BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS HAYES, and CAROLE DUNTLEY, Petitioners, vs. DESCHUTES COUNTY, Respondent, and CLEONE F. STOLOFF, and JAMES F. CRUMPACKER, Intervenors-Respondent.	LUBA No. 91-218 FINAL OPINION AND ORDER

Appeal from Deschutes County.

Greg Hendrix, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hendrix & Chappell.

Richard L. Isham, Bend, filed the response brief and argued on behalf of respondent.

Alfred H. Stoloff, Portland, represented intervenors-respondent.

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

AFFIRMED 04/06/92

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners challenge a Deschutes County Board of Commissioners decision denying a permit for a farm dwelling in an exclusive farm use zone.

MOTION TO INTERVENE

Cleone F. Stoloff and James F. Crumpacker move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Petitioners were the applicants below. The subject parcel is owned by petitioner Hayes and is zoned Exclusive Farm Use (EFU-20). The parcel is comprised of approximately 62 acres, 59 of which have irrigation rights through the Tumalo Irrigation District. A dwelling, barn and feed yard are located in an unirrigated area in the northwest portion of the parcel. The parcel is currently used for cattle grazing and hay production.

Petitioner Duntley proposes to purchase the parcel and construct a new farm dwelling in a presently irrigated portion of the southeast corner of the parcel. Petitioner Duntley proposes to conduct a more intensive farm operation, consisting of raising and training horses, raising cattle and growing hay. Petitioner Duntley proposes to use the existing dwelling as a residence for a ranch hand. A letter by petitioner Duntley accompanying the subject application

states:

> "* * * I live alone and it is necessary for me to travel extensively in my business and my ranch hand takes care of all the necessary responsibilities of the day to day operation of the ranch and care of the animals. There is an extensive irrigation system on the property which he also will maintain." Record 114.

After a public hearing, the county hearings officer denied the subject application. Petitioners appealed to the board of commissioners. After an additional evidentiary hearing, the board of commissioners issued its decision affirming the hearings officer's decision and denying the application. This appeal followed.

MOTION FOR EVIDENTIARY HEARING

Pursuant to ORS 197.830(13)(b) and OAR 661-10-045, respondent moves for an evidentiary hearing. Respondent seeks to introduce evidence which respondent contends will establish that petitioner Duntley no longer has an interest in the subject parcel and petitioner Hayes has no interest in constructing a new farm dwelling on the parcel.

ORS 197.830(13)(b) and OAR 661-10-045 authorize this Board to allow evidentiary hearings in certain circumstances where there are disputed allegations of fact which, if proved, would affect the outcome of the review proceeding. However, in view of our disposition of petitioners' first assignment of error, infra, the alleged facts respondent seeks to introduce through an evidentiary hearing, even if true, would not affect the outcome of this proceeding.

Respondent's motion for evidentiary hearing is denied.

INTRODUCTION

Deschutes County Zoning Ordinance[1] (DCZO) 18.28.020.D lists the following as a use "permitted outright" in the EFU-20 zone:

> "Dwellings * * * and other buildings customarily provided in conjunction with farm use as defined in ORS 215.203(2)(a)."

DCZO 18.28.030.O lists a "ranch hand residence" as a conditional use in the EFU-20 zone, as follows:

> "Pre-existing dwelling as a ranch hand residence, provided there shall not be more than one such conditional use permitted for each 20 acres in the farm unit and the Planning Director or Hearings Body finds that the occupant of the dwelling will be an employee of the owner, or an immediate family member, engaged in the farm operation. * * *"

Conditional uses listed in DCZO 18.28.030, including "ranch hand residences," must satisfy approval standards listed in DCZO 18.28.040.

Under the above quoted provisions, there are <u>two</u> ways the county could approve the proposed new farm dwelling on the subject parcel. First, the county could determine that the proposed dwelling is "customarily provided in conjunction with farm use," as required by DCZO 18.28.020.D,

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[1]All citations to the DCZO in this opinion are to the codified version of the DCZO adopted by Deschutes County Ordinance No. 91-020 on May 29, 1991, the date the subject application was filed with the county. ORS 215.428(3).

and that the existing dwelling satisfies the approval standards of DCZO 18.28.030.O and 18.28.040 for a ranch hand residence. The county's decision determines the "application to designate the existing dwelling as a ranch hand residence does not adequately address [the conditional use approval] standards" established by DCZO 18.28.040.A.[2] Record 10. Petitioners do not challenge this determination. Therefore, this alternative does not provide a potential basis for approving the proposed dwelling.

The second way the county could approve the proposed dwelling is by determining that both the existing and proposed dwellings are "dwellings * * * customarily provided in conjunction with farm use," under DCZO 18.28.020.D. With regard to this alternative, the county's decision states:

> "* * * The current farm use of the parcel is grazing and hay production.
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> "* * * More than one dwelling would not customarily be provided in conjunction with a grazing and hay operation on a 60-acre parcel." Record 5-6.

Petitioners do not challenge the county's determination that two dwellings are not justified based on the existing farm

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[2]The approval standards of DCZO 18.28.040.A(1)-(4) quoted in the county's decision concern compatibility with farm uses, interference with accepted farming practices, stability of the overall land use pattern of the area and general unsuitability of the land for farm use, and are virtually identical to the standards for nonfarm dwellings found in ORS 215.283(3)(a)-(d). We also note that this part of the decision is found in the hearings officer's decision, which was incorporated by reference into the board of commissioners' decision. Record 5.

use of the parcel. Rather, petitioners contend the county erred by not basing its decision on the more intensive proposed farm use of the subject parcel.

FIRST ASSIGNMENT OF ERROR

> "[The] County's decision improperly found that the more intensive future farm use must be in place prior to allowing the proposed farm help dwelling."

As quoted above, the county's decision states that more than one dwelling is not customarily provided in conjunction with the existing farm use of the subject parcel. Record 6. The county's decision also states:

> "The proposed farm use requiring the secondary dwelling for the ranch hand has not begun. It is different from the existing farm use. The need for the ranch-hand residence has not been established as the farm use proposed on the property does not exist and must be on the property prior to approval of the new primary dwelling." Id.

Petitioners argue neither the DCZO nor OAR 660-05-030(4) requires that a more intensive proposed farm use be in existence prior to county approval of a ranch hand or farm help dwelling which would only customarily be provided in conjunction with the more intensive farm use.[3]

[3]Petitioners also argue that neither the DCZO nor OAR 660-05-030(4) requires that the designation of an existing dwelling as a "ranch hand residence' under DCZO 18.28.030.O be based on a showing that a ranch hand residence is justified by the existing farm use of the property. We agree with petitioners on this point. OAR 660-05-030(4) applies only to dwellings "customarily provided in conjunction with farm use" authorized in exclusive farm use zones under ORS 215.213(1)(g) or 215.283(1)(f). Under DCZO 18.28.030.O and 18.28.040.A, "ranch hand residences" are approved as

Petitioners argue that in Rebmann v. Linn County, 19 Or LUBA 307, 310 (1990) (Rebmann), this Board held that so long as the subject "parcel is 'currently employed for farm use as defined in ORS 215.203,' OAR 660-05-030(4) is satisfied." Petitioners contend there is no dispute that the subject parcel currently is in farm use. Therefore, according to petitioners, the county should have approved the subject application on the basis that both the proposed and existing dwellings would customarily be provided in conjunction with the more intensive proposed farm use of the parcel.

OAR 660-05-030(4) provides, in its entirety:

> "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 (see Matteo v. Polk County, 11 Or LUBA 259 (1984) [(Matteo I)], affirmed without opinion by the Oregon Court of Appeals September 12, 1984, and Matteo v. Polk County, [14 Or LUBA 67] (1985) [(Matteo II)]." (Emphasis added.)

In Matteo I, 11 Or LUBA at 263, LUBA concluded that

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nonfarm dwellings authorized under ORS 215.213(3) or 215.283(3). However, as explained in the Introduction, supra, in this case the county made an unchallenged determination that the subject application does not satisfy approval standards for designation of an existing dwelling as a "ranch hand residence" found in DCZO 18.28.040.A.

"before a farm dwelling may be established on [land zoned for exclusive farm use], the farm use to which the dwelling relates must be existing." We derived this requirement from the provisions of ORS 215.213 and 215.283 authorizing dwellings "customarily provided in conjunction with farm use," and the provision of ORS 215.203(2) defining "farm use" as being the "current employment" of land to produce agricultural products. In Matteo I, the issue was whether a previously unused parcel was "currently employed" for orchard or woodlot use. The challenged decision was remanded because the county failed to find "the land * * * is supporting activities illustrating current employment for farm use as defined in ORS 215.203(2)(a)." Id. at 265.

After Matteo I, the county held additional hearings and approved the farm dwelling again. The county's decision was appealed in Matteo II. LUBA found that only the one acre of the subject nine acre parcel which had been planted in young fruit trees was arguably in farm use. Id. at 72. LUBA reversed the county's decision, stating:

> "[T]o 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. To hold otherwise would be to open the door to allowance of dwellings which serve other than farm uses. * * *" (Emphasis added.) Matteo II, 14 Or LUBA at 73.

In Newcomer v. Clackamas County, 16 Or LUBA 564 (1988), LUBA remanded a county decision approving a dwelling in

conjunction with farm use because the current use of the property did not satisfy the "wholly devoted to farm use" standard of Matteo II. LUBA's decision was appealed to the Court of Appeals, which reversed and remanded LUBA's decision. Newcomer v. Clackamas County, 92 Or App 174, 758 P2d 450 (1988) (Newcomer I). In Newcomer I, 92 Or App at 181-82, the Court of Appeals effectively overruled both Matteo I and II, holding that the "current employment" requirement of ORS 215.203(2)(a) is not part of the requirement of ORS 215.213(1)(g) and 215.283(1)(f) requirements that a dwelling be "customarily provided in conjunction with farm use." The court concluded that the only standards for approval of a farm dwelling pursuant to ORS 215.213(1)(g) and 215.283(1)(f) are the statutory requirement that the dwelling be "customarily provided in conjunction with farm use" and any tests in local legislation which comply with the statutory requirement. Id. at 183.

However, in Newcomer v. Clackamas County, 94 Or App 33, 764 P2d 927 (1988) (Newcomer II), the Court of Appeals reconsidered Newcomer I, recognizing that it had failed to consider (as had LUBA) the effect of OAR 660-05-030(4), quoted above. The Court of Appeals concluded that, as well as interpreting ORS 215.213(1)(g) and 215.283(1)(f), OAR 660-05-030(4) establishes substantive policy. Id. at 39. The Court of Appeals stated:

> "[T]here is no inconsistency between the statutory 'customarily provided in conjunction with farm use' test and the [rule] provision that 'farm dwellings cannot be authorized before establishment of farm uses on the land.' The actual use requirement of [OAR 660-05-030(4)] 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 [Newcomer I] that ORS 215.283(1)(f) allows farm dwellings to be permitted on agricultural parcels before some actual farm use is initiated on them." Newcomer II, 94 Or App at 39.

The Court of Appeals also stated it continues to disapprove Matteo II, insofar as it goes beyond Matteo I and OAR 660-05-030(4), to require that land be wholly devoted to farm use before a farm dwelling can be allowed on it.[4] The Court of Appeals did not address in Newcomer II, however, the extent of actual farm use of the subject property required by Matteo I and OAR 660-05-030(4). The Court of Appeals simply indicated that OAR 660-05-030(4) should be addressed on remand.

The facts in Rebmann, supra, are similar to the facts of this case. The 49 acre parcel at issue in Rebmann had an existing dwelling and was currently used by a tenant farmer for wheat and oat production. The property owners proposed to initiate a more intensive nut orchard and dairy cattle

[4]The Court of Appeals also quoted from administrative history of OAR 660-05-030(4) indicating that it was promulgated both (1) to provide guidance in interpreting ORS 215.213(1)(g) and 215.283(1)(f), and (2) to codify Matteo I, but reject Matteo II insofar as it goes beyond Matteo I.

farming operation and construct a new primary farm residence on the subject parcel. They sought county approval of the existing dwelling as an accessory dwelling for farm help needed to carry out the more intensive proposed farm operation. In Rebmann, the petitioners argued that under OAR 660-05-030(4), because the more intensive farm use justifying the accessory dwelling for farm help was not yet in existence, the farm help dwelling could not be approved. In interpreting OAR 660-05-030(4), we focused on its first sentence, stating:

> "* * * Because [the subject] parcel is 'currently employed for farm use as defined in ORS 215.203,' OAR 660-05-030(4) is satisfied."[5] Rebmann, 19 Or LUBA at 310.

However, OAR 660-05-030(4) must be construed in its entirety. The second and third sentences of this section of the rule provide guidance on how to determine whether a proposed dwelling is "customarily provided in conjunction with farm use," as required by ORS 215.213(1)(g) or 215.283(1)(f). Newcomer II, 94 Or App at 38-39. They refer

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[5]We also noted:

> "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 be 'customarily provided in conjunction with.' However, if [the Land Conservation and Development Commission] 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, 181-82, 758 P2d 369 (1988)."

to the "day-to-day activities on the subject land" and to "whether land would be principally used for residential purposes rather than for farm use." (Emphasis added.) We believe these sentences require consideration of the farm use which the proposed dwelling is contended to be customarily provided in conjunction with.

In addition, the fourth sentence states "farm dwellings cannot be authorized before establishment of farm uses on the land," citing Matteo I. We believe the fourth sentence does not simply restate the requirement established by the first sentence. Although it certainly could be clearer, because the fourth sentence refers to establishment of "farm uses," rather than "farm use as defined in ORS 215.203," and cites Matteo I,[6] the "farm uses" referred to, like those referred to in the second and third sentences, are the farm uses which the proposed dwelling would be customarily provided in conjunction with. Thus, OAR 660-05-030(4) does not allow approval of a dwelling customarily provided in conjunction with farm use where the farm use that the dwelling would be customarily provided in conjunction with does not yet exist on the subject property. To the extent Rebmann interprets OAR 660-05-030(4) differently, it is overruled.

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[6]We emphasize that Matteo I requires that "the farm use to which the [proposed farm] dwelling relates must be existing," and neither Newcomer II, nor the administrative history of OAR 660-05-030(4) cited therein, indicates any intent to overrule Matteo I.

Here, the county made an unchallenged determination that two dwellings would not be customarily provided in conjunction with the existing farm use of the property. Under the proper interpretation of OAR 660-05-030(4), this determination is sufficient justification for denying approval of an additional dwelling on the subject property as a dwelling customarily provided in conjunction with farm use.[7] The county did not err by failing to determine whether an additional dwelling would customarily be provided in conjunction with the more intensive proposed farm use of the property.

The first assignment of error is denied.

The county's decision is affirmed.[8]

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[7]In Miles v. Clackamas County, 18 Or LUBA 428, 439 (1989), we said it is consistent with OAR 660-05-030(4) for a county to approve a farm dwelling, in conjunction with approval of a specific farm management plan, even though the farm use proposed in the management plan does not yet exist on the subject property, "so long as the county (1) determines the level of farm use proposed by the farm management plan satisfies OAR 660-05-030(4), and (2) ensures through conditions that the farm dwelling cannot actually be built until after the county determines that the farm management plan has been carried out." However, here the county has not established any process for requiring specific farm management plans or for ensuring that final construction authorization does not occur until compliance with such farm management plan is verified.

[8]If the findings adopted in support of a local government decision to deny development approval adequately explain a sufficient basis for denial, the decision will be upheld. Forest Park Estate v. Multnomah County, ___ Or LUBA ___ (LUBA No. 90-070, December 5, 1990), slip op 29-30; Valley View Nursery v. Jackson County, 15 Or LUBA 591, 598 (1987); Cook v. City of Eugene, 15 Or LUBA 344, 347 (1987). Petitioners' other assignments of error challenge additional justifications stated in the county's decision for denying the subject application. Therefore, consideration of petitioners' other assignments of error would not affect the outcome of this appeal.