BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| RAY REBMANN and VIRGINIA REBMANN,<br><br>Petitioners,<br><br>vs.<br><br>LINN COUNTY,<br><br>Respondent,<br><br>and<br><br>THOMAS ROGERS and<br>PRISCILLA ROGERS,<br><br>Intervenors-Respondent. | LUBA No. 90-015<br><br>FINAL OPINION<br>AND ORDER |

Appeal from Linn County.

William E. Loose, Portland, filed the petition for review and argued on behalf of petitioners.

John T. Gibbon, Albany, filed a response brief and argued on behalf of respondent.

Edward F. Schultz, Albany, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Weatherford, Thompson, Brickey & Quick.

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

REMANDED 06/29/90

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

Petitioners appeal an order of the Linn County Board of Commissioners (board of commissioners), approving an accessory farm dwelling on property zoned Exclusive Farm Use (EFU).

MOTION TO INTERVENE

Thomas Rogers and Priscilla Rogers move to intervene in this appeal on the side of respondent. There is no objection to the motion, and it is allowed.

MOTION FOR OFFICIAL NOTICE OF DEED RECORDS

Respondent filed a motion "To Have the Board Take Official Notice of Planning Documents Establishing Zoning History." The documents are attached to respondent's motion.[1] There is no objection to respondent's motion, and it is allowed.

FACTS

Intervenors-respondent (intervenors) applied for permission to establish an accessory farm dwelling on a 48.67 acre parcel zoned EFU. The subject property contains intervenors' current residence, an older 400 square foot structure (older structure). Intervenors propose to build a new residence on the subject property to use as their residence, and to use the older structure as a residence for

[1]We will refer to these documents as "Supplemental Documents" and have numbered the pages for citation.

farm help. Intervenors propose to employ the farm help to assist intervenors in establishing different farm uses on the subject property than those presently in existence.[2]

Additionally, along the western edge of the subject property, there is another existing house (existing rental house), which is owned by intervenors and is used by them as a rental unit. In 1972, the Linn County Planning Commission (planning commission) may have approved the creation of a one acre parcel for this existing rental house, and use of the existing rental house as a nonfarm dwelling.[3]

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[2]The existing 400 square foot structure will in fact be the accessory dwelling. The primary dwelling will be the new home intervenors propose to build, the construction of which triggered intervenors' application for an accessory farm dwelling. The county accepted intervenors' application as being for an accessory dwelling under these circumstances, and there is no issue raised in this appeal regarding the correctness of this procedure.

[3]The legal effect of the planning commission's 1972 action is not clear. The letter from the planing director to the then owner of the subject property states:

> "This letter constitutes formal notification that your Conditional Use Permit request to create a one acre home site in the EFU (Exclusive Farm Use) District was approved on July 11, 1972.
>
> "The determination of the Commission shall become final 10 days after the day of decision unless appealed to the board of Commissioners in accordance with Article 34 of the Linn County Zoning Ordinance." Supplemental Documents 1.

The application to which this decision refers states the purpose of the application was to:

> "Partition from 57 acre parcel one acre and existing house." Supplemental Documents 6.

We do not have a copy of the 1972 decision of the planning commission concerning this application. We note, however, that it is unclear whether

Adjoining the subject property is a Christmas tree farm and haying operation to the north, a sheep and pig operation to the south, row crops to the west, and hay and alfalfa fields to the east. A portion of the subject property is currently leased to a tenant farmer who manages it for wheat and oat crop production. The tenant farmer's lease expires at the end of 1990, and intervenors do not plan to renew that lease. Intervenors instead propose to eliminate the wheat and oat crop operations, and replace them with a nut orchard and cattle operation. Intervenors propose to phase in the nut orchard, planting ten acres every four years for a total nut orchard acreage of 40 acres. The cattle operation will consist of breeding and milking approximately 30 head of cattle, and is proposed to begin immediately after expiration of the tenant farmer's lease.

The planning commission denied intervenors' application. Intervenors appealed the denial decision to the board of commissioners. The board of commissioners reversed the decision of the planning commission, and approved intervenors' application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Approval of the dwelling prior to the establishment of the proposed farm use was

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a partition was approved in 1972. Nevertheless, whether the one acre area containing the "existing rental house" is a part of the subject parcel or whether it is a discrete one acre parcel makes no difference to our resolution of this appeal. What is relevant is that this particular area of land (1) is near to the farming area on the subject land, and (2) contains a house owned and used by intervenors as a rental unit.

improper."

It is undisputed that the subject parcel currently is in farm use, and is proposed to remain in farm use. Petitioners argue that because the farm use which is alleged to require the accessory dwelling for farm help is not yet in existence, the proposed farm help dwelling cannot be allowed. OAR 660-05-030(4);[4] Newcomer v. Clackamas County, 94 Or App 33, 39, 764 P2d 927 (1988); Matteo v. Polk County, 11 Or LUBA 259, aff'd without opinion 70 Or App 179 (1984).

OAR 660-05-030(4) requires that a particular level of agriculture be established on EFU zoned property prior to approval of a farm dwelling. Here, however, it is undisputed that a commercial agriculture operation currently exists on the subject property. Because intervenors' parcel is "currently employed for farm use as defined in ORS 215.203," OAR 660-05-030(4) is satisfied.[5]

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[4]OAR 660-05-030(4) provides:

> "ORS 215.213(3)(1)(g) and ORS 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 * * *."

[5]Admittedly there may be policy arguments in favor of requiring, in addition to demonstrating that the parcel is currently employed for farm use, that the current farm use is the farm use the proposed dwelling is to

The relevant question presented in this appeal is whether the particular application for an accessory dwelling for farm help meets the applicable approval requirements of the Linn County Zoning Ordinance (LCZO). The standards for establishing that a proposed accessory dwelling on land zoned EFU is in conjunction with farm use are contained in LCZO 21.430(2). Under the second assignment of error, we address whether the proposed dwelling meets those requirements.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The Rogers' failed to satisfy the applicable criteria. The county's approval therefore, misconstrued the applicable law, was based on inadequate findings, and/or was not supported by substantial evidence in the whole record."

LCZO 21.430(2) establishes the following approval standards for accessory farm dwellings:

> "Additional farm-related dwelling:
>
> "(A) The subject parcel and any parcels in contiguous ownership are used for commercial agriculture, as determined by the following factors:
>
> "1. Soil productivity.
>
> "2. Land conditions.
>
> "a. Drainage

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be "customarily provided in conjunction with." However, if LCDC intends the rule to apply in this manner, it must amend the rule to impose that requirement. The rule itself does not now impose that requirement. See Newcomer v. Clackamas County, 92 Or App 174, 181-182, 758 P2d 369 (1988).

"b. Terrain

"3. Availability of irrigation water.

"4. Type, yield, and acreage of crops.

"5. Number and type of livestock

"6. Processing and marketing practices.

"7. Consistency with the definition of commercial agriculture."

"(B) The dwelling is needed as customarily provided in conjunction with commercial farm use, as determined by the following factors:

"1. Size of the farm, including land in contiguous ownership and any other land within the farm.

"2. Type of farm and typical labor requirements.

"3. The number of dwellings on or servicing the entire farm.

"4. The number of permanent and/or seasonal employees on the farm.

"5. The extent and nature of the work to be performed by occupants of the proposed dwelling.

"(C) The operation of the farm, based on accepted farm practices, requires that the occupants of the proposed dwelling reside on the subject property;

"(D) If the proposed dwelling is not a mobile home, the the occupants have a proprietary interest in the farmland or it is evident that the long-term operational requirements of the commercial farm unit justify another permanent dwelling;

"* * * * *"

Petitioners contend the county's findings are inadequate to satisfy LCZO 21.430(2) and, even if adequate, lack evidentiary support. Specifically, petitioners contend the findings and evidence are inadequate to establish (1) the subject land is used for commercial agriculture under LCZO 21.430(2)(A); (2) the proposed dwelling is needed as customarily provided in conjunction with farm use, as required by LCZO 21.430(2)(B); and (3) another dwelling is both justified and required by the farm operation, as specified by LCZO 21.430(C) and (D). We address each of these contentions separately below.

A. LCZO 21.430(2)(A)

Petitioners contend the county's findings are inadequate to establish the subject land is used for "commercial agriculture," as required by LCZO 21.430(2)(A).[6] Petitioners do not, however, argue that the findings regarding the existing agricultural operations on the subject parcel are inadequate to meet the definition in the LCZO of commercial agriculture. Petitioners argue the county's findings do not establish that the proposed farm uses for the subject land will constitute commercial

[6]Under LCZO Article 32, commercial agriculture is defined as:

> "* * * farm units that either contribute in a substantial way to the existing agricultural economy and help maintain agricultural processors and established farm markets, or diversify agricultural processing and create farm markets through the production of agricultural goods currently not a part of the agricultural economy." (Emphasis in original.)

agriculture.[7]

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[7]The county made the following findings regarding commercial agriculture on the subject parcel:

> "Presently, the property is in wheat and oat production. The property is leased to an area farmer. The lease will expire at the end of this year. Previously, the property has been planted with beans, hay, pasture and sunflowers. There have also been 75 head of sheep on the property.
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> "Ten acres will be cleared for a walnut grove and filberts. The orchard will increase by 10 acre increments. The lower land will be used for cattle and non-orchard crops. The higher land will have the proposed dwelling and the orchard. The proposed farm use will be daily care of 30 head of cattle, equipment and [a] walnut and filbert orchard. The applicant stated the soil on the property is currently available for nut production without additional soil improvement. Holstein cows are the primary herd planned.
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> "Nut crops are planned for mail order vacuum packed containers for annual subscription [and] monthly distribution. Cattle are planned for breeding and some milking.
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> "The orchard will include planting, fertilizing and spraying, pruning, picking, shelling, packaging, mailing, advertising and marketing. The livestock operation will include feeding, watering, grooming and cleaning.
>
> "There are three part-time people currently working a total of ten hours a week on the property. The number of hours working on the property will increase to 96 per week after the dwelling is located. Mr. Rogers does not have employment off the property. Mrs. Rogers will remain employed off the property. They currently reside in the 400+/- square foot dwelling on the property. Once the proposed dwelling is constructed, the existing dwelling will be used for farm help.
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> "The applicants own an adjacent parcel that contains a dwelling. The planning commission, on July 11, 1972, authorized the creation of a one acre parcel around the existing dwelling (CU-19-72). According to the applicants, the dwelling on the one acre has been set aside for 17 years as a non-farm unit. This dwelling is not available for farm help because the applicants have other plans for the dwelling. The applicants did not purchase this property with the intent of it being a part of the farm.

LCZO 21.430(2)(A) simply requires findings establishing that the current farm uses on the subject parcel constitute "commercial agriculture." We agree with respondent and intervenors that LCZO 21.430(2)(A) does not require findings establishing that all proposed future farm uses will constitute "commercial agriculture."

We may only reverse or remand the county's decision on the basis of inadequate findings addressing relevant approval criteria, and no approval criterion requires findings that proposed future agricultural operations on the subject property will constitute commercial agriculture.

This subassignment of error is denied.[8]

B. LCZO 21.430(2)(B)

Petitioner argues the county's findings are inadequate to establish that the proposed accessory farm dwelling is "needed as customarily provided in conjunction with commercial farm use," as required by LCZO 21.430(2)(B).[9]

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> "These facts demonstrate the property is and will be used for commercial agriculture and that a dwelling is needed as customarily provided in conjunction with commercial farm use." Record 8-9.

[8]Petitioners also argue the evidence does not support a finding that the proposed agricultural operations will constitute commercial agriculture. Because we determine LCZO 21.430(2)(A) does not require a finding that the proposed agricultural operations constitute commercial agriculture, it is unnecessary that such findings be supported by substantial evidence. Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), slip op 32.

[9]The findings relied upon by the county to satisfy LCZO 21.430(2)(B) are those findings quoted in n 7 above.

Specifically, petitioners contend:

> "The findings do not set forth the typical labor requirements for nut orchards or whether farm help dwellings are customarily provided in conjunction with such operations." Petition for Review 16.

We agree with petitioners. In determining whether a proposed dwelling is customarily provided in conjunction with commercial farm use, as required by LCZO 21.430(2)(B), the county must adopt findings addressing the factors listed in LCZO 21.430(2)(B) to determine whether it is customary to establish a dwelling for farm assistance for the proposed type of farming operation. We are cited to no findings addressing whether it is customary for a farm help dwelling to be provided in conjunction with either a nut orchard and 30 head cattle operation, or the existing oat and wheat crop activity. Accordingly, the county's findings are inadequate to comply with LCZO 21.430(2)(B).

This subassignment of error is sustained.[10]

C. LCZO 21.430(2)(C) and (D)

LCZO 21.4330(2)(C) and (D) provide:

> "(C) The operation of the farm, based on accepted farm practices, requires that the occupants of the proposed dwelling reside on the subject property;
>
> "(D) If the proposed dwelling is not a mobile

[10]We address petitioners' arguments that the proposed farm help dwelling is not "needed" in the next subassignment of error dealing with whether the proposed farm help dwelling is "required" and "justified" under LCZO 21.430(2)(C) and (D).

> home, the occupants have a proprietary interest in the farmland or it is evident that the long-term operational requirements of the commercial farm unit justify another permanent dwelling."

The county adopted the following findings addressing LCZO 21.430(2)(C) and (D):

> "The applicants submitted a letter from a medical doctor that stated Mr. Rogers had back surgery a number of years go and as a result, there is an area of weakness in the lower back. The letter stated that this 'would prevent him from safely performing duties requiring a great deal of bending and particularly heavy lifting.' The letter also stated that 'such activity might result in re-injury to his back and possibly even the need for further surgery.'
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> "The proposed farm use is a nut orchard and cattle raising activity. The planting of the nut orchard is planned for four year intervals at increments of ten acres.
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> "Mr. Rogers will be the farm operator, but is unable to perform many of the duties required to plant and maintain a nut orchard and cattle operation. A second dwelling on the property would make the farm more productive by having farm help immediately available. Therefore, it is evident that the long-term operational requirements of the commercial farm unit justify another permanent dwelling and that the operation of the farm requires that the farm help reside on the property." Record 9.

Petitioners state the county's findings indicate three people currently provide a total of ten hours of work per week on the subject property. Petitioners also argue:

> "There is no finding in the Boards' decision that shows that 96 hours per week will be necessary to operate the proposed farm management plan. The findings state only that the 'number of hours

> working on the property will increase to 96 per week after the dwelling is located.' The Board does not state why 96 hours a week will be necessary after the dwelling is located. It does not show why 96 hours per week will be necessary to operate the proposed farm. Nor is there a finding why it will take an additional employee to perform the work. The findings state that Mrs. Rogers will remain employed off the property. There is no explanation as to why Mrs. Rogers cannot assist in the farm duties." Petition for Review 17.

Petitioners also contend that the county's findings do not establish that farm help is required to live on the subject property. Petitioners argue there are no findings adequately addressing whether farm help could live in the rental unit owned by intervenors, or elsewhere. Petitioners further contend this Board should consider Mrs. Rogers as a principal farm operator, and that under Heininge v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-070, January 18, 1989), the fact that she chooses to work off of the farm precludes approval of an additional dwelling for farm help.

Intervenors argue the principle farm operator is Mr. Rogers. Intervenors point out Mr. Rogers is employed full time on the farm. According to intervenors, nothing requires Mrs. Rogers to give up her off farm employment, in favor of working with her husband, before an accessory dwelling for farm help may be approved. See Miles v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-098, November 20, 1989). Intervenors maintain the facts that Mr. Rogers

has a limiting medical handicap, together with the extensive farm chores listed in the findings, provide adequate justification that farm help is needed and that it needs to be located on site. Additionally, intervenors argue that the site is subject to flooding, and that the potential of flooding and the birth of calves are events which require the kind of immediate assistance only a live in farm hand can provide.

We agree with intervenors that there is nothing which requires Mrs. Rogers to give up her off farm employment, as a prerequisite to approval of a dwelling for farm help. Mr. Rogers is the farm operator, and he has no employment which consumes his time outside of the farm.[11] In Miles v. Clackamas County, supra, slip op at 8, we determined that a Clackamas County ordinance provision requiring that the assistance of farm help be required by the farm operator, is not so strict a standard as to preclude "any family member living in a primary dwelling from having outside employment, or family members taking vacations together, in order to demonstrate a requirement for assistance in the farm operation." We believe the principle in Miles v. Clackamas County applies equally in this case.

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[11]This case is distinguishable from Heininge v. Clackamas County, supra, cited by petitioners. In Heininge, the principal farm operator wished to construct an accessory farm dwelling for his son so that his son could work on the farm and enable the principal farm operator to devote time to outside activities.

However, we agree also with petitioners that the county's findings are inadequate to establish compliance with LCZO 21.430(2)(C). Farm help is not required to "reside on the subject property" if there are reasonable alternatives to construction of a residence on the farm parcel. In this case it is undisputed that there is a rental dwelling located on a parcel which is either part of or adjacent to the subject property. The county's findings that the owners of this dwelling (intervenors) "have other plans for the dwelling * * * [and] did not purchase this property with the intent of it being part of the farm" are inadequate to establish that this rental unit cannot provide adequate housing for the farm help needed by intervenors. Record 8. Additionally, the county's findings do not explain why 24-hour immediate assistance is required to deal with the birth of calves and with the potential for flooding, or with other eventualities which are anticipated. Finally, while the county's findings do state immediately available, live in farm help will make the farm more "productive," the findings are inadequate to explain why farm work, provided, in part, by a live in assistant, is required on the farm as LCZO 21.430(2)(C) demands.

With regard to LCZO 21.430(2)(D), the county's findings do not identify the "long-term operational requirements of the commercial farm" justifying the proposed additional dwelling. Without findings describing what the long term

operational requirements of the farm are, we cannot ascertain whether the proposed farm help dwelling is justified in light of those long term requirements.[12]

This subassignment of error is sustained.

The second assignment of error is sustained in part.[13]

The county's decision is remanded.

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[12]We note that over the years, the nature of the farm uses on the subject property have changed. None of the previous farm uses apparently required or justified the existence of live in farm assistance. For example, the subject property is currently leased to a tenant farmer who apparently has managed it over time for things as diverse as sunflowers, beans and 75 head of sheep. While the subject proposal contemplates a nut orchard, planted over a long period of time, as well as cattle, it is not stated what the long term operational requirements are for these operations.

[13]No purpose would be served in reviewing the evidentiary support for the findings which, in subassignments B and C above, we determine are inadequate to establish compliance with the relevant LCZO provisions.