

LAND USE  
BOARD OF APPEALS  
Nov 20 3 48 PM '89

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

JERRY MILES, OLAVI H. SALO, and )  
DAVID HEINTZ, )  
Petitioners, )  
vs. )  
CLACKAMAS COUNTY, )  
Respondent. )

LUBA No. 89-098  
FINAL OPINION  
AND ORDER

Appeal from Clackamas County.

Melinda S. Eden, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Miller, Nash, Wiener, Hager & Carlsen.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 11/20/89

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 a decision of the Clackamas County  
4 Hearings Officer approving an accessory farm dwelling.

5 FACTS

6 The subject property is a 31 acre parcel near Oregon City,  
7 designated Agriculture by the Clackamas County Comprehensive  
8 Plan (plan) and zoned General Agricultural District (GAD), an  
9 exclusive farm use zone. The subject property contains a  
10 residence, barn and other farm structures. George and Jan Elser  
11 (applicants) propose to relocate their existing llama breeding  
12 and raising operation from a 16 acre site in the Gresham area to  
13 the subject property in order to increase the size of their  
14 operation. The applicants currently have a herd of  
15 approximately 70 llamas, with 40 breeding females. Record 2.

16 The applicants filed an application for an accessory farm  
17 dwelling for a herdsman to assist in the round-the-clock care of  
18 the llama herd. Record 57. The county Department of  
19 Transportation & Development (DTD) denied the application. The  
20 applicants appealed that decision to the county hearings  
21 officer. After a public hearing, the hearings officer issued a  
22 decision approving the accessory farm dwelling, subject to  
23 certain conditions. This appeal followed.

24 FIRST ASSIGNMENT OF ERROR

25 "By concluding that the criteria for an accessory farm  
26 dwelling were met, the county made findings not  
supported by substantial evidence and misconstrued the  
law."

1 Clackamas County Zoning and Development Ordinance (ZDO)  
2 402.04.C establishes criteria for approval of an accessory farm  
3 dwelling in the GAD zoning district. Petitioners argue that the  
4 county's decision fails to demonstrate that two of those  
5 criteria, ZDO 402.04.C.2 and 402.04.C.5, are satisfied.

6 A. ZDO 402.04.C.2

7 "The Findings and Decision do not demonstrate that a  
8 live-in assistant is required to manage the farm,  
9 given that one of the principal operators is employed  
10 full-time off the farm and no evidence shows that both  
11 principal farm operators must be gone from the farm at  
12 the same time." Petition for Review 6.

13 ZDO 402.04.C.2 establishes the following criterion for  
14 approval of an accessory farm dwelling:

15 "The assistance of the occupant(s) of the accessory  
16 dwelling is, or will be, required by the farm operator  
17 in the management of the farm use. If the occupant(s)  
18 of the accessory dwelling is not related to the farm  
19 operator, the need for assistance shall be based  
20 solely on the size, type, and intensity of the farm  
21 use, and not on the personal conditions of the farm  
22 operator."

23 The county findings addressing ZDO 402.04.C.2 provide:

24 "The Hearings Officer believes all of the information  
25 concerning the nature of the farm use of breeding and  
26 raising llamas as set out by the applicants [at Record  
38-39]. This information establishes the need for  
assistance. Essentially, because of the nature of the  
animals themselves, the great value of the newly born  
llamas, the fact that births occur year-around and are  
not necessarily predictable, and the continuous care  
required by the animals, it is necessary that a care  
provider be available to the animals at all times.  
The nature of the business of marketing the animals,  
requiring the operators to be on the road on many  
occasions and the long hours involved in daily care,  
make it impossible for the farm operators to  
adequately manage the farm use without assistance.  
Further, this assistance needs to be available on a  
year-around basis." Record 3.

1           Petitioners do not challenge the county's determination  
2 that the applicants' llamas require continuous care. Rather,  
3 petitioners challenge the county's conclusion that the  
4 assistance of someone other than the applicants themselves is  
5 required to provide that continuous care.<sup>1</sup>

6           Petitioners point out the record shows that applicant  
7 George Elser has full-time nonfarm employment, and will continue  
8 to be so employed after the llama operation is relocated to the  
9 subject property. Petitioners contend there is no evidence in  
10 the record, other than his off-site job, to explain why George  
11 Elser cannot provide the assistance his wife needs to operate  
12 the farm.

13           Petitioners argue that in Heininge v. Clackamas County, \_\_\_  
14 Or LUBA \_\_\_ (LUBA No. 88-070, January 18, 1989) (Heininge), LUBA  
15 held that a farm operator's choice to pursue off-site nonfarm  
16 employment cannot support a determination that the farm  
17 operation requires additional assistance justifying an accessory  
18 dwelling under ZDO 402.04.C.2.<sup>2</sup> Petitioners point out that in  
19 Heininge LUBA upheld the following county finding:

20           "\* \* \* The ZDO does not permit the location of an  
21 accessory dwelling in conjunction with a commercial  
22 farm operation merely because the farm operator has

23           <sup>1</sup>Petitioners also challenge the county's determination that the  
24 assistant required to help provide continuous care to the llamas must  
25 reside on the subject property. This issue is addressed under  
subassignment B, *infra*.

26           <sup>2</sup>Our opinion in Heininge refers to ZDO 402.04.B.2. That provision has  
since been renumbered as ZDO 402.04.C.2.

1 decided to make himself unavailable for required farm  
2 management.'" Heininge, slip op at 9.

3 Petitioners also point out that in Heininge the proposed  
4 accessory farm dwelling was for a relative of the farm operator  
5 and, therefore, the "personal conditions" of the operator were a  
6 relevant consideration. According to petitioners, LUBA held in  
7 Heininge that under ZDO 402.04.C.2, the "personal conditions" of  
8 a farm operator do not "encompass voluntary choices, such as the  
9 decision to devote most of one's time to a new business."  
10 Heininge, slip op at 11. Petitioners assert that if a farm  
11 operator's off-site nonfarm employment will not justify an  
12 accessory dwelling for a relative, such off-site nonfarm  
13 employment certainly cannot justify an accessory dwelling for an  
14 unrelated occupant.<sup>3</sup>

15 Petitioners further argue the record lacks evidence as to  
16 why both applicants must be absent from the farm at the same  
17 time to go on llama marketing trips. According to petitioners,  
18 such simultaneous absences from the farm may simply be the  
19 applicants' choice. Petitioners conclude that the applicants'  
20 choices not to manage the farm themselves, and to go on  
21 marketing trips together, are not sufficient to satisfy the  
22 criterion of ZDO 402.04.C.2 that additional assistance be  
23 required by the farm operator.

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24  
25 <sup>3</sup>Petitioners note LUBA has described the county's ZDO criteria for  
26 accessory farm dwellings for relatives as being "less stringent" than those  
for accessory farm dwellings for non-related occupants. Hopper v.  
Clackamas County, 15 Or LUBA 413, 418, n 1 (1987).

1           The county argues that it is incorrect to interpret  
2 ZDO 402.04.C.2 to preclude any family member living in a primary  
3 farm dwelling from having employment off the farm. According to  
4 the county, the record shows that Jan Elser, the actual "farm  
5 operator," has no outside employment and works full-time on the  
6 farm. The record shows that George Elser has outside  
7 employment, but also is active in the llama operation. The  
8 county maintains that this significant involvement in the llama  
9 operation of both the farm operator and her spouse "is a  
10 sufficient base from which to proceed to a determination whether  
11 additional assistance is required." Respondent's Brief 3. The  
12 county argues that ZDO 402.04.C.2 does not require that both  
13 Elsers devote their time exclusively to the farm operation.

14           The county asserts that the facts involved in Heininge,  
15 supra, were quite different from those involved in this case.  
16 In Heininge, the applicants sought approval for an accessory  
17 dwelling for a son who would take over the management of their  
18 nursery stock and Christmas tree operation. Mrs. Heininge had  
19 full-time outside employment, and would provide no assistance in  
20 the farm operation. Mr. Heininge also had full-time outside  
21 employment and would devote very little time to the farm  
22 operation. Heininge, slip op at 13. The county points out, in  
23 contrast, that in this case Jan Elser works full-time at the  
24 farming operation and George Elser also devotes a good deal of  
25 time to it.

26           The county also contends that even if George Elser were to

1 quit his outside job, additional assistance would still be  
2 required for the Elsers' llama operation. According to the  
3 county, the record shows that at least one of the Elsers works  
4 with the llamas from 5:30 AM to 11 PM every day, and someone  
5 must be on the property 24 hours a day. Record 12, 21.  
6 Furthermore, the county argues the record shows that any time a  
7 llama is sick or injured, around-the-clock care is required.  
8 Record 38.

9 The county further argues there is evidence in the record  
10 not only that both Elsers are required on llama marketing trips,  
11 but also that they sometimes require additional assistance to  
12 transport and handle llamas on such trips. Record 24. The  
13 county also contends that it is understandable that the Elsers  
14 might occasionally want to take a vacation together. According  
15 to the county, in the past they were able to do this because  
16 they had children at home who could care for the llamas, but in  
17 the future the children will be elsewhere. Record 14, 21. The  
18 county argues that ZDO 402.04.C.2 is not so strict that it  
19 requires the Elsers to arrange their lives so that at least one  
20 of them will be on the property 24 hours a day, 365 days a year,  
21 before they can demonstrate a need for assistance in the llama  
22 operation.

23 Petitioners concede that the Elsers' llamas require  
24 continuous care. However, petitioners' basic contention is that  
25 ZDO 402.04.C.2 is violated because the Elsers would not require  
26 additional assistance to give continuous care to their llamas if

1 George Elser did not have outside employment and they did not go  
2 on marketing trips and vacations together.

3 We agree with the county that the record contains  
4 substantial evidence that at least two people are needed to  
5 transport and handle the llamas on the Elsers' marketing trips.  
6 We further agree with the county that ZDO 402.04.C.2 is not so  
7 strict that it precludes any family member living in a primary  
8 farm dwelling from having outside employment, or family members  
9 from taking vacations together, in order to demonstrate a  
10 requirement for assistance in a farm operation. In this case,  
11 ZDO 402.04.C.2 is satisfied by finding, based on the size, type,  
12 and intensity of the farm use, a need for additional assistance  
13 beyond the full-time efforts of one spouse and significant  
14 efforts of the other.<sup>4</sup>

15 This subassignment of error is denied.  
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18 <sup>4</sup>We note that we do not decide in this case the minimum acceptable  
19 degree of participation by a farm operator and family members living in the  
20 primary farm dwelling in determining whether the assistance of a  
21 non-relative(s) is required under ZDO 402.04.C.2. We simply determine that  
22 one spouse working full-time in the farm operation and the other devoting a  
23 significant amount of time to it is a sufficient degree of farm operator  
24 participation upon which to base a determination that additional assistance  
25 by a non-relative is required under ZDO 402.04.C.2.

26 We further note that the situation in this case is very different than  
that presented in Heininge. As the county points out, in Heininge the  
proposed accessory dwelling was for a relative, Mr. Heininge intended to  
devote a small amount of time to the farm operation (approximately 15 hours  
per week), and Mrs. Heininge did not intend to participate in the farm  
operation at all. Heininge, slip op at 13. In Heininge, the relevant  
issue was whether this minimal involvement by the Heininges in the farm  
operation and their consequent need for assistance were, under  
ZDO 402.04.C.2, due to the "personal conditions" of the farm operator.

1 B. ZDO 402.04.C.5

2 "The Findings and Decision do not demonstrate why an  
3 assistant could not live in town or why an assistant  
4 could not stay on the farm in the absence of the  
principal farm operators." Petition for Review 11.

5 ZDO 402.04.C.5 establishes the following criterion for  
6 approval of an accessory farm dwelling:

7 "There are no other suitable housing alternatives on  
8 the property or in the vicinity available to the farm  
help."

9 The county findings addressing ZDO 402.04.C.2 provide:

10 "\* \* \* The only other housing available on the  
11 property is the principal residence of the farm  
operators. It is not reasonable to require that the  
needed herdsman reside in that same residence.

12 "Regarding other housing in the vicinity, this is a  
13 rural, agricultural community. There is not rental  
14 housing in the immediate area. The City of Oregon  
15 City is only 4-5 miles distant, and, theoretically the  
16 herdsman could find housing there. However, the  
17 Hearings Officer is satisfied from this record that it  
is necessary that the herdsman be located on the  
property to provide the needed assistance. It is  
necessary that the assistance be immediately available  
for birthing and to deal with illness or other  
problems of the animals." Record 4.

18 Petitioners argue the hearings officer misconstrued the law  
19 by confusing the requirement of ZDO 402.04.C.5 that no suitable  
20 housing alternatives be available in the vicinity with the  
21 requirement of ZDO 402.04.C.2 that a live-in herdsman's  
22 assistance be required in the management of the farm. According  
23 to petitioners, these two criteria are separate and distinct.  
24 Petitioners argue both the record and the findings show that  
25 housing for a herdsman is available in Oregon City, only four  
26 miles from the subject property.

1           Petitioners also argue the record does not show that the  
2 continuous care required by the applicants' llamas can only be  
3 provided by a herdsman residing on the subject property.  
4 According to petitioners, the findings and record do not support  
5 a conclusion that a live-in assistant is required to help with  
6 llama births. Petitioners argue there is no evidence that an  
7 assistant could not live elsewhere and travel to the property  
8 when the birthing process begins. Petitioners contend that two  
9 or three births a month do not justify a full-time, live-in  
10 assistant.

11           Petitioners also argue that the absence of the applicants  
12 while on marketing trips and vacations does not mean that an  
13 assistant is required to reside in an accessory dwelling on the  
14 property. Petitioners contend that while both applicants are  
15 absent from the property on such trips, a farm assistant could  
16 stay in their dwelling.

17           The county points out that ZDO 402.04.C.5 requires there be  
18 no suitable housing alternatives available to the needed farm  
19 assistant. The county maintains that both the findings and the  
20 evidence in the record support the county's determination that  
21 the assistance of the herdsman must be "immediately available"  
22 at all times. Record 4, 12, 17, 22, 24. Therefore, according  
23 to the county, a residence not on the subject property itself is  
24 not "suitable housing." Furthermore, the county points out that  
25 the only housing on the property itself is the applicants' own  
26 dwelling, and argues it correctly found that ZDO 402.04.C.5 does

1 not require the applicants to allow their hired herdsman to move  
2 in with them.

3 We agree with the county that ZDO 402.04.C.5 does not  
4 require a showing that there is absolutely no housing available  
5 in the area, but rather that there is no suitable housing  
6 available. In this case, housing suitable to meet the  
7 identified need for assistance is housing on the subject  
8 property itself. The county found that "[i]t is necessary that  
9 the herdsman be located on the property to provide the needed  
10 assistance \* \* \* for birthing and to deal with illness or other  
11 problems of the animals." Record 4. Furthermore, there is  
12 substantial evidence in the record to support the finding.  
13 Record 12, 17, 22, 24.

14 This subassignment of error is denied.<sup>5</sup>

15 The first assignment of error is denied.

16 SECOND ASSIGNMENT OF ERROR

17 "The applicant failed to establish a commercial farm  
18 use on the premises before an accessory farm dwelling  
19 was approved and such approval of a proposed use was  
20 improper."

21 The county's decision states that "[t[he commercial farm  
22 use described in the [applicants'] farm management plan does not

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23 <sup>5</sup>We note that petitioners' contention there is no evidence in the record  
24 as to why a hired assistant could not stay in the applicants' dwelling  
25 while they are on marketing trips or vacations, even if correct, would not  
26 provide a basis for reversing or remanding the county's decision. As  
stated in the text, infra, the decision and the record show that  
immediately available assistance is needed at times other than when the  
applicants are on marketing trips or vacations.

1 exist on the property at this time." Record 2. However, the  
2 decision makes approval of the accessory farm dwelling subject  
3 to the following condition:

4 "DTD approval of a building permit for the accessory  
5 dwelling. This permit may be issued only after the  
6 applicants have implemented this approved [farm]  
management plan and a commercial farm use has been  
established on the property." Record 5.

7 Petitioners argue that the county's decision violates the  
8 following provisions of OAR 660-05-030(4):

9 "ORS 215.213(1)(g) and 215.283(1)(f) authorize a farm  
10 dwelling in an EFU zone only where it is shown that  
11 the dwelling will be situated on a parcel currently  
employed for farm use as defined in ORS 215.203. Land  
12 is not in farm use unless the day-to-day activities on  
the subject land are principally directed to the farm  
13 use of the land. \* \* \* At a minimum, farm dwellings  
cannot be authorized before establishment of farm uses  
on the land \* \* \*." (Emphasis added.)

14 According to petitioners, the above-emphasized portion of  
15 OAR 660-05-030(4) requires the establishment of farm use before  
16 a farm dwelling can be approved on EFU zoned land. Petitioners  
17 concede that in Newcomer v. Clackamas County, 92 Or App 174,  
18 182, n 3, 758 P2d 369 (1988) (Newcomer I), the Court of Appeals  
19 noted that the approval of a farm dwelling on EFU zoned land  
20 could be made contingent on the applicant's initiation of a  
21 specific level of farm use on the property. Petitioners argue,  
22 however, that the Court of Appeals conceded, in its opinion on  
23 reconsideration of Newcomer I, Newcomer v. Clackamas County, 94  
24 Or App 33, 36, 764 P2d 927 (1988) (Newcomer II), that it had  
25 failed to consider the impact of OAR 660-05-030(4). In  
26 Newcomer II, 94 Or App at 39, the court specifically withdrew

1 its previous conclusion that farm dwellings may be permitted on  
2 EFU-zoned land before some actual farm use is initiated.  
3 According to petitioners, this means that Newcomer II  
4 specifically disapproves the note in Newcomer I indicating  
5 counties may grant contingent approvals for farm dwellings on  
6 EFU zoned land.

7 Petitioners argue, in the alternative, that even if  
8 conditional approval of a farm dwelling is proper prior to  
9 establishment of farm use of the subject property, in this case  
10 the county erred by failing to specify the activities that must  
11 be carried out to constitute farm use of the property.  
12 Petitioners argue that the county should have identified in its  
13 order specific activities to be carried out before a building  
14 permit for the accessory dwelling can be issued, rather than  
15 stating a building permit will be issued only after "the  
16 approved management plan [is implemented] and a commercial farm  
17 use has been established." Record 5. Petitioners also contend  
18 that if the applicants "performed all of the activities listed  
19 in the farm management plan before obtaining a building permit,  
20 they will have already built the accessory dwelling." Petition  
21 for Review 14.

22 Petitioners maintain that the courts and this Board have  
23 established a general rule that "conditions are not an adequate  
24 substitute for findings." Citizens to Save the Willamette  
25 Waterfront, 12 Or LUBA 244, 260 (1984) (quoting Rockaway v.  
26 Stefani, 23 Or App 639, 543 P2d 1089 (1975)). Petitioners

1 complain that the county avoided making findings of compliance  
2 with OAR 660-05-030(4) by conditioning its approval on a future  
3 determination of compliance with this standard.

4 The county argues that what OAR 660-05-030(4) requires is  
5 that there be farm use on a property before a farm dwelling is  
6 built. Therefore, the county maintains it is permissible to  
7 approve a farm dwelling before there is farm use on the property  
8 so long as issuance of a building permit for the farm dwelling  
9 is made contingent upon the farm use first being established.  
10 The county does not consider the use of the phrase "farm  
11 dwellings cannot be authorized before farm uses" in  
12 OAR 660-05-030(4) as intended to prohibit such contingent  
13 approvals of farm dwellings. The county argues that Matteo v.  
14 Polk County, 11 Or LUBA 259, 263, aff'd without opinion 70  
15 Or App 179 (1984), the case which led to the adoption of  
16 OAR 660-05-030(4), states that "before a farm dwelling may be  
17 established on agricultural land, the farm use to which the  
18 dwelling relates must be existing." (Emphasis added by the  
19 county.)

20 The county further argues that the Court of Appeals  
21 endorsed the type of contingent approval of a farm dwelling that  
22 was granted in this case in Newcomer I, 92 Or App at 182, n 3.  
23 The county contends Newcomer II did not disapprove this aspect  
24 of Newcomer I. The county points out that after withdrawing its  
25 previous conclusion that farm dwellings may be permitted on EFU  
26 zoned land before some actual farm use is initiated, the Court

1 stated "[w]e adhere to the other conclusions in our former  
2 opinion." Newcomer II, 94 Or App at 39.

3 The county also argues that its decision adequately  
4 identifies what must occur for a building permit for the  
5 approved accessory dwelling to be issued. According to the  
6 county, under its condition, a commercial farm use will be  
7 considered established on the subject property when the  
8 applicants complete the physical improvements specified in their  
9 approved farm management plan (with the obvious exception of  
10 building the accessory dwelling itself) and move their llama  
11 herd onto the property.

12 We have repeatedly held that once a local government has  
13 decided that a proposal can meet an applicable standard, the  
14 imposition of conditions is an appropriate way to ensure the  
15 standard is met. Miller v. City of Ashland, \_\_\_ Or LUBA \_\_\_  
16 (LUBA No. 88-038, November 22, 1988), slip op 40; McCoy v. Linn  
17 County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 87-046, December 15, 1987),  
18 slip op 7, aff'd 90 Or App 271 (1988); Sigurdson v. Marion  
19 County, 9 Or LUBA 163, 176 (1983). This principle is consistent  
20 with the Court of Appeals' statement in Newcomer I, supra, that  
21 "[w]hen appropriate, the approval of a [farm] dwelling can be  
22 made contingent upon the applicant's initiation of a specific  
23 level of actual farm use and completion of specific preparatory  
24 actions in accordance with an approved farm management plan."  
25 We agree with the county that this aspect of Newcomer I was not  
26 disapproved by the court in Newcomer II.

1           Thus, it is consistent with OAR 660-05-030(4) for a county  
2 to approve a farm dwelling, in conjunction with approval of a  
3 specific farm management plan, in the absence of existing farm  
4 use on the subject property, so long as the county  
5 (1) determines the level of farm use proposed by the farm  
6 management plan satisfies OAR 660-05-030(4), and (2) ensures  
7 through conditions that the farm dwelling cannot actually be  
8 built until after the county determines that the farm management  
9 plan has been carried out.

10           In this case, the county determined that the applicants'  
11 farm management plan proposes that a commercial farm use be  
12 established on the property. Record 2. This is more than a  
13 sufficient level of farm use to satisfy OAR 660-05-030(4), and  
14 petitioners do not contest this determination. Next, the county  
15 imposed a condition that a building permit for the accessory  
16 farm dwelling would not be approved until after the applicants  
17 implemented the approved farm management plan. Record 5.

18           The farm management plan lists tasks already completed,  
19 tasks still required and the number of llamas per acre to be  
20 placed on the subject property. Record 59-61. We agree with  
21 the county that in this case, it is sufficiently clear from the  
22 farm management plan that what is required of the applicants to  
23 implement the plan, and satisfy the county's condition, is to  
24 carry out the tasks listed as "still required" (with the  
25 exception of building the proposed accessory dwelling) and to  
26 move their existing llama herd onto the property.

1           The county's decision ensures that a building permit for  
2 the approved accessory farm dwelling will not be issued before  
3 the farm use proposed by the approved farm management plan is  
4 established on the subject property. This is sufficient to  
5 satisfy OAR 660-05-030(4).

6           The second assignment of error is denied.

7           The county's decision is affirmed.