BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS L. HOPPER, DENNIS K. HOPPER, and HOPPER BROS., a partnership, Petitioners, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 87-007 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Jeffrey H. Keeney, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Tonkon, Torp, Galen, Marmaduke & Booth.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of Respondent County.

No appearance by Applicants Anfilofieffs.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

REMANDED 05/22/87

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners appeal approval of an accessory farm dwelling on property in rural Clackamas County. Petitioners ask that the decision be reversed.

FACTS

The 17.6 acre parcel is in an exclusive farm use zone. It is used to raise a berry crop.

The applicants work off the property and seek a second dwelling to provide a residence for their son and daughter-in-law. The applicants plan that their son will serve as "full-time manager" of the berry farm operation.

FIRST ASSIGNMENT OF ERROR

> "The order and the findings do not demonstrate that the criteria of Clackamas County Code Section 401.04B and ORS 215.213(1)(e) are met."
>
> "1. The occupant of the accessory dwelling will replace, rather than assist, the farm operator in the management of the farm. This result violates Clackamas County Code Section 401.04B(2) and ORS 215.213(1)(e)(B)."

In this subassignment of error, petitioners argue the county order violates Clackamas Development Code, (CDC) Section 401.04B(2) which provides, in part:

> "2. The assistance of the occupant(s) of the accessory dwelling is, or will be, required by the farm operator in the management of the farm use."

Petitioners argue that the applicants Mr. and Mrs. Anfilofieff, both work full time off the farm, and the proposed accessory dwelling allows their son and daughter-in-law to

"take over" the farm operation. See Record 5, 46, 50. Petitioners claim that the zoning ordinance allows a second dwelling only where assistance in farm operations is required. The ordinance does not allow a take over of farm operations, according to petitioners.

The county found

> "the management plan substantiates a need for a second residence on the parcel. The applicants' son will take over the day-to-day management of the farm. The applicant and his wife have other jobs which keep them from active management of the farm." Record 3.

Respondent argues evidence in the record shows that the applicants will continue to have a part in operating the farm. The evidence includes testimony by the applicants' attorney to the effect that Mr. Anfilofieff milks the cow and is the caretaker of a "huge vegetable garden." Record 11. Further, other children in the family help with the berry harvest, moving irrigation pipes and assisting hired berry pickers. Id. Mr. Anfilofieff also assists in the harvest. Ibid, 11-12. Respondent states that occupants of both existing and proposed dwellings will be involved with the farm operations; and, therefore, the additional residence is not meant as a replacement farm dwelling.

Respondent concludes that the "ordinance does not require that activities in furtherance of the farm use be broken down 50/50; nor does it require that the occupant of the original farm dwelling spend more time on farming than the occupant of the new dwelling."

The ordinance and ORS 215.283(1)(e), authorizing an accessory dwelling for a specified relative, appear to place the determination of when the accesory dwelling is "required" on the farm operator. Here, there has been a change in the operator's farm management. Mrs. Anfilofieff is no longer able to provide the management services she provided while Mr. Anfilofieff was away from the farm. The owner is not relinguishing all farm duties, but the management has changed, and nothing in the ordinance requires a particular break down of farm duties between the owner and the relative occupying the accessory dwelling. Under these limited circumstances, we do not find error as alleged.[1]

The first subassignment of error is denied.

> "2. The Order and the Findings do not demonstrate that the accessory dwelling will be located on the same lot or parcel as the principal dwelling of the farm operator."

Petitioners argue that the property consists of two tax lots, Tax Lot 2000 consisting of 16.77 acres and Tax Lot 2001 which consists of .92 acres. Petitioners argue the legal description of the property in the finding confuses the issue by showing a total of 17.7 acres but describes the tax lot as Tax Lot 2000. To petitioners, the existence of the second tax lot is evidence that the applicants' property consists of two lots, not one as suggested by the findings. Petitioners argue that because CDC Section 401.04B(1) requires that the "accessory dwelling will be located on the same lot or parcel

as the principal dwelling of the farm operator," this application fails to meet county criteria.

We disagree. The Clackamas County Zoning and Development Ordinance defines a lot as "any lot, parcel, tract or combination thereof shown on a plat of record or recorded by metes and bounds."

The ordinance does not suggest that adjacent tax lots in the same ownership are separate lots. The county argues its interpretation of the ordinance ignores tax lots and looks to ownerships as indicia of whether a tract meets the definition of "lot" in the county ordinance.

This interpretation is consistent with State v. Emmich, 34 Or App 945, 500 P2d 570 (1978), wherein the court said,

> "[w]e are not directed to any case where land was held to be noncontiguous due to separation by anything short of an intervening geographical barrier or parcel of land in separate ownership. Accordingly, we hold that a parcel of land is subject to the Oregon Subdivision Control Law even though intersected by a road and we uphold the trial court's finding."

The two tax lots under the applicants' ownership do not constitute two lots under the county ordinance.[2]

We deny this subassignment of error.

> "3. The Order and the Findings do not demonstrate that the accessory dwelling will be sited in a manner which minimizes negative impacts on farm uses and sensitive wildlife areas."

Petitioners argue the application does not address the following standard:

> "The accessory dwelling shall be cited in a manner which minimizes negative impacts on farm uses, and

also minimizes impacts on sensitive wildlife areas..." CDC 401.04B(3).

Respondent Clackamas County argues that this criterion does not require a finding. CDC Section 401.04B(3) only requires siting accessory dwellings to minimize negative impacts on farm uses and sensitive wildlife areas identified in the comprehensive plan, according to respondent. Respondent says this property contains no such sensitive wildlife areas, and therefore no comment on this issue is needed in this case.

In addition, respondent argues that this criterion is not an approval requirement but simply a "performance" criterion providing guidelines for actual development of the property.

Respondent is correct that the ordinance appears to address siting after approval. Nevertheless, the criterion does require consideration in the findings. In this case, the order does not state where the accessory dwelling will be placed or what effect it may have on farming operations. We are cited to no evidence about the second dwelling and whether it will have any impact on farm operations. Such a finding is necessary in order to show that any dwelling approved will have the minimal impact called for in the ordinance.[3]

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

"The applicant failed to submit a five-year farm management plan as required by sections 401.04B and 401.10 of the Clackamas County Code."

CDC Section 401.04B requires that a farm management plan be

submitted as part of the application for an accessory dwelling. Section 401.10 describes the plan as follows:

> "A written description of a five-year plan describing the proposed cropping or livestock pattern by type, location, and area size." CDC Section 401.10A(1).

In this case, the applicants submitted a two-year plan. We note the form provided for the county calls for a two-year plan and makes no mention of the five-year requirement.

The county responds that petitioners' complaint is only about a technical failure and does not constitute grounds for reversal or remand. Respondent says the purpose of the plan is to provide evidence "that the proposed farm use is viable, and such evidence is not relevant to a proposal which simply perpetuates an existing farm use." Respondents Brief at 10.

In Hershberger v. Clackamas County, ___ Or LUBA ___ (LUBA No. 87-008, May 1, 1987) we had occasion to construe this same requirement. We noted that where required information does not appear in the proper place but appears elsewhere in the record, petitioners are not entitled to a reversal. However, where required information is not available elsewhere in the record, the application is incomplete, and information necessary for the county to make its decision in accordance with substantive criteria may be impaired. See Dougherty v. Tillamook County, 12 Or LUBA 20 (1984); Grover's Beaver Electric Plumbing v. Klamath Falls, 12 Or LUBA 61 (1984).

In this case, the two-year plan provides sufficient information. There is no change contemplated in the farm

operation aside from the changes in management. The record reveals a continuing berry farm enterprise. Under such circumstances, the failure to detail the next three years of what is a continuing farm operation is not reversable error.[4]

We therefore deny this assignment of error.

This case is remanded to Clackamas County for review of what impacts, if any, will occur as a result of the second dwelling.

FOOTNOTES

[1] We note, as does respondent in its brief, that the county ordinance provides less stringent criteria for allowing a second dwelling occupied by a family member than for one occupied by some other party. A non-family occupant of an accessory dwelling must show that his assistance is not required because of some "personal condition of the farm operator." CDC 401.04(B) In contrast, if the second dwelling is for a family member, all that need be shown is that the accessory dwelling is required in the management of the farm use. This language suggests that the "personal condition of the operator" is sufficient ground to allow a second farm dwelling for a relative.

[2] The application in this place lists the owner of a parcel of land as the applicants, Grigory and Anna Anfilofieff. There is no mention of a second parcel, and we consider the application sufficient evidence to show that only parcel is at issue in this case. We note also that the county found that "the parcel is a legal lot of record." Record 3.

[3] We note the ordinance does not prohibit impacts on farm use, and consideration would seem to be limited to choosing a site with the least impact on farm use and wildlife.

[4] Our view is not without doubt. We note respondent's counsel stated the form which mistakenly requests only a two-year farm management plan is being revised. As this case is being remanded, it might be opportune to update the plan to include the final three years as required by the ordinance.