BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, Petitioner, vs. COOS COUNTY, Respondent, and ROBERT D. HURT and JANET W. HURT, Intervenors-Respondent.	LUBA No. 89-141 FINAL OPINION AND ORDER

Appeal from Coos County.

Keith Bartholomew, Portland, filed the petition for review and argued on behalf of petitioner.

David Ris, Coquille, filed a response brief and argued on behalf of respondent.

David Smith, Tigard, filed a response brief and argued on behalf of intervenors-respondent.

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

REMANDED 02/20/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals Coos County Ordinance No. 89-09-009 which amends the Coos County Zoning and Land Development Ordinance (ZLDO) to authorize the siting of farm help dwellings for the relatives of farm operators in the county's exclusive farm use zones.

MOTION TO INTERVENE

Robert D. Hurt and Janet W. Hurt move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Coos County adopted Ordinance No. 89-09-009 on October 25, 1989 over petitioner's objections. This appeal followed.

ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction and improperly construed the applicable law by adopting a new land use regulation that delegates to applicants the responsibility for determining whether applicable standards are satisfied."

Section 5 of Ordinance No. 89-09-009 (ordinance) adds to the ZLDO the following review standards for farm help dwellings for relatives of farm operators in exclusive farm use zones:

> "One farm-help dwelling in conjunction with farm use may be allowed for the relative of a farm operator when:
>
> "i. the relative is the grandparent, grandchild,

parent, child, brother, or sister of the farm operator or the farm operator's spouse;

"ii. the farm operator states in writing that the relative's assistance in the management of the farm use is or will be required by the farm operator, and that the farm operator will continue to have some significant involvement in farm operations;

"iii. the farm-help dwelling will be located on the same lot or parcel as the dwelling of the farm operator;

"iv. the lot or parcel upon which the farm operator's dwelling is located is at least 20 acres in size, including any portion of the lot or parcel not zoned EFU, EFU-10 or CREMP-AGF;

"v. the farm operator's dwelling and the farm-help relative's dwelling are the only dwellings on the subject lot or parcel; and

"vi. the county imposes a condition on the subject lot or parcel prohibiting its division or partition upon establishment of the farm-help relative's dwelling on the lot or parcel." (Citations omitted.)

The sole issue in this appeal is whether subsection (ii) quoted above improperly delegates to the farm operator the decisions (1) whether a relative's assistance is or will be required by the farm operator, and (2) whether the farm operator will continue to have significant involvement in farm operations, in violation of ORS 215.283(1)(e) and ORS 215.416(9).[1] Petitioner argues:

[1]ORS 215.283(1)(e) provides in relevant part, as follows:

> "Coos County's new ordinance * * * does not require findings or evidence. Rather, the county merely restates that applicant's 'state in writing' that the standards are met. It is the applicant, not the county, who will be determining whether the assistance is required and whether the operator will continue to be involved. No evidence will be produced and no statement of findings will be written; all an applicant need do is submit a piece of paper containing the following:
>
> > 'I require assistance of the new occupant. I will continue to have some significant involvement in the farm operations.'" Petition for Review 8.

The county argues that the disputed ordinance provision is consistent with the following language from our opinion in Hopper v. Clackamas County, 15 Or LUBA 413, 415, aff'd 87

> "The following uses may be established in any area zoned for exclusive farm use:
>
> "* * * * *
>
> "(e) A dwelling located on real property used for farm use if the dwelling is
>
> > "(A) located on the same lot or parcel as the dwelling of the farm operator; and
> >
> > "(B) Occupied by a relative, which means grandparent, grandchild, parent, child, brother, or sister of the farm operator or the farm operator's spouse, whose assistance in the management of the farm use is or will be required by the farm operator."

ORS 215.416(9) provides in relevant part:

> "Approval or denial of a permit shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

Or App 169, 741 P2d 921 (1987) (Hopper):

> "[The county] 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.
>
> "[The county] concludes that the 'ordinance [and statute do] not require that activities in furtherance of the farm use be broken down 50/50; nor [do they] require that the occupant of the original farm dwelling spend more time on farming than the occupant of the new dwelling.'
>
> "The [county's] ordinance and ORS 215.283(1)(e), authorizing an accessory dwelling for a specified relative, appear to place the determination of when the accessory 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 relinquishing all farm duties, but the management has changed, and nothing in the ordinance [or statute] require a particular break down of farm duties between the owner and the relative occupying the accessory dwelling. * * *"[2] (Emphasis supplied.)

The county argues in Hopper, the Court of Appeals agreed that the determination of whether a farm help dwelling is required is for the applicant to make and not the county. According to the county, ORS 215.283(1)(e) is unique because (1) it requires a subjective determination of whether assistance is or will be required, (2) the words

[2]In Hopper, 87 Or App at 171-172, the Court of Appeals stated that it "agree[d] generally with the [above quoted] reasoning."

chosen are different and less restrictive than the words chosen to articulate the standard for farm dwellings in ORS 215.283(1)(f), and (3) ORS 215.265(7) prohibits dividing a parcel for which a relative's farm help dwelling has been approved, demonstrating that "the legislature was willing to allow relative, farm help dwellings in circumstances in which a second [ORS 215.283(1)(f) farm] dwelling would not be allowed." Respondent's Brief 5.

The county also argues that under the ZLDO, as amended by the ordinance, the county is required to adopt findings which determine:

> "the farm operator has submitted a written statement that the relative's assistance in the management of the farm use is or will be required." Respondent's Brief 6.

We do not read the Hopper decision as the county does to approve eliminating the requirement for a county to adopt findings, supported by substantial evidence, demonstrating that the standard of ORS 215.283(1)(e) is satisfied. See Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 1, 571 P2d 141 (1977); Green v. Hayward, 275 Or 693, 552 P2d 815 (1976). Admittedly, the language in our decision in Hopper, with which the Court of Appeals indicated general approval, can be read literally to say the farm operator may make the determination (or substantive finding) that an accessory farm dwelling for a relative is required. Although such a literal reading may be possible, it is

clearly incorrect. Nothing in the Court of Appeals' Hopper decision suggests the Court embraced such a reading of our opinion.

ORS 215.283(1)(e) and ORS 215.416(9) require the county to adopt findings supported by substantial evidence which demonstrate that the assistance of a relative is, or will be, required by the farm operator. Heininge v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-070, January 18, 1989), slip op 11; Wagoner v. Clackamas County, ___ Or LUBA ___ (LUBA No. 87-102, April 27, 1988), slip op 9-10. Additionally, the Court of Appeals in Hopper interpreted ORS 215.283(1)(e) to require that the farm operator maintain some significant involvement in the farm operations. Accordingly, to satisfy ORS 215.283(1)(e), the county must adopt findings, supported by substantial evidence, determining both (1) the farm operator will maintain significant involvement in farm operations, and (2) the assistance of a relative is or will be required by the farm operator. We agree with petitioners that the disputed ordinance provision improperly authorizes approval of farm help dwellings for relatives without requiring the county to make either determination.[3]

[3]We understand the county to argue ORS 215.283(1)(e) imposes a less stringent evidentiary burden than that which is required to satisfy ORS 215.283(1)(f). However, even if the county were correct, it would not save the disputed ordinance provision here. Under the disputed provision, in order to approve a relative's "farm help" dwelling, all that is required is the written statement of a farm operator applicant that he or she

The assignment of error is sustained.

The county's decision is remanded.

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requires the assistance of a relative and that the operator will maintain significant involvement in the operation of the farm. Although such a statement may constitute substantial evidence in support of findings that the standard of ORS 215.283(1)(e) is met in a particular case, the statement cannot eliminate the requirement that the county adopt findings showing the statutory standard is met. As explained above, the written statement of the farm operator is not the equivalent of county findings supported by substantial evidence that the ORS 215.283(1)(e) is satisfied.