

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the Marion County Hearings Officer denying an application for a dwelling for a full time farm employee, on land zoned for exclusive farm use.

FACTS

Petitioners own and actively farm a 300 acre parcel of land zoned Exclusive Farm Use (EFU). Additionally, some of petitioners also own contiguous EFU-zoned property in active farm use, which consists of approximately 1200 acres. The total acreage petitioners own and manage for farm use is approximately 1500 acres.

Existing dwellings on the 1500 acres include the homes of (1) Catherine Zorn, who manages the legal affairs of the farm corporations and performs bookkeeping services for the various farm operations; (2) Joe Zorn, manager of other aspects of the farm operations; (3) the widow of a deceased farm worker who has resided on the farm for approximately 12 years; (4) a semi-retired farm worker, who devotes approximately 16 hours per week to the farm operations; and (5) a relative of Catherine Zorn who works on the farm.

Additional relevant facts follow:

"The farm worker for whom the application for permit was made presently lives in a small travel trailer that he owns himself. Petitioners wish to upgrade and provide better housing for him and his young daughter who visits him on weekends.

"Petitioner [sic] applied to the Marion County Planning Office for a permit to place a mobile home on their farm in an EFU Zone in north Marion County for use by this full time year-around farm worker employed in conjunction with their farming operation.

"Upon making their request, petitioners were given a copy of the Marion County Zoning Ordinance, Chapter 136, and directed to address certain criteria in the ordinance. Petitioners did so and prepared a statement in support of their application which was filed in the Planning Office on May 19, 1989, and thereupon the Planning Office determined the application to be complete.

"It has been the custom of the Zorn farms as well as other larger farms to provide housing for their farm workers if they needed it and for protection of other farm structures.

"However, petitioners were precluded from filing a permit for a 'dwelling customarily provided in conjunction with farm use' by reason of the restrictive condition in Marion County Zoning Ordinance, 136.040(a)(1) limiting such dwellings to be the only dwelling on the subject and contiguous property in the same ownership.

"By notice, dated July 6, 1989, the Planning Director informed petitioners that the application was denied. Petitioners appealed the decision to the Hearings Officer. Adjoining property owners were informed of the appeal and forthcoming hearing. No objections were received from anyone.
* * *

"At the hearing before the Hearings Officer, petitioners entered into evidence Exhibit 1 involving a decision on a previous application in 1982 by petitioners to place a mobile home on their farm for a part time year-around semi-retired farm worker who had been employed for many years on the farm, which application was granted by the then Hearings Officer. * * *

"Significantly in the 1982 case the Hearings

Officer found the mobile home to be 'a dwelling customarily provided in conjunction with farm use.'

"* * * * *

"The proposed site of the mobile home is in the core area of the farm, near large machine sheds housing trucks, expensive farm machinery and equipment, a machine workshop and storage space, where the mobile home by its presence and occupancy, will serve to deter vandalism, theft and arson. In the past the Zorn farm has lost a house and a few years later a barn through arson.

"The mobile home will be situated at the end of a long driveway leading from Champoeg Road to the core area of the farm. The site will require no new access from the road to serve the location. It will not affect the normal flow or movement of traffic on public roads. It will be situated so that no farm land will be taken out of production. The mobile home will not be visible from any public road, Champoeg Park or any neighboring property or dwellings. All utilities are presently available. * * *

"* * * * *

"The farm worker occupying the mobile home assists in all phases of such work but particularly in caring for sheep especially during lambing season which requires around the clock presence on the farm to check the sheep day and night in order to help ewes with difficult births, rounding strayed lambs, treating sick or injured sheep, protecting them from marauding dogs or coyotes, etc.

"* * * the Hearings Officer denied petitioners' application on the sole ground that not all dwellings on the farm were occupied by full time farm workers. The Board of County Commissioners, without notice or a hearing, affirmed the decisions and Order of the Hearings Officer * * * ." (Record citations omitted.) Petition for Review 3-6.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

"The county was without authority to impose any condition by ordinance for dwellings customarily provided in conjunction with farm use not contained in ORS 215.213(1)(g)."¹

ORS 215.283(1)(f) provides:

"(1) * * * the following uses may be established in any area zoned for exclusive farm use:

* * * * *

"(f) The dwellings and other buildings customarily provided in conjunction with farm use.

* * * * *

The Marion County Zoning Ordinance (MCZO) provides two ways to authorize dwellings which are in conjunction with farm use, hereafter referred to as "farm dwellings." The first is under MCZO 136.020(c). MCZO 136.020(c) allows as a permitted use in the EFU zone:

"A single-family dwelling or mobile home and other structures customarily provided in conjunction with farm use subject to section 136.040(a).

The standards specified in MCZO 136.040(a) for a farm dwelling permitted under MCZO 136.020(c) include the

¹As the county points out, it has not adopted a marginal lands designation, and consequently ORS 215.283(1)(f) applies to the county, not ORS 215.213(1)(g). We also agree with the county that ORS 215.283(1)(f) and ORS 215.213(1)(g) are sufficiently similar that the legal analysis concerning both is the same. We refer to ORS 215.283(1)(f) in resolving this appeal. See Kola Tepee v. Marion County, ___ Or LUBA ___ (LUBA No. 89-021, June 28, 1989), slip op 6, aff'd 99 Or App 481 (1989).

requirement that the proposed farm dwelling be "the only dwelling on the subject property and contiguous property in the same ownership * * *." MCZO 136.040(a)(1).

The second MCZO provision for authorization of farm dwellings is under MCZO 136.030(a), which provides in relevant part:

"The following uses may be permitted in an EFU zone subject to obtaining a conditional use permit and satisfying the applicable criteria in Section 136.040.

"(a) Additional dwellings or mobile homes in conjunction with farm use, meeting the criteria in 136.040(b).

"* * * * *" (Emphasis supplied.)

MCZO 136.040(b) sets forth the following standards for "additional" farm dwellings:

"The criteria for approving the uses in 136.030(a) are:

"* * * * *

"(4) All dwellings located on the farm * * * are occupied by households that perform a significant amount of farm work throughout the year.

"(5) The household residing in the proposed dwelling will perform a significant amount of farm work through the year that other households on the farm cannot accomplish.

"* * * * *

Petitioners argue that under ORS 215.283(1)(f), the county is required to permit outright all dwellings customarily provided in conjunction with farm use.

Petitioners contend the county's ordinance provision, requiring a conditional use permit for "additional [dwellings] customarily provided in conjunction with farm use," impermissibly conflicts with ORS 215.283(1)(f). According to petitioners, the county is without authority to require conditional use permits for any proposed dwelling of a kind customarily provided in conjunction with farm use.

The county argues there is no conflict between the MCZO and ORS 215.283(1)(f). The county contends that in Hopper v. Clackamas County, 87 Or App 167, 741 P2d 921 (1987), rev den 304 Or 680 (1988), the Court of Appeals recognized a distinction between primary and accessory farm dwellings. Additionally, the county argues because ORS 215.283(1)(e) makes provision for other kinds of farm dwellings (those for relatives who will work on the farm), it is implicit that ORS 215.283(1)(f), applies only to the residence of the farm operator, or to the primary farm dwelling.

In the alternative, the county argues even if the disputed MCZO provisions are more restrictive than ORS 215.283(1)(f), nothing in that statute prevents the county from applying more restrictive standards to applications for farm dwellings. The county contends that ORS 215.283 provides only minimum standards that must be applied to land zoned EFU.

We agree with the county that ORS 215.283(1)(f) does not require the county to permit outright all dwellings

customarily provided in conjunction with farm use. ORS 215.283 simply sets out the kinds of uses which the county may authorize in EFU zones. As we stated in Kola Tepee v. Marion County, supra:

"* * * there is no statutory requirement that counties adopt EFU zones at all. ORS 215.203(1) provides as follows:

"Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Lands within such zones shall be used exclusively for farm use except as otherwise provided in ORS * * * 215.283.
* * *

"Thus, ORS 215.203(1) enables, but does not require, counties to adopt EFU zones. If a county is not statutorily required to adopt an EFU zone, it could not violate ORS [215.283(1)] by failing to provide [certain uses] as outright uses in its EFU zone.

"Aside from the lack of a statutory requirement to adopt an EFU zone, ORS 215.203 explicitly states that land within EFU zones 'shall be used exclusively for farm use except as otherwise provided in * * * ORS 215.283.' * * * ORS 215.283(1) and (2) * * * explicitly state 'the following uses may be established * * *.

"If the operative language in * * * ORS 215.283(1) and (2) instead stated 'the following uses shall be allowed (outright or with conditions) in an EFU zone,' it might be possible to argue the legislature intended ORS [215.283(1)] to be incorporated intact into county EFU zones when counties elect to adopt such zones. However, we conclude the legislature's use of the terms 'may' and 'shall' in ORS chapter 215 demonstrate the legislature did not intend to require that counties adopt EFU zones that incorporate, word for word, ORS [215.283(1)]. * * *" (Footnotes

omitted; emphases in original.) Kola Tepee v. Marion County, supra, slip op at 7-8.

Furthermore, in Doughton v. Douglas County, 82 Or App 444, 728 P2d 887 (1986), rev den 303 Or 74 (1987), the Court of Appeals recognized that ORS 215.283(1)(f) does not provide precise standards for approving dwellings customarily provided in conjunction with farm use, and that counties may adopt specific standards defining under what circumstances such dwellings will be approved. Specifically, the Court stated:

"* * * the determination of whether [a] dwelling [is] customarily provided in conjunction with farm use 'd[oes] not entail the application of standards'. * * *

"['Customarily provided in conjunction with farm use'] simply states a requirement, without articulating criteria for deciding when, whether, and how the requirement is satisfied." (Emphasis in original.) Id. at 449.

Additionally, in Newcomer v. Clackamas County, 92 Or App 174, 183, 758 P2d 369, modified 94 Or App 33 (1988), the Court of Appeals recognized that so long as local legislation is consistent with ORS 215.283(1)(f), such legislation may impose criteria to determine whether a particular application complies with ORS 215.283(1)(f).

We believe these cases indicate that counties may adopt ordinance provisions which are consistent with ORS 215.283(1)(f), but impose additional criteria for determining whether an application for a dwelling customarily provided in conjunction with farm use may be

approved.

The disputed MCZO conditional use permit requirement for "additional" farm dwellings applies only where there is at least one existing farm dwelling on EFU zoned land. The MCZO simply requires that an applicant for an "additional" farm dwelling show that any existing dwelling(s) are occupied by persons who perform a significant amount of work on the farm. This allows the county to determine whether the proposed dwelling is one customarily provided in conjunction with farm use, or is proposed to accommodate continuation of nonfarm dwellings on EFU zoned land.² If the EFU zoned land already has dwellings, some of which are properly characterized as nonfarm dwellings, no additional farm dwellings may be approved until such nonfarm dwellings are converted to farm dwellings. MCZO 136.020; MCZO 136.040(a) and (b).

While this requirement regarding analysis of the farm or nonfarm nature of existing dwellings on land zoned EFU is not mandated by ORS 215.283(1)(f), it does further the legislative policy contained in ORS 215.243, and is consistent with ORS 215.283(1)(f) and 215.283(3). We conclude that the disputed MCZO provisions articulate criteria for determining when, whether, and how the

²In these circumstances, under the MCZO, a nonfarm dwelling is considered a dwelling occupied by a household which does not perform a significant amount of work on the farm.

requirement that dwellings be customarily provided in conjunction with farm use is satisfied. ORS 215.283(1)(f); see Doughton v. Douglas County, 82 Or App at 449.

Accordingly, the county's application of the disputed MCZO provisions does not exceed its authority under ORS 215.283(1)(f).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"The criteria in the Marion County Zoning Ordinance Section 136.040(a)(1) requiring any dwelling customarily provided be the only dwelling on the subject and contiguous property in the same ownership is an unreasonable restriction prohibited by ORS 215.253(1)."

Petitioners characterize MCZO 136.040(a)(1) as authorizing only one dwelling customarily provided in conjunction with farm use on particular EFU zoned land. As we understand it, petitioners argue MCZO 136.040(a)(1) is a regulation "affecting farm use on land situated within an exclusive farm use zone" which "unreasonably restrict[s] or regulate[s] * * * farm structures, in violation of ORS 215.253(1).³

³ORS 215.253 provides:

"No state agency, city, county or political subdivision of this state may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated in an exclusive farm use zone established under ORS 215.203 or within an area designated as marginal land under ORS 197.247 in a manner what would unreasonably restrict or regulate farm structures or that would unreasonably restrict or regulate accepted farming practices

As we have already explained, under MCZO 136.020(c) "[a] single family dwelling * * * customarily provided in conjunction with farm use [is allowed] subject to MCZO 136.040(a) * * *." MCZO 136.040(a)(1) makes it clear that only one farm dwelling may be approved under these provisions. However, additional farm dwellings may be approved as conditional uses under MCZO 136.030(a) and 136.040(b). The standards applicable to these "additional" farm dwellings require, among other things, that the household occupying the proposed dwelling perform a significant amount of farm work. MCZO 136.040(b)(4) and (5). In this case, the county's decision to deny the requested conditional use permit was based on the application of MCZO 136.040(b) (4) and (5), not 136.040(a)(1). Petitioners do not explain why MCZO 136.040(b)(4) and (5), apparently adopted to encourage conversion of nonfarm dwellings to farm dwellings before allowing construction of additional farm dwellings, "unreasonably restrict or regulate farm structures" in violation of ORS 215.253(1).⁴

because of noise, dust, odor or other materials carried into the air or other conditions arising therefrom if such conditions do not extend into an adopted urban growth boundary * * *."

⁴Petitioners also assert that MCZO 136.040(a)(1) "arbitrarily limits the number of dwellings used in conjunction with farm use," citing 1000 Friends v. Benton County, 2 Or LUBA 324, 329 (1981). Petition for Review 8. Petitioners fail to explain their position that the county's ordinance is "arbitrary." The applicability of 1000 Friends v. Benton County, supra,

Petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

"Denial of the mobile home permit on the ground that not all dwellings are occupied by full time farm workers fails to take into consideration ORS 215.130(5) permitting any lawful use of any building existing at the time of enactment of any zoning ordinance to be continued."

Petitioners argue that ORS 215.130(5) prohibits the county from considering the existence of dwellings on the subject land, which were constructed prior to the current EFU zoning, in making decisions concerning current development approvals.⁵

We agree with the county that nothing in the disputed MCZO provisions prohibits the continuation of pre-existing lawful uses. The MCZO provisions at issue in this case simply provide that if an applicant wishes to apply for new uses, the applicant must meet current requirements. In other words, in order to gain approval for additional farm

to this case is unclear at best. That case involved a pre acknowledgment challenge to a conditional use permit for a nonfarm dwelling on a parcel smaller than the Goal 3 minimum lot size. LUBA stated that Goal 3 places no express limit on the number of residences which may be constructed on a parcel meeting the Goal 3 minimum parcel size. We do not understand how this statement demonstrates that the county's ordinance is "arbitrary." It is petitioners' obligation to explain their theory.

⁵ORS 215.130(5) provides:

"[t]he lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in such use. A change of ownership or occupancy shall be permitted."

dwellings on this EFU zoned land, the applicants must establish that all existing dwellings are dwellings meeting the standards of MCZO 136.040(b)(4) and (5).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

"The decision fails to take into consideration the legislative policy relating to farm workers declared in Oregon Laws 1989, chapter 964, as well as fails to take into consideration other policies relating to land use."

ORS 197.677 provides in part:⁶

"* * * it is the policy of this state to insure adequate agricultural labor accommodations commensurate with the housing needs of Oregon's workers that meet decent health, safety and welfare standards. To accomplish this objective in the interest of all of the people in this state, it is necessary that:

"(1) Every state and local government agency that has powers, functions or duties with respect to housing, land use or enforcing health, safety or welfare standards, under this or any any other law, shall exercise its powers functions or duties consistently with the state policy declared in ORS 197.675, 197.685, 215.213, 215.277, 215.283 and 455.380 and in such a manner as will facilitate such sustained progress in attaining the objectives established.

"(2) Every state and local government agency that finds farm worker activities within the scope of its jurisdiction must make every effort to alleviate insanitary, unsafe and overcrowded accommodations.

⁶The relevant portions of Oregon Laws 1989, chapter 964, are codified in ORS 197.677.

"* * * * *"

Additionally, ORS 197.685 authorizes counties to establish farm-worker housing standards and provides limitations on the standards which may be set as follows:

"* * * * *

"(3) [With regard to seasonal farm worker housing, local government has the perogative to]

"(a) Set approval standards under which seasonal farm-worker housing is permitted outright;

"(b) Impose special conditions upon approval of a specific development proposal; or

"(c) Establish approval standards.

"(4) Any approval standards, special conditions and procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable delay."

As we understand it, petitioners argue the disputed MCZO provisions have the effect of violating the above quoted policies of ORS 197.677. However, petitioners do not explain how these statutory policies are violated by the disputed MCZO provisions, and we do not see that they are.

Marion County has simply established certain limitations on placement of farm dwellings on EFU zoned property. These limitations are aimed at preventing accumulations of dwellings converted from farm to nonfarm dwellings, on property zoned EFU. Nothing in the MCZO provisions to which we are cited has the effect of placing

unreasonable restrictions on farm help dwellings on EFU zoned land.

The fourth assignment of error is denied.⁷

FIFTH ASSIGNMENT OF ERROR

"The decision of the Hearings Officer in significant parts is not supported by substantial evidence."

Petitioners argue that the hearings officer's findings that the dwellings occupied by the semi-retired farm worker and Zorn relative are nonfarm dwellings, are not supported by substantial evidence in the whole record.

The county argues that these findings are not necessary to its decision.

We agree with the county. The hearings officer also found that the widow of a deceased farm worker occupies a dwelling on the subject farm, and that the widow does not perform a significant amount of farm work. Record 7. Petitioners do not challenge the evidentiary support for this finding. Under MCZO 136.040(b)(4), this finding, that there is a dwelling on the subject property not occupied "by households that perform a significant amount of farm work

⁷Petitioners also cite Clatsop County v. Rock Island Construction Inc., 5 Or App 15, 482 P2d 541 (1971), for the proposition that the county erred by failing to consider the "rule regarding zoning ordinances * * * that statutes 'in derogation of common law which would otherwise be lawful are strictly construed in favor of the property owner.'" Petition for Review 10. We do not understand what this principle has to do with the relationship between the cited statutory policy and the disputed MCZO provisions.

throughout the year," is adequate to support denial of the proposed additional farm dwelling.⁸ Furthermore, there is substantial evidence in the whole record to support this finding.

Under these circumstances, we need not review the evidentiary support for the challenged findings concerning the dwellings of the semi-retired farm worker and the Zorn relative, as they are unnecessary to the challenged decision. Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), slip op 32.

The fifth assignment of error is denied.

The county's decision is affirmed.

⁸We recognize that the result of applying the disputed provisions of the MCZO may be harsh in particular circumstances. However, there is nothing to which we are cited which makes application of these provisions unlawful.