

LAND USE
BOARD OF APPEALS

JAN 18 2 19 PM '89

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

1 RICHARD and BETTY HEININGE,)
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LUBA No. 88-070
FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Richard and Betty Heininge, Aurora, filed the petition for review. Betty Heininge argued on her own behalf.

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

Jay T. Waldron, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Schwabe, Williamson & Wyatt.

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

AFFIRMED 01/18/89

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 county decision denying their
4 application for an accessory dwelling in conjunction with farm
5 use on a 26 acre parcel in the General Agricultural District
6 (GAD).

7 MOTION TO INTERVENE

8 Anna M. Wagoner, Sandra J. Thompson, Russel O. Bassindale,
9 Lila A. Bassindale, Charles R. Kibler, Bobbie J. Kibler,
10 Margaret R. McCreeedy, Connie J. Thomsen, Thomas R. Thomsen,
11 Jr., Donna M. Cottardi, Dennis Weis, William E. Miley, Howard
12 E. Miley, Gloria E. Miley, Gary W. Estes, Jack Baker, Kathryn
13 Baker, Susan E. McKay, W.R. McKay, Ronald W. Kingsman, Jennifer
14 Lyn Kingman, and Laurie J. Kingman move to intervene in this
15 proceeding on the side of respondent. There is no opposition
16 to the motion, and it is allowed.

17 FACTS

18 Petitioners own and reside on a 26 acre parcel designated
19 Agricultural in the Clackamas County Comprehensive Plan and
20 zoned GAD, an exclusive farm use zone. In late 1986,
21 petitioners applied for approval of an accessory dwelling in
22 conjunction with farm use on their property. The accessory
23 dwelling would be occupied by petitioners' son, who would
24 assist his father in operating the farm. In support of their
25 request, petitioners submitted a farm management plan which
26 showed that a total of 15.5 acres would eventually be put into

1 cultivation for growing Christmas trees and nursery stock.

2 On October 21, 1987 the county board of commissioners
3 adopted an order approving the accessory dwelling. The
4 county's decision was appealed to LUBA. In Wagoner v.
5 Clackamas County, ___ Or LUBA ___ (LUBA No. 87-102, April 27,
6 1988) (Wagoner),¹ we remanded the county's decision because
7 it failed to comply with two requirements of the Clackamas
8 County Zoning and Development Ordinance (ZDO).² We held the
9 county did not demonstrate (1) the accessory dwelling would be
10 in conjunction with a commercial farm use, and (2) the
11 assistance of the occupant of the accessory dwelling would be
12 required by the farm operator in the management of the farm
13 use.

14 The county limited its consideration on remand to the two
15 deficiencies identified in our decision in Wagoner.
16 Petitioners submitted additional materials which indicate they
17 no longer intend eventually to employ 15.5 acres in their farm
18 operation, but rather to limit their farm operation to the 9
19 acres presently in cultivation.³ After a public hearing, the
20 hearings officer issued an order denying the request for an
21 accessory farm dwelling. This appeal followed.

22 FIRST ASSIGNMENT OF ERROR

23 "The County Did Not Establish the Land is not Being
24 Used for the Primary Purpose of Obtaining a Profit in
25 Money from Farm Activity Under Applicable County
Ordinances."

26 The county's ordinance allows accessory dwellings in the

1 GAD zone only "in conjunction with commercial farm use."

2 ZDO 402.04.B. The ZDO defines commercial farm as follows:

3 "FARM, COMMERCIAL: A farm unit with all of the
4 following characteristics:

5 "(a) The land is used for the primary purpose of
6 obtaining a profit in money from [farm]
7 activities described in Sections 401.03A
8 and B, and 402.03A and B;

9 "(b) The net income derived from farm products is
10 significant; and

11 "(c) Products from the farm unit contribute
12 significantly to the agricultural economy,
13 to agricultural processors and farm
14 markets." ZDO Section 202.

15 The county concluded that the current farming operation on the
16 subject property is not a commercial farm as defined in the ZDO
17 because the property is not "used for the primary purpose of
18 obtaining a profit in money from farm activity."⁴ Record 11.

19 Petitioners assert that 9 acres of the subject property are
20 under cultivation for nursery stock and Christmas trees, 15
21 acres are in timber "available for harvest" and only two acres
22 are used for residential purposes. Petition for Review 6.
23 Petitioners argue that because a total of 24 acres are either
24 in cultivation or in timber, the "primary purpose of obtaining
25 a profit in money from [farm] activities" criterion of the
26 ZDO's commercial farm definition is satisfied. Petitioners
argue that clear-cutting the timber and establishing more
cultivated land is not necessary to meet this standard.
Petitioners also contend that preservation of the 15 acres of
woodland on the property, thereby "retaining the natural

1 character of the adjoining rural residential development," is
2 wanted by both themselves and opponents. Petition for Review 7.

3 The county argues it reasonably concluded the primary use
4 of the property is for residential purposes and operation of
5 petitioners' businesses, and the secondary use is for raising
6 nursery stock. The county contends raising nursery stock is
7 only a secondary use of the property because while only 35% of
8 the property is being used for farming, petitioners reside on
9 the property and both petitioners operate full time nonfarm
10 businesses on the property.⁵ The county contends it is
11 undisputed that only 9 acres of the property are in
12 agricultural use. The county argues petitioners' intent to
13 retain 15 acres in their natural woodland state may be
14 laudable, but it does not support petitioners' contention that
15 those 15 acres are used for the primary purpose of obtaining a
16 monetary profit from farm activities.

17 We find no error in the county's interpretation and
18 application of its criterion that property be "used for the
19 primary purpose of obtaining a profit in money from [farm]
20 activities" in order to be considered a commercial farm. It
21 was reasonable for the county to conclude that farming only 9
22 of 26 acres, while residing on and operating two businesses
23 from the property, does not satisfy the standard that the
24 primary use of the property is for obtaining a monetary profit
25 from farming.

26 The first assignment of error is denied.⁶

1 SECOND ASSIGNMENT OF ERROR

2 "The County did not Establish Assistance of the
3 Applicant's Son in an Accessory Dwelling is not
4 Required to Manage and Maintain the Present Operation
Based Upon the Personal Conditions of the Operator."

5 Under ZDO 402.04.B.2, the applicant for an accessory
6 dwelling must demonstrate

7 "The assistance of the occupant(s) of the accessory
8 dwelling is, or will be, required by the farm operator
9 in the management of the farm use. If the occupant(s)
10 of the accessory dwelling is not related to the farm
11 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."⁷ (Emphasis added).

12 In Wagoner, the county argued that under the above-quoted
13 standard, the "personal conditions" of the farm operator may
14 form the entire basis of the requirement for the assistance of
15 the occupant of an accessory dwelling, if the occupant is
16 related to the farm operator. However, we stated in Wagoner
17 that all the county's findings disclosed was that Russel
18 Heininge is retiring and plans to devote more time to his model
19 airplane business. We found this insufficient to explain why
20 the son's assistance is "required" as provided in
21 ZDO 402.04.B.2.⁸ Wagoner, slip op at 9-10.

22 On remand, the county concluded petitioners did not
23 establish that assistance of the occupant of an accessory
24 dwelling is required by (1) the characteristics of the farm
25 operation, or (2) the personal conditions of the farm
26 operator. Record 10-11.

1 A. Characteristics of the Farm Operation

2 Petitioners challenge the county's determination that they
3 did not establish that the characteristics of the farm
4 operation require assistance for the farm operator as follows:

5 " * * * The Hearings Officer ignored the record by
6 the applicant and acknowledges the 'better evidence'
7 of the opponents, Exhibit 7 which concludes two people
8 are not needed to manage the nursery stock. The
applicant has submitted documents for one fulltime
manager with the operator's 'significant
involvement.'" Petition for Review 7-8.

9 Petitioners argue the county's determination that petitioners
10 failed to establish that assistance is required for their farm
11 operation, based on the characteristics of the farm use, is not
12 supported by substantial evidence.

13 In order for petitioners to prevail in this claim, it is
14 not sufficient for petitioners to show there is evidence in the
15 record which supports their position. Rather, the "evidence
16 must be such that a reasonable trier of fact could only say
17 [petitioners'] evidence should be believed." Morley v. Marion
18 County, ___ Or LUBA ___ (LUBA No. 87-095, February 3, 1988),
19 slip op 12; Weyerhauser v. Lane County, 7 Or LUBA 42, 46
20 (1982). Furthermore, in determining whether the evidence meets
21 this standard, we consider all relevant evidence to which we
22 are cited in the record, including both that which supports and
23 detracts from the county's decision. Younger v. City of
24 Portland, 305 Or 346, 360, 752 P2d 262 (1988).

25 Intervenors-respondent (intervenors) argue that the county
26 correctly found the evidence in support of petitioners'

1 position unreliable and irrelevant, as it consisted of a letter
2 about a different type of nursery stock operation, including
3 both retail and wholesale sales, on 100 acres. Record 80.
4 Intervenors also assert the record shows that, according to
5 county extension agents, (1) Christmas tree operations require
6 5 days of work per acre per year, or 45 days of work per year
7 for the subject 9 acres, and (2) nursery stock requires even
8 fewer days of work per year. Record 186, 188. According to
9 intervenors, petitioners' own testimony indicates that Russell
10 Heininge will be available to work in the farm operation a
11 total of over 75 days a year.

12 The only evidence which we are cited in support of
13 petitioners' position is the letter from the operator of a 100
14 acre nursery stating that his nursery employs 35 people and he
15 and two other family members work in the nursery full time.
16 The comparability of this larger operation to that of
17 petitioners is not established in the letter. However, the
18 operator also states in the letter "it is not reasonable to
19 assume that one person could manage 8 or 10 acres of nursery
20 plantings." Record 80.

21 The nursery operator's conclusion appears to be at odds
22 with the opinions of the county extension agents cited by
23 intervenors. In addition, we note that petitioners' own
24 submittal states that during 1979-1985, when Russell Heininge's
25 previous construction business was affected by a recession, "he
26 was able to devote the hours needed in nurturing the

1 stock."⁹ Record 207. The submittal also states "it is
2 full-time for one person to care for this investment." Id.

3 In light of all the evidence discussed above, we are unable
4 to conclude that a reasonable decision maker could only
5 conclude that the characteristics of petitioners' farm
6 operation require assistance for a farm operator.

7 This subassignment of error is denied.

8 B. Personal Conditions of the Farm Operator

9 The county based its conclusion that assistance is not
10 required because of personal conditions of the farm operator on
11 a determination that retirement or outside employment of the
12 farm operator are not "personal conditions," but rather
13 choices. The relevant findings state:

14 " * * * The only 'condition' of the applicant which
15 precludes him from adequately managing the farming
16 operation on the subject property is his limited
17 financial resources. The fact that he does not have
18 substantial time to devote to the farm operation
19 because of his choice to devote his time to the
20 operation of a model airplane business, is not found
21 to be a 'condition' which can justify a requirement
22 for assistance. Other conditions of a farm operator
23 which could justify a need for assistance could
24 include ill health, lack of required strength for
25 certain types of operations, advanced age, etc. The
26 record establishes none of those conditions for this
farm operator. As pointed out above, retirement of
the farm operator or outside employment are determined
not to be conditions but are choices of the farm
operator. The ZDO does not permit the location of an
accessory dwelling in conjunction with a commercial
farm operation merely because the farm operator has
decided to make himself unavailable for required farm
management." Record 11.

25 Petitioners argue that the county's decision does not
26 address personal conditions of the operator other than to

1 acknowledge the operator's limited financial resources.
2 Petitioners disagree that the operator's choice to devote his
3 time to operation of his model airplane business is not a
4 "personal condition" which can justify a requirement for
5 assistance. Petitioners point out that in Hopper v. Clackamas
6 County, 15 Or LUBA 413, aff'd 87 Or App 167, 741 P2d 921
7 (1987), an accessory farm dwelling was found to comply with a
8 similar county ordinance provision even though both the
9 operator and his wife had outside employment. Petitioners also
10 argue that with limited financial resources and diminishing
11 physical capabilities, a father's requirement for his son's
12 assistance is a need rather than a choice.

13 The county argues it interpreted ZDO 402.04.B.2 strictly,
14 but reasonably, holding that the farm operator cannot himself
15 create the need for assistance and then seek to fill it by
16 means of approval of an accessory dwelling. The county
17 maintains this is an appropriate interpretation of the
18 ordinance, consistent with the goal of preserving farm land.
19 The county argues the decision in Hopper v. Clackamas County,
20 supra, is not dispositive in this case because the question of
21 the proper interpretation of "required" and "personal
22 conditions" was not raised in Hopper v. Clackamas County.

23 We agree with the county that the interpretive issues it
24 identifies were not raised in Hopper v. Clackamas County. In
25 both our decision and the Court of Appeals decision, the issue
26 discussed was whether the son would replace the father as the

1 farm operator, or whether the father would retain some
2 significant involvement in the farm operation. See n 8,
3 supra. We also agree with the county that it is reasonable to
4 interpret "personal conditions" requiring assistance for a farm
5 operator under ZDO 402.04.B.2 not to encompass voluntary
6 choices, such as the decision to devote most of one's time to a
7 new business.

8 Finally, to the extent petitioners argue that Russell
9 Heininge has a condition of diminished physical ability which
10 the county failed to recognize in its findings and which
11 results in a need for his son's assistance, we find that
12 petitioners have not cited any evidence in the record
13 indicating that Russell Heininge has such a physical
14 condition.¹⁰

15 This subassignment of error is denied

16 The second assignment of error is denied.

17 The county's decision is affirmed.

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FOOTNOTES

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4 The record in Wagoner is incorporated into the record in
5 this appeal proceeding. References to the record in Wagoner
6 will be given as "Record (Wagoner) ____."

7 2
8 During the course of the initial county proceedings,
9 petitioners applied for, and the county's October 21, 1987
10 order also granted, approval of (1) a plan map amendment from
11 Rural to Agriculture for a five acre portion of the subject
12 property, and (2) a zone change for those five acres from
13 Residential Farm/Forest-5 to GAD. However, the plan and zone
14 change aspects of the county's initial decision were not
15 challenged in Wagoner and are not at issue in this appeal.

16 3
17 Petitioners' oral and written testimony repeatedly refers
18 to a 9 acre farming operation. Record 35, 205, 224, 226.
19 Petitioners' submittal also states they "would very much regret
20 the need to" clear the 6.5 acres in the southwest corner of the
21 property identified as Section III on their initial farm
22 management plan. Record 228-229. In addition, the site map
23 submitted by petitioners on remand does not indicate a 6.5 acre
24 Section III as part of the intended farming operation. The
25 area which had been identified as Section III is simply labeled
26 as "forested areas." Record Ex.#2.

27 4
28 The county found petitioners' farming operation does
29 satisfy parts (b) and (c) of the ZDO's commercial farm
30 definition. Record 9. Those determinations are not at issue
31 in this appeal.

32 5
33 The county's findings in support of this conclusion state:
34
35 "Applicant's farming operation began in 1980 when four
36 acres of Christmas trees were planted. The farming
37 operation expanded in 1981 to nine acres with the planting
38 of additional acreage in nursery stock. Although the
39 applicant's farm management plan called for further
40 expansion to twelve acres in 1988 and ultimately to 15.5
41 acres in agricultural use, no such expansion has occurred

1 to this point and the applicant's wife testified at the
2 public hearing that the applicant does not intend to expand
3 beyond nine acres of nursery stock unless required to do
4 so. The ten plus acres of the subject property not
5 allocated for the raising of nursery stock and potential
6 expansion of that farming operation has been allocated by
7 the applicant to residential purposes for himself and his
8 family and for what he proposes as a second residential
9 structure for his son and his son's family. As noted
10 above, there has previously been constructed a large
11 'studio' on a portion of the subject property which the
12 applicant intends to utilize as the accessory dwelling
13 structure.

8 "Since 1985 the applicant has been employed full time as
9 the owner and operator of a model airplane company. He has
10 available at this time only approximately one and one-half
11 hours in the evening and approximately eight hours on
12 weekends to devote to the farming operation on the
13 property. The applicant's wife is employed full time as a
14 real estate broker. Both the applicant and his wife run
15 their businesses from their residence on the subject
16 property. The applicant's wife has no time available with
17 which to assist in the farming operation.

13 " * * * * *

14 "The fact that the applicant is currently utilizing only
15 approximately 35% of the subject property for farming
16 purposes, that the applicant and his wife both operate full
17 time businesses from the subject property, and the history
18 of the development of the property itself lead to a finding
19 that the land is not being used for the primary purpose of
20 obtaining a profit in money from farming activities. * * *
21 " Record 8-9.

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20 In denying this assignment of error, we uphold one of the
21 county's two bases for denial of the requested accessory
22 dwelling. This alone requires us to affirm the county's
23 decision. Hutmacher v. City of Salem, Or LUBA (LUBA
24 No. 87-052, October 16, 1987), slip op 5; Portland City Temple
25 v. Clackamas County, 11 Or LUBA 70, 78 (1984).

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25 ZDO 402.04.B.2 closely parallels a similar provision in
26 ORS 215.283(1), which provides in pertinent part:

26 / / /

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

3 " * * * * *

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

6 " * * * * *

7 "(B) Occupied by a relative, which means grandparent,
8 grandchild, parent, child, brother or sister of the farm
9 operator or the farm operator's spouse whose assistance in
10 the management in the farm use is or will be required by
11 the farm operator."

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14 However, we note that we did find in Wagoner, supra, that
15 the father will retain "some significant involvement" in the
16 farm operation. We found "some significant involvement" to be
17 required under an identical provision of the county's EFU
18 zone. Hopper v. Clackamas County, 87 Or App 167, 172, _____
19 P2d _____ (1987). However, this determination was not part of
20 our basis for remand in Wagoner, and is not at issue in this
21 appeal.

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24 Petitioners' farm operation began with four acres of
25 Christmas trees in 1980 and was expanded in 1981 to nine acres,
26 with the addition of five acres of nursery stock. Record 8.

27 _____
28 10

29 We note that the county's order indicates that it, in fact,
30 would consider diminished physical capability of the farm
31 operator to be a personal condition capable of justifying a
32 requirement for assistance under ZDO 402.04.B.2.