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

3	STEPHEN SIEGEL,)	
	THERESA SCHLEGEL,)	
4	RONALD SHAFFER,)	
)	
5	Petitioners,)	LUBA No. 82-008
)	
6	vs.)	FINAL OPINION
)	AND ORDER
7	JOSEPHINE COUNTY,)	
	and PAUL GRANCELL,)	
8)	
	Respondents.)	

10 Appeal from Josephine County.

11 Stephen Siegel, Theresa Schlegel, Ronald Shaffer, Grants
12 Pass, filed the Petition for Review and argued the cause on
their own behalf.

13 Daniel F. Hughes, Grants Pass, filed the brief and argued
14 the cause on behalf of Respondent Paul Grancell.

15 No appearance by Josephine County.

16 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;
participated in this decision.

17 AFFIRMED 6/14/82

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners appeal Josephine County's decision which allows
4 a second dwelling on a lot subject to conditions. The county's
5 decision was pursuant to the "special provisions" section of
6 the county's zoning ordinance which provides that the county
7 may permit

8 "A second dwelling on a lot, subject to the
9 following conditions:

10 "a. The second dwelling must be occupied by
11 parent, grandparent, brother, sister, son or
12 daughter of the record owner. Other
relationships may be allowed by the planning
commission when individual circumstances warrant
such action.

13 "b. The circumstances relating to the
14 necessity for the second dwelling must establish
15 either a health condition necessitating constant
16 attention by the record owner, or in the case of
17 a son or daughter, an economic hardship, in which
18 event, the permit shall not exceed nine (9)
months in duration. The fact that someone has
attained the age to retire from active work is
not a sufficient justification for applying for
this provision.

19 "c. The property owner must enter into an
20 agreement with the county verifying the facts,
21 acknowledging the conditions of approval, and
22 promising immediate removal of the second
dwelling unit upon termination of the
circumstances justifying approval." Josephine
County Zoning Regulations, Section 22(1)(k).

23 The application for a second dwelling unit was submitted by Mr.
24 Paul Grancell who, with his wife, resides on a 4.35 acre parcel
25 in Josephine County. He requested the second dwelling unit so
26 that his daughter and son-in-law could move onto the property

1 to care for him. He believed care by these relatives was
2 needed because he was legally blind.

3 Petitioners challenge the county's decision approving the
4 second dwelling unit on the basis that the findings in support
5 of the county's decision are inadequate as a matter of law, and
6 there is not substantial evidence in the record to support the
7 county's findings. We affirm the county's decision.

8 FACTS

9 Respondent Grancell received approval from the Josephine
10 County planning director for placement of a second dwelling
11 unit on respondent's property. The planning director's
12 approval was reviewed by the zoning commission and affirmed.
13 Thereafter, petitioner Rachel Siegel requested that the zoning
14 commission conduct a public hearing and review its decision.
15 The zoning commission held a public hearing and heard testimony
16 from numerous witnesses. At the close of the public hearing,
17 the zoning commission adopted findings of fact but took no
18 formal action. Notwithstanding the zoning commission's
19 inaction, the matter was appealed to the Board of
20 Commissioners. The Board of Commissioners, by a two to one
21 vote, affirmed the planning director's approval of the second
22 dwelling unit. Two of the commissioners voted to adopt those
23 findings of the planning commission which were in support of
24 the approval. These two commissioners also adopted additional
25 findings in support of the approval.

26 As part of the hearings process before the county planning

1 director or zoning commission, respondent Grancell submitted a
2 form medical certificate filled in and signed by his doctor.
3 The form certificate, with portions filled in by respondent
4 Grancell's doctor emphasized, was as follows:

5 "This certifies that Grancell, Paul is my
6 patient/outpatient and that the condition of health
7 described below requires this person to have constant
8 care or supervision by a relative or friend, and that
9 inability to obtain this care would necessitate
10 institutionalized care.

11 The condition of health requiring care is: macular
12 degeneration.

13 The treatment administered consists of: (medication,
14 surgery, therapy, etc.)

15 Periodic follow-ups."

16 The form medical certificate was supplied by the county to be
17 used for purposes of administration of Section 22(k) of the
18 county's zoning ordinance. It was pursuant to Section 22(k)
19 that respondent Grancell made his application. Respondent
20 Grancell also submitted a certificate of blindness from the
21 State of Oregon Commission For The Blind stating that he was
22 legally blind. The certificate defines "blind individual" as

23 "An individual whose central visual acuity does
24 not exceed 20/200 in the better eye with correcting
25 lenses, or whose visual acuity is greater than 20/200
26 but is accompanied by a limitation in the fields of
vision such that the widest diameter of the visual
field subtends an angle no greater than 20 degrees."

27 At the hearing before the zoning commission, Mr. Anderson,
28 Mr. Grancell, Mr. Cunningham, Mr. Spandri, Mr. Vahrenwald and
29 Mr. Pangburn testified in support of approving the second
30 dwelling unit. Mr. Anderson testified that Mr. Grancell was

1 chairman of the Elks Lodge National Foundation and that Mr.
2 Anderson was his assistant. Mr. Anderson said that Mr.
3 Grancell could not see well enough to do the job he was
4 appointed to do, so Mr. Anderson did a majority of the work for
5 Mr. Grancell. Mr. Anderson also testified that Mr. Grancell
6 could not read letters 3/8ths of an inch high, and that when he
7 went to dinner with Mr. Grancell, if the lighting were not
8 sufficient, Mr. Grancell could not see what was on his plate.
9 Mr. Anderson stated that Mr. Grancell's condition was
10 deteriorating.

11 Mr. Grancell testified that he has a severe eyesight
12 problem and that he is under a doctor's care. His main
13 problems are dizzy-spells and flashing lights. He testified
14 that he could operate a rototiller in his yard for 15 to 30
15 minutes at a time, then would have to sit down for 15 minutes.

16 Mr. Cunningham testified that he lived directly across the
17 street from Mr. Grancell and had had the opportunity to observe
18 his deteriorating condition. Mr. Cunningham noted that if
19 opponents who had testified Mr. Grancell kept his property well
20 maintained looked closely they would find there were "quite a
21 few weeds." He testified that he had seen Mr. and Mrs. Spandri
22 operating the rototiller in addition to Mr. Grancell.

23 Mr. Spandri, Mr. Grancell's son-in-law, testified that Mr.
24 Grancell's rototiller was very easy to operate and could be
25 controlled with one finger. Mr. Spandri's 10 year old son
26 often operated the rototiller for Mr. Grancell. Mr. Grancell

1 could not, according to Mr. Spandri, operate any other kind of
2 rototiller. Mr. Spandri concluded his testimony by noting that
3 Mr. Grancell had been an active person all his life and that if
4 he did not have someone on the property to assist him he would
5 attempt to do whatever needed to be done all by himself.

6 Mr. Vahrenwald noted that Mr. Grancell could no longer
7 identify him from a distance of between 25 to 50 feet. Mr.
8 Pangburn said, based on his experience,¹ that just because
9 Mr. Grancell's wife was at home did not necessarily mean that
10 she would be able to provide "constant care" for him.

11 Mr. and Mrs. Siegel, Mr. Longhurst, Mr. Shaffer and Mr.
12 Axtail testified before the zoning commission in opposition to
13 the approval. Both Mr. and Mrs. Siegel testified to the
14 numerous times they had observed Mr. Grancell operating his
15 rototiller in his garden as well as doing other gardening
16 tasks. They both questioned whether someone who was capable of
17 performing these activities was in need of constant care or
18 supervision within the meaning of the county zoning ordinance.
19 Mrs. Siegel asked the commission why a second dwelling unit was
20 necessary on the property "when his wife is there and in good
21 health and he certainly appears to be himself at this time."
22 Mr. Siegel testified he thought it significant that not once
23 had Mr. Grancell ever indicated to him that he required
24 constant care and supervision or that failure to obtain such
25 care would require him to be placed in a convalescent home or
26 other constant care facility. Mr. Siegel also did not believe

1 Mr. Grancell had ever in the proceeding claimed he needed help
2 caring for himself; the only claim made was that Mr. Grancell
3 needed help caring for his garden. Mr. Siegel testified that
4 Mr. Grancell's daughter and her family had not spent any
5 significant amount of time on the property in the last two
6 months. Mr. Siegel did not understand how Mr. Grancell could
7 do all this work if he was in need of constant care and
8 supervision. Mr. Siegel did not believe that blindness was a
9 sufficient criterion to justify a conclusion a person needs
10 constant care and supervision, noting that five totally blind
11 people had recently climbed Mt. Rainier. Mr. Siegel testified
12 that "no medical information was presented to substantiate the
13 claim that Mr. Grancell is essentially an invalid. Even Mr.
14 Grancell did not claim this, but this is the only valid reason
15 for approval."

16 Mr. Longhurst testified concerning Mr. Grancell's constant
17 rototilling and said he did not believe that anyone who "spent
18 the amount of time Mr. Grancell did in maintaining his property
19 needed to be institutionalized." He also said he did not
20 understand why Mrs. Grancell could not provide the care needed
21 by Mr. Grancell. Mr. Shaffer stated he concurred with
22 petitioner Siegel's comments. He also stressed the amount of
23 time Mr. Grancell devoted to his garden and that he did a very
24 good job. The minutes reflect Mr. Axtail, former zoning
25 commission member, testified that the request had first come
26 before the commission when he was a member. He subsequently

1 decided the medical information was not adequate to enable the
2 commission to make a decision.

3 In response to the Siegel's questions about whether Mrs.
4 Grancell was able to take care of Mr. Grancell, Mr. Grancell
5 said that his wife was 66 years old and that while she did her
6 best to care for him, "his doctor felt it would be better if a
7 younger person was there to assist him."

8 In addition to the above, Dr. Apostol supplemented his
9 earlier medical certification in a letter responding to a
10 request for more information from the county's permit
11 administrator. Dr. Apostol's letter stated:

12 "Mr. Grancell was last examined May 1981 at which
13 time his visual acuity was 20/count fingers, right
14 eye; 20/400 in the left."

15 After listening to the foregoing testimony, "dissenting"
16 zoning commission members Herman, Faine, Hickson and Mootz made
17 certain findings. Among them they found:

- 18 (1) Mr. Grancell was legally blind, and that even
19 with corrective lenses his vision was 20/200
20 which was very poor.
- 21 (2) Mr. Grancell's condition had deteriorated over
22 the past year, which indicated further
23 deterioration could occur;
- 24 (3) Mr. Grancell required constant care or
25 supervision which could not feasibly be provided
26 by Mrs. Grancell;
- (4) Mr. Grancell's parcel was one of the larger
parcels in the area;
- (5) A second dwelling unit would not adversely impact
adjoining property owners because the same size
family would be occupying the mobile home as had
lived there before.

1 The public hearing before the Board of Commissioners on
2 appeal from the zoning commission's "action" consisted mainly
3 of repeating the testimony given before the zoning commission
4 and argument concerning that testimony. By a vote of two to
5 one, the Board of Commissioners upheld the planning director's
6 approval of the second dwelling permit. The Board adopted the
7 findings of the dissenting zoning commission members set forth
8 above. The Board of Commissioners also stated the following in
9 the "findings, reasons and conclusions" section of the order:

10 "Commissioner Haugen cited the testimony
11 incorporated in the Staff Report concerning the
12 progressive deterioration of Mr. Grancell's condition
13 in addition to the testimony given by Messrs. Delbert
14 Anderson, Paul Cunningham, Andrew Vahrenwald, Walter
15 Spandri and in particular Marvin Pangburn's
16 testimony. Commissioner Ford concurred.

17 "Commissioners Haugen and Ford cited the
18 Certification of Health Condition signed by Dr. John
19 G. Apostol, certifying that the condition of Mr.
20 Grancell's health required constant care or
21 supervision by a relative or friend; further, that
22 inability to obtain this care would necessitate
23 institutionalized care.

24 "Commissioner Ford cited the State of Oregon
25 Certificate of Blindness dated December 16, 1980,
26 certifying that Paul Grancell was blind within the
legal definition.

 "Noting testimony concerning the physical
appearance of the applicant, Commissioner Haugen
believed this was irrelevant and had no bearing on the
medical hardship attested to by Dr. Apostol; namely
macular degeneration, which posed some problem.
Commissioner Ford concurred.

 "Commissioners Haugen and Ford cited the reasons
given by Messrs. Faine, Hickson, Herman and Mootz and
adopted said reasons by reference."

1 OPINION

2 1. Jurisdiction.

3 Respondent Grancell raises two issues which must be dealt
4 with preliminarily. The first issue is that this Board lacks
5 jurisdiction over the county's decision. Respondent's argument
6 is that petitioners have failed to allege a violation of any
7 statewide planning goals and that without such alleged
8 violations we lack jurisdiction. Respondent cites two recent
9 Court of Appeals opinions: Fisher v Colwell, 51 Or App 301,
10 625 P2d 1333 (1981), and Montmore Homeowners Association v
11 Brydon, 55 Or App 242, ___ P2d ___ (1981).

12 The cases cited by respondent are distinguishable from the
13 present case. It is true that in both of those cases, the
14 Court of Appeals ruled that we lacked jurisdiction in the
15 absence of alleged violations of statewide planning goals. But
16 in those cases the petitioners had only alleged violations of
17 local ordinances. Those ordinances did not implement a
18 comprehensive plan because the City of Portland had no
19 comprehensive plan. Under 1979 Oregon Laws, ch 772, sec 3
20 (1981 Replacement Part), in effect when the above cases were
21 decided, LUBA had jurisdiction over land use decisions. A land
22 use decision was defined, in pertinent part, as:

23 "A final decision or determination...that
24 concerns the adoption, amendment or application of:

25 "(A) The statewide planning goals;

26 "(B) A comprehensive plan provision; or

1 "(C) A zoning, subdivision or other ordinance
2 that implements a comprehensive plan;..."

3 In the two Court of Appeals cases, petitioners did not allege
4 before LUBA that the decision violated statewide planning goals
5 or a comprehensive plan provision. The ordinance of the City
6 of Portland allegedly violated was not one which implemented a
7 comprehensive plan because the City of Portland did not have a
8 comprehensive plan. Accordingly, the Court of Appeals
9 concluded the city's decisions in both cases were not "land use
10 decisions" over which LUBA had jurisdiction.

11 In the present case petitioners, as in the above cases,
12 have alleged a violation of a local ordinance. However, there
13 is no assertion in this case that the ordinance which
14 petitioners allege to have been violated does not implement the
15 county's comprehensive plan. In fact, the ordinance which is
16 alleged to have been violated in this appeal is the zoning
17 ordinance for Josephine County which states, in Section 14.020
18 "Purpose," that it is the purpose of the zoning ordinance to
19 "provide for the orderly implementation of the comprehensive
20 plan for Josephine County." Accordingly, we conclude
21 petitioners have alleged the county made a decision involving
22 application of an ordinance which implements the county's
23 comprehensive plan, and that this Board, therefore, has
24 jurisdiction under 1979 Oregon Laws, ch 772, (4), as amended by
25 1981 Oregon Laws, ch 748.²

1 2. Standing.

2 The second preliminary issue involves respondent Grancell's
3 challenge to petitioners' standing to appeal. Respondent
4 contests standing because petitioners have failed to allege how
5 their interests were adversely affected or how they were
6 aggrieved by the county's decision. The standing section of
7 petitioners' brief asserts that all three petitioners received
8 notice of the hearings before the Josephine County Zoning
9 Commission and Board of Commissioners. Petitioner Siegel
10 appealed the decision of the Zoning Commission to the Board of
11 Commissioners. All three petitioners appeared before the Board
12 of Commissioners.

13 The petitioner alleges

14 "All three Petitioners are aggrieved by the
15 decision of the Board and assert that their interests
16 as property owners are adversely affected."

17 1979 Oregon Laws, ch 772, sec 4, subsection 3, as amended
18 by 1981 Oregon Laws, ch 748 provides:

19 "Any person who has filed a notice of intent to
20 appeal as provided in subsection (4) of this section
21 may petition the Board for review of a quasi-judicial
22 land use decision if the person:

23 "(a) Appeared before the local government or
24 special district governing body or state
25 agency orally or in writing; and

26 "(b) Was a person entitled as of right to notice
and hearing prior to the decision to be
reviewed or was a person whose interests are
adversely affected or was aggrieved by the
decision."

 Petitioners' claim that their interests are adversely

1 affected and that they are aggrieved by the county's decision
2 is a conclusional statement without facts explaining how the
3 decision affects them. Petitioners are required to set forth
4 the facts in their petition for review which establish their
5 standing. 1979 Or Laws, ch 772, sec 4(6), as amended by 1981
6 Or Laws, ch 748. Parsons v Josephine County, 2 Or LUBA 343
7 (1981); Citizens for Planned Development v The Dalles, 2 Or
8 LUBA 359 (1981).

9 A person need not, to establish standing to appeal a
10 quasi-judicial decision, set forth the facts showing how his or
11 her interest are adversely affected or how s/he is aggrieved by
12 a decision if the person can show s/he was entitled as of right
13 to notice and hearing prior to the decision and s/he appeared
14 orally or in writing in the proceedings. Here, all petitioners
15 alleged they received notice but have not alleged they were
16 entitled as of right to notice. It is the entitlement to
17 notice which satisfies the requirement for standing in our
18 statute, not the mere receipt of notice. The only person who
19 has alleged facts showing he was entitled to receive notice is
20 petitioner Siegel. He alleged that he appealed the Zoning
21 Commission's decision to the Board of Commissioners and, as
22 such, has alleged facts which show his entitlement to notice.
23 See: 1000 Friends of Oregon v Benton County, 2 Or LUBA 324
24 (1981); Clemens v Lane County, 4 Or LUBA 63 (1981).

25 Petitioner Siegel has alleged facts showing that he was
26 entitled as of right to notice and hearing prior to the

1 county's decision and that he appeared before the Board of
2 Commissioners. Petitioner Siegel has standing to bring the
3 present appeal. Petitioners Shaffer and Schlegel, however,
4 have failed to allege facts showing they were entitled as of
5 right to notice and hearing prior to the county's decision or
6 showing their interests were adversely affected or they were
7 aggrieved. They do not have standing to participate in this
8 appeal.

9 3. Assignments of Error.

10 Petitioners' first assignment of error challenges the
11 sufficiency of the evidence to support the county's findings,
12 and the third assignment of error challenges the adequacy of
13 those findings. We will discuss first petitioners' contention
14 with respect to the adequacy of the county's findings.
15 Petitioners make two objections to the adequacy of the
16 findings. The first is that the findings merely summarize
17 portions of the evidence and ignore the remainder of the
18 record. We agree with petitioners' contention, at least in
19 part. First, we should note the county's findings are somewhat
20 unorthodox in their form. Instead of having the findings set
21 out as those of the Board of Commissioners, the findings made
22 by each member of the Board of Commissioners are set forth
23 separately. We have not been asked to pass upon the propriety
24 of the county's procedure and do not do so. The form used by
25 the county does, however, create some confusion as to exactly
26 what findings the Board of Commissioners did make.

1 Second, the findings, listed under each commissioner are,
2 with one very important exception, mere recitations of the
3 evidence or statements that evidence was introduced on a
4 particular point. For example, Commissioner Haugen did not
5 find that Mr. Grancell's condition had deteriorated. Rather,
6 he "cited the testimony incorporated in the Staff Report
7 concerning the progressive deterioration of Mr. Grancell's
8 condition..." It is probable that Commissioner Haugen did
9 believe the evidence concerning deterioration of Mr. Grancell's
10 condition and would, based upon that evidence, have found that
11 Mr. Grancell's condition was deteriorating. However, the
12 "finding" contained in the county's order is not phrased as a
13 finding of fact. See: Norvell v Portland Metro Area Local
14 Government Boundary Commission, 43 Or App 849, 604 P2d 896
15 (1979). We are not permitted, based on this recitation of the
16 evidence alone, to speculate as to whether Commissioner Haugen
17 believed the testimony concerning Mr. Grancell's condition and
18 believed Mr. Grancell's condition was deteriorating.

19 However, when the statements of the individual
20 commissioners are read in connection with that portion of the
21 order which states that they adopt by reference the findings of
22 the zoning commission, it does become clear commissioners
23 Haugen and Ford did "find" Mr. Grancell is legally blind and
24 his condition is deteriorating. They also found or concluded
25 he is in need of constant care and supervision and Mrs.
26 Grancell is unable to provide that constant care and

1 supervision. Therefore, although some statements in the
2 county's order are merely references to or recitations of the
3 evidence, it is permissible to read these statements not as
4 findings of fact but as citations to evidence relied upon by
5 the commissioners in making their findings of fact and
6 conclusions. Accordingly, we find no error in the county's
7 findings based on the contention they are mere recitations of
8 the evidence.

9 Petitioners' second disagreement with the adequacy of the
10 findings concerns the findings' alleged failure to explain why
11 the county commissioners believed the standards for granting a
12 second dwelling permit had been met. Petitioners cite our
13 recent decision in Krause v Josephine County, 4 Or LUBA 143
14 (1981), in which we said:

15 . "Where conflicting evidence exists on a material
16 fact in issue, it is incumbent upon the county to not
17 only state what it found the facts to be but explain
18 why it found as it did." [Citing cases]. 4 Or LUBA
19 143 at 146. (Emphasis added).

20 We take petitioners' challenge to be one directed at the
21 county's determination that Mr. Grancell was in need of
22 constant care and supervision and that Mrs. Grancell could not
23 provide the needed care and supervision. Petitioners believe
24 there was conflicting evidence on these questions, and it was
25 incumbent upon the county to explain why the county accepted
26 the proponents' evidence and rejected the evidence submitted by
petitioners and others. We do not believe the rule expressed
in Krause v Josephine County, supra, is applicable given the

1 evidence in this case. The rule is only applicable if there is
2 conflicting evidence which is competent, relevant and
3 material. As will be discussed more fully in the discussion on
4 petitioners' first assignment of error, we do not believe the
5 evidence in the record in this case was such that we can say
6 there was conflicting evidence material to the issue of Mr.
7 Grancell's need to have constant care and supervision or
8 competent as to the issue of Mrs. Grancell's ability to care
9 for him. As such, we do not believe the county was under a
10 duty to explain, in its findings, why it believed certain
11 evidence over other evidence.

12 Petitioners' first assignment of error is that there was
13 not substantial evidence to support the county's findings. The
14 focus of petitioners' appeal is that Mr. Grancell is not in
15 need of constant care or supervision, the absence of which
16 would require his institutionalization. The basis for
17 petitioners' belief that Mr. Grancell is not in need of
18 constant care or supervision is the contention that he is able
19 to rototill his garden and do yard work.

20 We note at the outset there was conflicting evidence
21 presented as to Mr. Grancell's ability to take care of his
22 garden. Even if the evidence showed Mr. Grancell could take
23 care of his garden, this evidence is, standing alone, not
24 material to the question of whether he is in need of constant
25 care and supervision, the standard under the ordinance for
26 granting a second dwelling permit. The inquiry under the

1 ordinance is not whether the individual's property is in need
2 of care or supervision. Direct evidence was submitted by Mr.
3 Grancell's physician, Dr. Apostol, that Mr. Grancell was in
4 need of constant care and supervision by reason of macular
5 degeneration. While Dr. Apostol did not define the term
6 macular degeneration, it is apparent from the record that
7 "macular degeneration" is an eye condition which has left Mr.
8 Grancell legally blind. Other unrefuted testimony in the
9 record is that Mr. Grancell cannot read print under 3/8ths of
10 an inch in height, that he cannot even read print of that size
11 in poor light, and that he suffers or has suffered from
12 fainting and dizzy spells.

13 The foregoing evidence, in particular that supplied by Dr.
14 Apostol, is sufficient to support a determination that Mr.
15 Grancell is in need of constant care and supervision.³ There
16 is no material evidence to the contrary.

17 The other issue raised by petitioners is whether
18 substantial evidence exists in the record to support the
19 county's determination that Mrs. Grancell cannot provide the
20 care and supervision which Mr. Grancell requires. While this
21 question is more difficult than the previous question, again we
22 conclude substantial evidence exists in the record to support
23 the county's determination, and no believable evidence exists
24 to the contrary. Mr. Grancell testified that his doctor
25 believed a younger person would be better able to provide the
26 care and supervision which Mr. Grancell required. There was

1 also evidence that at least on one occasion Mrs. Grancell was
2 unable to assist Mr. Grancell when he collapsed on his way to
3 the kitchen. Mr. Grancell's daughter and son-in-law for whom
4 the second dwelling permit is intended would seem to meet the
5 younger person requirement.

6 While Mrs. Grancell may well be able to provide some of the
7 care and supervision which Mr. Grancell may require, we believe
8 the record contains sufficient evidence including that
9 referenced above to support a determination that she cannot, by
10 herself, provide the kind of constant care and supervision
11 needed by Mr. Grancell. Primarily petitioners below only
12 challenged the sufficiency of the evidence to support a
13 determination that Mrs. Grancell could not provide the care and
14 supervision required.⁴ Petitioner Siegel also expressed the
15 opinion that Mrs. Grancell could provide the care and
16 supervision which Mr. Grancell may require. Petitioner Siegel
17 testified before the zoning commission that "Mrs. Grancell is
18 completely capable of providing such care as is required." The
19 testimony of Mr. Siegel concerning Mrs. Grancell's ability to
20 care for her husband is opinion evidence. However, Mr.
21 Siegel's qualifications to give such an opinion have not been
22 established by any facts in the record. We believe that
23 without such qualifications being established Mr. Siegel's
24 opinion is not competent, and the county had no duty to explain
25 why his opinion was disbelieved.

26 Petitioners' first assignment of error is, accordingly,

1 denied.

2 Petitioners' second assignment of error is that:

3 "The Board erred in finding that Applicant met
4 the criterion referred to as 'impacts,' which requires
5 evidence as to why property owners should bear the
6 burden of introducing the proposal into their area."

7 Petitioners, in essence, argue that the Board of Commissioners'
8 finding that the second dwelling would not create any adverse
9 impacts is not supported by substantial evidence.

10 Whether the Board of Commissioners' finding was or was not
11 supported by substantial evidence is immaterial, in our view.
12 There is no requirement in Section 22(k) of the county's zoning
13 ordinance or anywhere else in the zoning ordinance to which we
14 have been directed that requires a determination that a second
15 dwelling permit will not create adverse impacts. The county's
16 finding concerning adverse impacts is mere surplusage and must
17 be disregarded for purposes of determining the validity on
18 review of the county's order.

19 Josephine County's order allowing a second dwelling unit on
20 respondent Grancell's property is affirmed.
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FOOTNOTES

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3 1

4 According to the minutes, Mr. Pangburn testified he had previously

5 "worked for ambulance companies in the city of
6 Grants Pass and performed volunteer work at the
7 hospitals as an emergency technician and found
8 that just because an individual had a spouse at
9 home to care for them did not necessarily mean
10 they could provide 'constant care.'"

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13
14 2

15 We note that 1979 Or Laws, ch 772, sec 3 which was
16 interpreted in Fisher v Colwell, supra, and Montmore Homeowners
17 Association v Brydon, supra, was repealed by 1981 Or Laws, ch
18 748. However, the definition of "land use decision" which
19 previously appeared in 1979 Or Laws, ch 772, sec 3 was modified
20 and now appears in ORS 197.015(10). The definition of land use
21 decision as it appears in ORS 197.015(10) is basically
22 unchanged from that which appeared in sec 3 of 1979 Or Laws, ch
23 772 and is as follows:

24 "'Land Use Decision' means:

25 "(a) A final decision or determination made by a
26 local government or special district that
concerns the adoption, amendment or
application of:

27 "(A) The goals;

28 "(B) A comprehensive plan provision; or

29 "(C) A land use regulation;..."

30 "'Land use regulation' is defined in ORS 197.015(11)
31 as:

32 "Any local government zoning ordinance, land
33 division ordinance adopted under ORS 92.044 or
34 92.046 or similar general ordinances establishing
35 standards for implementing a comprehensive plan.
36 'Land Use Regulation' does not include small
tract zoning map amendments, conditional use
permits, individual subdivision, partitioning or
a planned unit development approvals or denials,

1 annexations, variances, building permits and
2 similar administrative-type decisions."

3 Respondent acknowledges the change in the definition of
4 "land use decision" and asserts that the definition in 1979 Or
5 Laws, ch 772, sec 3 is applicable in this appeal because the
6 county's decision was made September 29, 1981, before the
7 revised definition took effect. We do not think it matters
8 which definition of "land use decision" is applicable as under
9 either definition petitioners have appealed a land use decision.

10 3

11 Petitioners have argued that we should give little or no
12 weight to Dr. Apostol's medical certification concerning Mr.
13 Grancell's condition. The reason for this advanced by
14 petitioners is that his letter supplementing the certification
15 was not responsive to a direct question asked of him by the
16 planning director as to whether Mr. Grancell's condition was
17 such that it was necessary for the daughter and son-in-law to
18 be on the property to care for Mr. Grancell. Petitioners state
19 their argument as follows:

20 "Applicant's physician failed to respond to a
21 direct inquiry from the Planning Office concerning
22 Applicant's medical circumstances relating to the
23 criteria. That inquiry specifically addressed the
24 need for a second family. (Record at 35 & 36).
25 Applicant presented no corroboration of any kind
26 before the Commission or the Board in support of the
27 'constant care requirement.' Applicant's wife was at
28 the hearing but did not testify.

29 * * *

30 "Petitioners testified to major discrepancies
31 between the physician's first letter and his failure
32 to respond to the Planning Office concerns. No
33 evidence was presented in support of the first
34 certification of need; neither the applicant nor the
35 Board made any attempt to answer the concern raised by
36 Petitioners about the physician's apparent reversal of
37 his earlier medical opinion." Petition for Review at
38 pp. 16, 17.

39 Petitioners' concern has to do with an interpretation of
40 the letter from the Planning Office directed to Dr. Apostol
41 asking for additional information. The letter, in its
42 entirety, is as follows:

1 "Dear Doctor Apostle [sic]:

2 "On May 21, 1981, the application for Mr. Paul
3 Grancell was presented for affirmation to the
4 Josephine County Zoning Commission. The Zoning
5 Commission is composed of laypersons and a question
6 arose from the audience as to Mr. Grancell's need to
7 have his daughter and son-in-law, Susan and Walter
8 Spandri, on the parcel to care for him.

9 "The applicant stated that he was legally blind on the
10 agreement with the County. Please understand that the
11 Zoning Commission is not questioning your expertise in
12 any way. They would like to have a clarification in
13 layman's terms of 'Macular Degeneration' and
14 specifically if that term would signify if Mr.
15 Grancell is legally blind.

16 "We would very much appreciate hearing from you as
17 soon as possible in order that a determination can be
18 made by the Zoning Commission as to whether it is
19 necessary for the daughter and son-in-law to be there
20 or whether the presence of Mr. Grancell's wife would
21 suffice for his care. We would appreciate your
22 response in helping us arrive at a decision."
23 (Emphasis added).

24 We do not interpret the above letter as asking Dr. Apostol for
25 his opinion as to whether the presence of Mr. Grancell's
26 daughter and son-in-law on the premises is necessary. We
27 interpret the letter, as we believe did Dr. Apostol, as only
28 asking for clarification of the term "macular degeneration" and
29 "if that term would signify Mr. Grancell is legally blind." By
30 not offering his opinion as to the necessity of Mr. Grancell's
31 daughter and son-in-law being on the premises, we do not
32 believe Dr. Apostol in any way avoided answering a question
33 asked of him. The basis, therefore, for petitioners' attack on
34 Dr. Apostol's medical certification is mistaken.

35 _____
36 4

37 Granted, it would be easier for us to review the county's
38 determination if there were more evidence in the record as to
39 exactly what kind of care and supervision Mr. Grancell might
40 require and what Mrs. Grancell's capabilities were in providing
41 that care and supervision. We do not believe, however, that
42 the absence of more detailed information requires us to remand
43 this case to the county.