BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Sept. 1, 89

RUSSELL A. NEWCOMER, Petitioner, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 87-107 ORDER ON REMAND FROM COURT OF APPEALS

On remand from the Court of Appeals.

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

REMANDED 09/01/89

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

Opinion by Holstun.

INTRODUCTION

This case is before us on remand from the Court of Appeals.[1] The case concerns the county's approval of a single family residence in conjunction with farm use in the county's Exclusive Farm Use, 20 acre minimum lot size (EFU-20) zone.

Before LUBA, petitioner alleged three assignments of error. We rejected the first assignment of error. That portion of our decision was affirmed by the Court of Appeals. Newcomer I, 92 Or App at 186-187. However, in Newcomer I and II, our resolution of the second and third assignments of error was remanded to us by the Court of Appeals for further consideration. We discuss briefly our prior disposition of the second and third assignments of error before turning to the Court of Appeals' decisions in Newcomer I and Newcomer II.

LUBA DECISION

A. Second Assignment of Error

The second assignment of error challenged the county's finding of compliance with Clackamas County Zoning and Development Ordinance (ZDO) 401.04A, which provides in pertinent part:

> "A. Principal Dwelling In Conjunction With A Principal Use: The development of a single family residence in conjunction with a commercial farm use on a pre-existing legal lot

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[1] Newcomer v. Clackamas County, ___ Or LUBA ___ (LUBA No. 87-107, April 8, 1988), remanded 92 Or App 174, 758 P2d 450 (1988) (Newcomer I), modified 94 Or App 33, 764 P2d 927 (1988) (Newcomer II).

of record larger than five (5) acres in size may be approved by the Planning Director, subject to review with notice pursuant to 1305.02, when the applicant provides a farm management plan, as provided under 401.10, and other evidence as necessary to demonstrate all the following criteria are satisfied:

"1. The lot is as large as the acreage supporting the typical commercial farm unit in the area ('area' for the purposes of Section 401.04 is defined as the land within a one-mile radius of the subject property), or the proposed principal use is a commercial farm use of greater intensity (such as a nursery) than commercial farms in the area;

"* * * * *

"4. Development of the property will not adversely affect or limit the existing or potential commercial farm uses in the area * * *."

Petitioner argued (1) the county's findings were inadequate to demonstrate compliance with ZDO 401.04A.1 (2) the county failed to find that a residence is customarily provided in conjunction with the proposed type of farm use and (3) the county's findings were inadequate to demonstrate compliance with ZDO 401.04A.4.

We concluded that the county's findings addressing ZDO 401.04A.1 were inadequate to demonstrate that the lot was as large as "the typical commercial farm unit in the area." Newcomer v. Clackamas County, supra, slip op at 8. However, in concluding that the county's findings concerning ZDO 401.04A.1 were inadequate, we rejected petitioner's contention that the county's decision should also be remanded for failure to find the proposed dwelling is "customarily provided in conjunction with farm use," noting ZDO 401.04A does not require such a

finding. Id., slip op at 15, n 4.

Finally, we found the county's findings adequately addressed ZDO 401.04A.4 (concerning adverse effects on existing or potential commercial farms in the area), quoted supra, and rejected that portion of petitioner's second assignment of error.

B. Third Assignment of Error

The third assignment of error alleged the county's decision violated ORS 215.203(2)(A) (definition of "farm use") because, in order for the county to approve a dwelling in conjunction with farm use, the subject property must be currently employed for the primary purpose of obtaining a profit in money from farm activities. We sustained petitioner's third assignment of error.

Our resolution of the third assignment of error relied explicitly on our decision in Matteo v. Polk County, 14 Or LUBA 67 (1985) (Matteo II), and implicitly on our decision in Matteo v. Polk County, 11 Or LUBA 259, aff'd without opinion 70 Or App 179 (1984) (Matteo I). The Matteo decisions construed ORS 215.203, 215.283(1)(f), 215.283(3) and 215.243.[2]

In Matteo I, we held

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[2]The relevant statutory provisions are set out in Newcomer I, 92 Or App at 176-177, n 1, and need not be repeated verbatim here. ORS 215.283(1)(f) is similar to ZDO 401.04A.1 and provides that "dwellings * * * customarily provided in conjunction with farm use" may be allowed in EFU zones. ORS 215.203(2)(a) defines "farm use" to mean "current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops * * *." (Emphasis added.)

> "* * * [B]efore a farm dwelling may be established on agricultural land, the farm use to which the dwelling relates must be existing." 11 Or LUBA at 261, 263. (Emphasis added.)

In other words, our decision in Matteo I resolved the farm use/farm dwelling chicken or egg question in favor of the farm use; i.e., existence of the farm use must precede approval of the farm dwelling.

In Matteo II, we expanded Matteo I and held

> "It is, therefore, our view that to be entitled to a 'dwelling customarily provided in conjunction with farm use,' the applicant must show and the county must find that the dwelling will be sited on a parcel wholly devoted to farm use. * * *" (Emphasis added.)

Although a number of farm related improvements are planned for the property at issue in this case, we concluded that the planned improvements fell substantially short of the Matteo II standard that the property be wholly devoted to farm use and, therefore, sustained the third assignment of error.[3]

COURT OF APPEALS DECISIONS

A. Newcomer I

The Court of Appeals discussed both of our Matteo decisions and found them both to rely on an incorrect interpretation of the applicable statutes. The Court stated:

> "The Matteo decisions point to nothing in the language or history of the statutes to support their engrafting of the 'current employment' requirement onto the ORS 215.283(1)(f) test for farm dwellings, let alone

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[3]As the Court of Appeals noted, our disposition of the third assignment of error did not explicitly rely on the Matteo I standard that the property be currently employed for farm use.

> the extension in Matteo II that a parcel can qualify as the location for such a dwelling only if it is devoted in its entirety to current farm use. * * *" Newcomer I, 92 Or App at 181-182.

The Court of Appeals affirmed the portion of our decision under the second assignment of error which concluded the county's findings addressing ZDO 401.04A.1 were inadequate. However, the Court disagreed with our conclusion that the county need not find that the dwelling "is customarily provided in conjunction with farm use." The Court stated:

> "Whether the proposed dwelling is one which is 'customarily provided in conjunction with farm use' is the threshold question. * * *" Newcomer I, 92 Or App at 185.

The county argued to the Court of Appeals that its ordinance required no such finding. The Court disagreed, stating:

> "We do not agree that additional and different restrictions in local legislation obviate the need for compliance with--and a finding concerning--a standard which the state statute makes essential." (Footnote omitted.)[4] Newcomer I, 92 Or App at 186.

In summary, the Court's decision in Newcomer I (1) affirmed

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[4]In the omitted footnote the court further explained:

> "Given the basis for our conclusion, we do not comment on whether the ordinance itself requires a finding on whether a proposed dwelling is of a kind customarily provided in conjunction with farm use. We note, however, that section 401.04A of the ordinance, which relates to the 'development of a single family residence in conjunction with a commercial farm use,' appears to incorporate the substantive standard of ORS 215.283(1)(f). We also note that the statutory requirement does not become inapplicable to counties after acknowledgment. See Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983)." (Emphasis in original.)

our decision as to the first assignment of error; (2) remanded the portion of our resolution of the second assignment of error which determined a finding that the proposed dwelling is customarily provided in conjunction with farm use is unnecessary; and (3) remanded our determination regarding the third assignment of error, in which we concluded the county improperly failed to determine that the parcel was wholly devoted to farm use as required by Matteo II. The Court of Appeal's decision required that we remand the decision to the county for a determination on whether the proposed dwelling is customarily provided in conjunction with farm use, without the additional requirements imposed by Matteo I and II, discussed above.

B. Newcomer II

In Newcomer II, the Court of Appeals reconsidered and modified its decision in Newcomer I, based on OAR 660-05-030(4), which provides:

> "ORS 215.213(1)(g) and 215.283(1)(f) authorize a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than for farm use, a proposed dwelling would not be 'customarily provided in conjunction with farm use' and could only be approved according to ORS 215.213(3) or 215.283(3). At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land (see Matteo v. Polk County, 11 Or LUBA 259 (1984) affirmed without opinion by the Oregon Court of Appeals, September 12, 1984, and Matteo v. Polk County LUBA No. 85-037, September 3, 1985)."

The Court of Appeals concluded the above rule

> "* * * states substantive policy as well as a statutory interpretation. We also conclude that, in adopting it, LCDC acted within the range of discretion allowed by the statutory policy. Whether or not we were correct in concluding in our former opinion that the relevant statutes themselves do not require active farm use on a parcel before a farm dwelling can be permitted, there is no inconsistency between the statutory 'customarily provided in conjunction with farm use' test and the regulatory provision that 'farm dwellings cannot be authorized before establishment of farm uses on the land.' The actual use requirement of the rule refines the statutory test and promotes the general statutory policy of restricting farm dwellings to those which are connected with farm use. We withdraw the conclusion in our former opinion that ORS 215.283(1)(f) allows farm dwellings to be permitted on agricultural parcels before some actual farm use is initiated on them.
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> "We adhere to the other conclusions in our former opinion. However, our modification necessitates additional comment about two of those conclusions. We held that the county was required to make a finding about whether the proposed dwelling is one which is customarily provided in conjunction with farm use. 92 Or App at 185-186. We now add that OAR 660-05-030(4) and any other applicable LCDC rules must be taken into account by the county in any further proceedings on that issue." (Emphasis added.) Newcomer II, 94 Or App at 39.

CONCLUSION

In our initial decision, we noted the county included

> "a condition requiring that [a proposed] irrigation well and * * * drain tiles be installed along with planting two acres of the property before any permit for a dwelling is issued." Slip op at 11.

However, we stated

> "we do not believe the installation of drain tile, construction of an irrigation well and planting of one quarter of the total acreage sufficiently places this property in farm use to satisfy the standard announced in Matteo II. The drain tile admittedly may make some farm use more feasible, efficient or convenient, but

> the installation of drain tile does not show the property is wholly devoted to farm use. The county did not explain whether the irrigation well was constructed to serve the whole property, and farm use, or whether the irrigation well simply serves a portion of the property. In any case, the construction of an irrigation well does not place the property itself in 'farm use.' The facts in this case do not show the improvements place even a majority of the land on the subject property in farm use, let alone all the property and farm use." Slip op at 12-13.

Just as the above noted facts are insufficient to show compliance with the Matteo II "wholly devoted to farm use" standard rejected by the Court of Appeals in Newcomer I, they are insufficient to demonstrate compliance with the requirement in OAR 660-05-030(4) that "the day-to-day activities on the subject land are principally directed to farm use of the land." It may be that the existence of the irrigation well, drain tile and planting of two acres could provide the basis for findings explaining why the standard in OAR 660-05-030(4) is met. However, in the absence of findings explaining why the condition imposed by the county and any other relevant portions of the proposed farm management plan demonstrate "the day-to-day activities on the subject property are principally directed to the farm use of the land," we are unable to conclude the standard specified in OAR 660-05-030(4) is met.

In conclusion, our decision, as modified in light of Newcomer I and II, remands the county's decision for failure to (1) adopt findings demonstrating compliance with the requirement in ZDO 401.04A.1 that "[t]he lot is as large as the acreage supporting the typical commercial farm unit in the area * * *;"

(2) adopt findings showing the proposed dwelling satisfies the requirement that it be "customarily provided in conjunction with farm use;" and (3) adopt findings demonstrating compliance with OAR 660-05-030(4) and any other applicable LCDC rules.

The county's decision is remanded.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Order on Remand From Court of Appeals for LUBA No. 87-107, on September 1, 1989, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Russell A. Newcomer
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Dated this 1st day of September, 1989.

Jan Zwemke
Management Assistant