on  
20 the property. Id. Intervenor also testified that after his  
21 manager moved out, he moved his mechanic into the manager's  
22 residence and, after closing his Portland office, moved his  
23 secretary into the other secondary dwelling. Record 21.

24 Substantial evidence is evidence which a reasonable mind  
25 could accept as adequate to support a conclusion. Braidwood v.  
26 City of Portland, 24 Or App 477, 480, 546 P2d 777, rev den

1 (1976). See also, Christian Retreat Center v. Comm. for Wash.  
2 Co., 28 Or App 673, 679, 560 P2d 1100, rev den (1977). We must  
3 determine whether, in light of all the evidence in the record,  
4 the county was reasonable in concluding that the approved  
5 secondary dwelling would customarily be provided in conjunction  
6 with the mushroom operation. See Younger v. City of Portland,  
7 305 Or 346, 360, 752 P2d 262 (1988).

8 The only evidence in the record which supports the county's  
9 conclusion that an on-site residence for a manager would  
10 customarily be provided at a mushroom operation the size of  
11 intervenor's is the intervenor's unsubstantiated statement.  
12 Furthermore, the two examples cited by intervenor, Country  
13 Fresh Mushrooms and Kalapooia Mushrooms, are not persuasive.  
14 For instance, it is not known from the record whether Country  
15 Fresh Mushrooms has an owner and mechanic living on site, as  
16 well as a manager. Also, the record indicates only that  
17 Kalapooia Mushrooms has two persons living on-site running the  
18 operation, as does intervenor (himself and his mechanic)  
19 without the additional secondary dwelling for a manager.  
20 Finally, petitioners' testimony that Mushroom Unlimited and  
21 Valley Mushrooms do not provide on-site residences for their  
22 employees was not rebutted or distinguished during the county's  
23 proceeding.

24 In addition, the record indicates that one of the two  
25 secondary dwellings already located on the property was  
26 specifically approved as a residence for the manager of the

1 mushroom plant. We have been cited to no evidence in the  
2 record indicating why the manager cannot occupy the dwelling  
3 which previously was approved for that purpose. We have been  
4 cited to no evidence in the record establishing that on-site  
5 dwellings at mushroom operations similar to intervenor's are  
6 customarily provided for mechanics and secretaries. Further,  
7 there is no evidence that the secondary dwellings occupied by  
8 those persons were approved under some other YCZO provision.

9 We do not believe the above evidence is sufficient to allow  
10 a reasonable decision maker to conclude that a third secondary  
11 dwelling on the subject property would be a use customarily  
12 provided in conjunction with this type of farm use.

13 The fourth assignment of error is sustained.<sup>7</sup>

14 The county's decision is remanded.  
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FOOTNOTES

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Only 80 acres of the total 131 acres is zoned EF-40. However, for purposes of this opinion we will assume, as do the parties, that the applicable standard to be met is the 40 acre standard applicable to the EFU-40 zone. We do not separately address the 20 acre standard applicable to the AF-20 zone.

2

Petitioners also argue in their petition that the findings are inadequate because they fail to demonstrate that (1) the criteria for a farm dwelling were satisfied, (2) the occupant of the new secondary dwelling would perform work that occupants of other dwellings on the premises cannot, and (3) it is necessary for the farm manager to reside in a secondary dwelling. However, such determinations, while required by the YCZO EF-40 secondary dwelling provisions in effect prior to April 17, 1987, are not required by the YCZO secondary dwelling standards applicable to the county's June 8, 1988 order appealed in this case, quoted in the text, supra. Since the portions of petitioners' argument addressing criteria no longer in effect do not provide us with a basis for reversal or remand of the county's decision, we do not consider them further. Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984).

3

ORS 215.203(2)(a) defines farm use as:

" \* \* \* the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agriculture or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation and storage of the products raised on such land for human use and animal use and disposal by marketing or otherwise. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic species. It does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section."

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As previously stated, the county's EF-40 and AF-20 zones allow secondary dwellings customarily provided in conjunction with "farm use." YCZO 402.02.E.2 and 403.02.E.2. The "farm use" permitted in these zones is "as defined by ORS Ch 215." YCZO 402.02.A and 403.02.A. The definition of "farm use" found in ORS 215.203(2)(a) is set out in footnote 3, supra.

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The county points to testimony that one neighbor has cultivated wheat on approximately 50 acres of the parcel and that other neighbors use other portions of the property for growing hay and grazing cattle. Record 34.

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We note that petitioners' argument under this assignment is based entirely upon their interpretation of the YCZO density provisions being correct. In other words, they do not argue there is not substantial evidence to support a determination of compliance with the county's interpretation of the density standards.

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Petitioner's fifth assignment of error was withdrawn at oral argument.