

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

APR 27 5 10 PM '88

OF THE STATE OF OREGON

ANNA M. WAGONER, SANDRA J.  
THOMPSON, JACK BAKER, DONNA  
COTTARDI, DENNIS WEIS,  
GAYLE REEVES, LAURINE J. and  
RONALD KUNZMAN, WILLIAM E.  
MILEY, BOBBIE J. and CHARLES  
KIBLER, PATRICIA A. and J.  
BAUMGARNER, NATHALIE and ED  
HEGER, ANNE C. VOEGTLIN,  
JEFFREY FULLMAN and  
TOM THOMSEN,

Petitioners,

and

RUSSEL E. and LILA A.  
BASSINDALE,

Participants-  
Petitioners,

vs.

CLACKAMAS COUNTY,

Respondent,

and

RICHARD and BETTY HEININGE,

Participants-  
Respondents.

Appeal from Clackamas County.

Jay T. Waldron, Portland, filed a petition for review and  
argued on behalf of petitioners. With him on the brief was  
Schwabe, Williamson & Wyatt.

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

Richard and Betty Heininge, Aurora, filed a response brief  
and argued on their own behalf.

LUBA No. 87-102

FINAL OPINION  
AND ORDER

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

3               REMANDED                               04/27/88

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

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1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners challenge the county's decision approving an  
4 accessory dwelling in conjunction with farm use for a 26 acre  
5 parcel located in the General Agricultural District (GAD), an  
6 exclusive farm use zone.

7 FACTS

8 The county's decision also rezones a five acre portion of  
9 participants-respondents' (respondents') property from Rural  
10 Residential Farm/Forest-5 to GAD and amends the plan  
11 designation for that five acre portion from Rural to  
12 Agriculture. With these plan and zone changes, respondents own  
13 26 acres designated Agriculture and zoned GAD. Respondents  
14 submitted a farm management plan and requested approval for an  
15 accessory dwelling to be occupied by respondents' son.  
16 According to the farm management plan, the son will take over  
17 primary management of the Christmas and ornamental tree farming  
18 operation conducted on a portion of the 26 acres. Petitioners  
19 challenge only the portion of the county's decision approving  
20 the accessory dwelling.<sup>1</sup>

21 FIRST ASSIGNMENT OF ERROR

22 "Applicants did not establish that there is a  
23 commercial farm on their property under applicable  
county ordinances."

24 Clackamas County Zoning and Development Ordinance (ZDO)  
25 Section 402.04(B), which governs approval of accessory  
26 dwellings in the GAD Zone, provides in pertinent part:

1     "Accessory Dwellings In Conjunction With a Principal  
2     Use: The Planning Director may approve an accessory  
3     dwelling in conjunction with a commercial farm use on  
4     a lot larger than five (5) acres when the applicant  
5     provides a farm management plan, as provided under  
6     Subsection 402.10, and other evidence necessary to  
7     demonstrate that the appropriate criteria below are  
8     satisfied. \* \* \*

9                     \* \* \* \* \*."

10     The above-quoted provision allows accessory dwellings only  
11     "in conjunction with a commercial farm use." Petitioners argue  
12     the respondents' farm is not a commercial farm.

13     The ZDO defines commercial farm as follows:

14     "FARM, COMMERCIAL: A farm unit with all of the  
15     following characteristics:

16         "(a) The land is used for the primary purpose of  
17         obtaining a profit in money from activities  
18         described in Sections 401.03A and B, and  
19         402.03A and B;

20         "(b) The net income derived from farm products is  
21         significant; and

22         "(c) Products from the farm unit contribute  
23         significantly to the agricultural economy, to  
24         agricultural processors and farm markets."  
25         ZDO Section 202.

26     The respondents' farming operation began in 1980 when four  
27     acres of Christmas trees were planted. The operation expanded  
28     in 1981 to nine acres. Expansion to 12 acres is planned for  
29     1988, and ultimately 15.5 acres are to be placed in  
30     agricultural use. The farming operation encompasses Christmas  
31     trees and other nursery stock. Record 122.

32     Petitioners note the respondents' tax returns show the  
33     farming operation resulted in a net loss between 1981 and 1983,

1 and net profits of \$176 in 1984 and \$5,893 in 1985.

2 Petitioners point out the \$176 net profit in 1984 should be  
3 discounted by \$4,571 in one-time logging income and that there  
4 is no way to determine whether the 1985 net income also  
5 includes logging income or other income not appropriately  
6 attributable to the purported commercial farming operation.

7 The county and respondents point to substantial sales of  
8 nursery stock in 1986 and a promised payment of \$10,000 in 1987  
9 for nursery stock sales. In addition, they note income  
10 projected in the farm management plan is \$37,000 in 1986,  
11 \$18,000 in 1987 and \$15,000 in 1988. The county emphasizes it  
12 is understandable that the operation would lose money in  
13 initial years, but that the farm operation is now earning a net  
14 profit and the county expects it to continue to do so in the  
15 future.

16 We do not believe the evidence shows the respondents' farm  
17 operation generates significant net income from farm products  
18 as required by ZDO Section 202(b). The farm did not earn  
19 significant net profits in 1980-84. We are unable to determine  
20 from the record what the net income for 1985 through 1987 is.  
21 We can not tell if the \$5,893 net income for 1985 is limited to  
22 income from the farming operation or whether, as petitioners  
23 suggest, it is artificially inflated by nonrecurring timber  
24 sales. The income projections for 1986 and 1987 show amounts  
25 which, taken at face value, might qualify as significant.  
26 However, we have no way of determining what the net income in

1 those years actually was.

2 The county applies, as a rule of thumb, an annual income  
3 level of \$8,000-\$12,000 to determine whether a farm generates  
4 significant income. This rule of thumb is not adopted as part  
5 of the ZDO. The county argues that this rule of thumb applies  
6 to gross income, but argues even if the rule of thumb applies  
7 to net income, the respondents' projections show significant  
8 income.<sup>2</sup>

9 If respondents' projections are accurate, it may well be  
10 that the significant net income standard in ZDO Section 202(b)  
11 will be met. However, ZDO Section 202(b) requires a showing  
12 that net income is significant, not that it might be in the  
13 future.

14 We are unable to tell what the net income from the farming  
15 operation has been since 1984. In view of the absence of that  
16 information we must agree with petitioners that the record is  
17 insufficient to support the county's unexplained conclusion  
18 that the requirement in ZDO Section 202(b) is met. Because ZDO  
19 Section 202(b) is a mandatory part of the definition of  
20 commercial farm, the county failed to establish that the  
21 respondents' farm is a commercial farm use. Therefore, ZDO  
22 Section 402.04(B), which would only allow the proposed dwelling  
23 if it is "in conjunction with a commercial farm use," was  
24 violated. See Matteo v. Polk County, 11 Or LUBA 259 (1984).<sup>3</sup>

25 The other parts of the definition of commercial farm in ZDO  
26 Section 202 require that the land be "used for the primary

1 purpose of obtaining a profit in money from [agricultural]  
2 activities" and that "the farm unit contribute significantly to  
3 the agricultural economy, to agricultural processors and farm  
4 markets." Petitioners argue the record shows that respondent  
5 is a builder who now runs a model airplane business.  
6 Petitioners say the evidence in the record is insufficient to  
7 show the property is used for the primary purpose of obtaining  
8 a profit in money from agricultural activity.

9 We agree with petitioners that the county's unexplained  
10 conclusion that the property will primarily be used for  
11 agricultural purpose is not sufficient. Only 15.5 acres of the  
12 property will be planted and substantial nonagricultural use of  
13 the property is contemplated. The county's conclusion  
14 regarding primary use appears to be based solely on income  
15 projections, and those assumptions are not sufficient to show  
16 compliance with ZDO Section 202(a).

17 We also agree, as petitioners note, the county failed to  
18 address expressly the requirement in ZDO Section 202(c) that  
19 the products of the farm contribute significantly to the  
20 agricultural economy, agricultural processors and farm  
21 markets. It may be that the production envisioned in the farm  
22 management plan, if achieved, would support findings that the  
23 standard in Section 202(c) is met. However, that production is  
24 speculative, not actual. More importantly, the county's  
25 decision must include a statement of reasons explaining why the  
26 facts found lead to its conclusion that the farm's products

1 "contribute significantly to the agricultural economy, to  
2 agricultural processors and farm markets." South of Sunnyside  
3 v. Clackamas Co. Comm., 280 Or 3, 22-23, 569 P2d 1063 (1977);  
4 Phillips v. Coos County, 4 Or LUBA, 73, 80 (1981).

5 The First Assignment of Error is sustained.<sup>4</sup>

6 SECOND ASSIGNMENT OF ERROR

7 "The applicants did not establish that they needed the  
8 assistance of a relative in the accessory dwelling to  
maintain twelve acres of Christmas trees."

9 Under ZDO Section 402.04(B)(2) the applicant for an  
10 accessory dwelling must demonstrate

11 "The assistance of the occupant(s) of the accessory  
12 dwelling is, or will be, required by the farm operator  
13 in the management of the farm use. If the occupant(s)  
14 of the accessory dwelling is not related to the farm  
15 operator, the need for assistance shall be based  
solely on the size, type, and intensity of the farm  
use, and not on the personal conditions of the farm  
operator." (emphasis added).<sup>5</sup>

16 Petitioners cite a study in the record which shows a single  
17 farm operator can care for up to 80 acres of Christmas trees.  
18 According to petitioners, this study shows the accessory  
19 dwelling is not really required for a farm operation of only  
20 15.5 acres.

21 The county and respondents note that the farm operation  
22 proposed includes nursery stock as well as Christmas trees. We  
23 understand the county and respondents to argue the  
24 non-Christmas tree nursery stock will require more work than  
25 Christmas trees. However, neither the county nor respondents  
26 point to any evidence in the record showing how much additional



1 effort such nursery stock will require. Beyond presenting raw  
2 total numbers of various plant types in the farm management  
3 plan and suggesting that the son is needed to help with  
4 required management, neither the county's order nor the  
5 applicant's plan provide any explanation of the type of  
6 management required, when it is required and why respondents  
7 are not able to perform the required management without the  
8 son's assistance.

9 The county and respondents note correctly that under  
10 Section 402.04(B)(2) the requirement for the assistance of the  
11 occupant of an accessory dwelling may be based on the personal  
12 conditions of the farm operator, if the occupant of the  
13 accessory dwelling is related to the farm operator. Both the  
14 respondent and the county seem to say that the "personal  
15 conditions" of the farm operator may form the entire basis for  
16 the requirement for the assistance of the occupant of the  
17 accessory dwelling. See Hopper v. Clackamas County, \_\_\_\_ Or  
18 LUBA \_\_\_\_ (LUBA No. 87-007; May 22, 1987), affd. 87 Or App  
19 167, \_\_\_\_ P2d \_\_\_\_ (1987).

20 However, all the county's findings disclose is that one of  
21 the respondents, Mr. Heininge, is retiring and plans to devote  
22 more time to his model airplane business. We can not tell  
23 whether Mr. Heininge's plans mean the son's assistance is  
24 "required." It may simply be that it is more convenient for  
25 the respondents to look to their son for assistance. The  
26 county's findings are insufficient to explain why the son's

1 assistance is "required" as provided in Section 402.04(B)(2).

2 The Second Assignment of Error is sustained.

3 THIRD ASSIGNMENT OF ERROR

4 "If the operator is retiring from operating the  
5 Christmas tree farm, then the relative in the  
6 accessory dwelling is replacing the operator and not  
7 assisting him."

8 Petitioners say the respondent is simply retiring from his  
9 building business to devote time to his model airplane  
10 company. Petitioners again note the study that indicates one  
11 operator can take care of up to 80 acres of Christmas trees.  
12 Petitioners claim the record suggests the son is taking over  
13 the farming operation altogether and this circumstance violates  
14 the requirement that the son be needed to "assist" the "farm  
15 operator." Petitioners cite Hopper v. Clackams County, 87 Or  
16 App 167, 172 \_\_\_\_ P2d \_\_\_\_ (1987) in which the Court of Appeals  
17 construed ORS 215.283(1)(e)(B) and concluded:

18 "The critical criterion in ORS 215.283(1)(e)(B) is  
19 whether the accessory dwelling is sought for a  
20 relative 'whose assistance in the management of the  
21 farm use is or will be required by the farm  
22 operator.' We do not construe that phrase to mean  
23 that the amount of the required assistance is the  
24 determinant of whether there may be a relative's  
25 dwelling, as long as the 'farm operator' continues to  
26 have some significant involvement in the farm  
27 operations. (emphasis in opinion).

28 While the wording of ZDO Section 402.04(B)(2) is not  
29 identical to that in ORS 215.283(1)(e)(B), it is substantially  
30 similar. We believe ZDO Section 402.04(B)(2), like  
31 ORS 215.283(1)(e)(B), requires the farm operator to retain  
32 "significant involvement in the farm operation". However, we

1 view the record somewhat differently from petitioners. It is  
2 true that at one place in the record, respondents refer to a  
3 changeover of management. Record 118. However, it is clear  
4 when that statement is placed in context, and viewed with other  
5 parts of the record, that the son is going to assist in the  
6 farm operation and the father will retain "some significant  
7 involvement" as required under Hopper, supra. Record 67, 118,  
8 120.

9 The Third Assignment of Error is denied.

10 FOURTH ASSIGNMENT OF ERROR

11 "The farm management plan proposed by the applicant  
12 does not meet the applicable criteria."

13 Respondents submitted a two year farm management plan. The  
14 code requires a five year plan. ZDO Section 420.10(A)(1).  
15 Petitioners claim the farm management plan, therefore, was  
16 insufficient. Petitioners add two specific arguments under  
17 this assignment of error. Petitioners again attack the income  
18 projections in the farm management plan and claim they do not  
19 show the farm will produce significant net income.  
20 Petitioners' final argument is the plan does not reflect the  
21 use and size of surrounding parcels in writing as required by  
22 ZDO Section 402.10(A)(3).

23 Citing Hopper v. Clackamas Co., supra, the county claims  
24 the submission of a two year farm management plan rather than a  
25 five year plan is only a technical violation which the county  
26 recognized, but excused, and LUBA should do the same.

1 In Hopper, we concluded the county did not err in accepting  
2 a two year plan rather than a five year plan as required under  
3 the ZDO where the information that should have been in the farm  
4 managment plan was available elsewhere in the record. The farm  
5 management plan submittal requirements are as follows:

6 "402.10 SUBMITTAL REQUIREMENTS

7 "A. Farm Management Plan: An application for a  
8 principal use lot division (402.09B) or for  
9 a dwelling in conjunction with a commercial  
10 farm use (402.04) shall include a farm  
11 management plan for the specific uses  
proposed by the applicant. Each management  
plan shall, at a minimum, include all the  
following information:

12 "1. A written description of a five-year  
13 plan describing the proposed cropping  
or livestock pattern by type, location,  
and area size.

14 "2. Soils tests or SCS OR-1 field data  
15 sheets, or similar information  
demonstrating the suitability of the  
16 land for the proposed crop or pasture  
uses.

17 "3. A written description of the commercial  
18 farm uses in the area, including  
acreage size and type of crop or  
19 livestock raised."

20 The only deficiencies petitioners identify as resulting  
21 from the respondents' failure to submit a five year plan are  
22 lack of (1) net income projections and (2) information  
23 regarding adjoining properties. Therefore, we limit our  
24 discussion under this assignment of error to the two  
25 deficiencies petitioners identify.

1       ZDO Section 402.10 does not expressly require either net or  
2 gross income projections. Respondents did, however, supply a  
3 five year projection of estimated gross income. Record 120.  
4 As the county points out, the respondents did submit a map  
5 showing the information about adjoining properties required by  
6 ZDO Section 402.10(A)(3). Supp Record 59. We agree with the  
7 county that the record is sufficient to provide the income and  
8 surrounding parcel information petitioners claim is required by  
9 ZDO 402.10.<sup>6</sup>

10       The Fourth Assignment of Error is denied.

11       The county's decision is remanded.

FOOTNOTES

<sup>1</sup>  
The county also imposed conditions affecting respondents' continued use of a structure located on the five acre portion of the property rezoned to GAD. In their brief, respondents appear to claim the conditions are improper. However, respondents neither appealed the county's decision nor filed a cross petition in this proceeding. Therefore, we do not consider further respondents' claims concerning this aspect of the county's decision. The parties also dispute various aspects of prior development and partition approvals for respondents' property. Those decisions are not before the Board and we do not consider the parties' arguments concerning those decisions.

<sup>2</sup>  
Respondents' projected income figures in the farm management plan for 1986 through 1988 are set forth below. The county applied a factor of .6 to calculate net income from projected gross income. We are uncertain what the basis for this .6 factor is.

<u>FARM MANAGEMENT PLAN</u>		<u>NET ANNUAL INCOME ASSUMING</u>
<u>PROJECTED ANNUAL INCOME</u>		<u>NET INCOME = .6 GROSS INCOME</u>
1986	\$37,000	\$22,000
1987	\$18,000	\$11,000
1988	\$15,000	\$ 9,000

<sup>3</sup>  
In Matteo we interpreted nearly identical language in ORS 215.283(1)(f) ("customarily provided in conjunction with farm use") to require that a farm use currently exist, rather than be in planning stages, before a dwelling could be "in conjunction with farm use." Id. at 263. In Matteo v. Polk County (Matteo II) 14 Or LUBA 67 (1985) we determined that, in addition, the parcel must be "wholly devoted" to farm use. Id. at 73. While petitioner does not argue this requirement, as explained in Matteo II, should apply to the county's decision, we note that only approximately one-half of the 26 acres is presently devoted to farm use and only 15.5 acres is planned for eventual farm use.

///

1 \_\_\_\_\_  
2 4  
3 The county also cites a document prepared by the Oregon  
4 State University Extension Service which the county argues  
5 shows the typical farm unit size for farms producing  
6 horticultural specialties is 25 acres. We do not understand  
7 how this fact shows the definition of commercial farm in ZDO  
8 Section 202 is met.

9 \_\_\_\_\_  
10 5  
11 ZDO Section 402.04(b)(2) closely parallels a similar  
12 provision in ORS 215.283(1) which provides in pertinent  
13 part:

14 "Subject to ORS 215.288, the following uses may be  
15 established in any areas zoned for exclusive farm use:

16 \* \* \* \* \*

17 "(e) A dwelling on real property used for farm use if  
18 the dwelling is:

19 \* \* \* \* \*

20 "(B) Occupied by a relative, which means grandparent,  
21 grandchild, parent, child, brother or sister of the  
22 farm operator or the farm operator's spouse whose  
23 assistance in the management in the farm use is or  
24 will be required by the farm operator." ORS 215.283

25 \_\_\_\_\_  
26 6  
27 As we discussed under the first assignment of error,  
28 we agree with petitioners that the county's acceptance of  
29 gross income figures provides an insufficient basis for  
30 the county to conclude that the farm produces significant  
31 net income as required to met the commercial farm  
32 definition of ZDO Section 200(b). However, ZDO Section  
33 402.10(A) does not require a farm management plan to  
34 include projections of net income.