BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN L. LOUKS, KENDRA G. LOUKS, THOMAS LAVAGNINO, and VICKI LAVAGNINO, Petitioners, vs. JACKSON COUNTY, Respondent, and ASSOCIATED FRUIT COMPANY, Intervenor-Respondent.	LUBA No. 93-133 FINAL OPINION AND ORDER

Appeal from Jackson County.

G. Philip Arnold, Ashland, filed the petition for review on behalf of petitioners. With him on the brief was Drescher & Arnold. John L. Louks, Medford, filed a reply brief and argued on his own behalf.

No appearance by respondent.

John R. Hassen and Richard H. Berman, Medford, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Blackhurst, Hornecker, Hassen & Ervin B. Hogan.

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

REMANDED 01/11/94

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer's decision approving two farm dwellings on an EFU-zoned parcel.

MOTION TO INTERVENE

Associated Fruit Company, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The relevant facts are set forth in the challenged decision:

> "* * * The subject property * * * consists of 108.29 acres. The property * * * is a producing pear orchard owned and managed, along with other orchards, by Associated Fruit Co. Applicant owns or operates a total of approximately 1,500 acres of orchard land at various locations in the Rogue Valley.
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> "Applicant has been in the orchard business for 50 years. The average annual value of applicant's gross farm sales for three years preceding the application exceeded $5,000,000. Applicant's profits are approximately $150-300 per acre and constitute about 1% of the gross income per acre.
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> "Applicant employs approximately 40 full-time workers and as many as 150 additional workers on a seasonal basis. Both full-time and seasonal workers are engaged in the planting, raising, harvesting[,] packing and shipping of applicant's orchard products.
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> "There is one existing farm dwelling on the property which is licensed, seasonally, as a farm labor camp. * * *

> "Applicant currently provides 13 single family dwellings for its full-time employees and 5 seasonal-worker residential facilities for approximately 80 individuals. The proposed farm dwellings would be occupied by applicant's full-time employees." Record 7-8.

FIRST ASSIGNMENT OF ERROR

Petitioners contend the challenged decision violates former Jackson County Land Development Ordinance (LDO) 218.030(4).[1] LDO 218.030(4) identifies the following permitted uses in the EFU zone:

> "Farm dwellings * * * and other buildings customarily provided in conjunction with farm use. More than one farm dwelling shall not be permitted unless substantial evidence is provided which shows conclusively that the additional farm dwelling is necessary for the operation of the commercial farm. * * *
>
> "* * * * *"

Petitioners argue the evidence in the record does not "conclusively" establish "that the additional farm dwelling is necessary for the operation of the commercial farm," as required by LDO 218.030(4). Petitioners are correct.

As the hearings officer's findings point out, LDO 218.030(4) differs significantly from ORS 215.213(1)(g) and 215.283(1)(f), which allow farm dwellings in EFU zones. Neither statute requires that an applicant carry an

[1]After the decision challenged in this appeal was rendered, the county amended LDO Chapter 218 to comply with Oregon Laws 1993, chapter 792 (HB 3661). Those amendments repealed the provisions of former LDO 218.030(4) which petitioners contend the hearings officer erroneously found to be satisfied in this case.

evidentiary burden to demonstrate "conclusively" that a proposed farm dwelling be "necessary for the operation of the commercial farm." LDO 218.030(4) does not impose that burden for the first farm dwelling, but it does impose that burden for subsequent farm dwellings.

The hearings officer recognized that decisions by LUBA and the appellate courts have considered the meaning of the term "necessary" in the context of the requirement under Statewide Planning Goal 4 (Forest Lands) that forest management dwellings be "necessary for and accessory to forest uses." Record 9. However, the hearings officer concluded that interpretations of the meaning of the term "necessary" in the Goal 4 context need not be applied in this case, because the EFU zone at issue here implements Goal 3 (Agricultural Land). While the hearings officer found the term "necessary" should not be interpreted in the same way it has been interpreted in the Goal 4 context, he did not explain how he believed it should be interpreted.[2]

Although it is true the challenged LDO provision was adopted to implement Goal 3 rather than Goal 4, that is not a sufficient basis for assigning a different meaning to the word "necessary," as it is used in LDO 218.030(4). Just as

[2]The hearings officer also found that even if the "necessary" requirement of LDO 218.030(4) were interpreted in the same manner it has been interpreted under Goal 4, the disputed dwellings are necessary for intervenor's commercial farming operation. For the reasons explained below, the record does not support that finding.

the LDO does not define the term "necessary" as that term is used in LDO 218.030(4), the Lane County Code did not define that term as it was used in the code provisions at issue in 1000 Friends of Oregon v. LCDC (Lane County), 83 Or App 278, 282-83, 731 P2d 457, on reconsideration 85 Or App 619 (1987), aff'd 305 Or 384 (1988). In that case the Court of Appeals explained its understanding of the "necessary" component of the "necessary and accessory" requirement in the Goal 4 context as follows:

> "* * * The dictionary definition [of necessary] is 'that cannot be done without: that must be done or had: absolutely required.' Webster's Third New International Dictionary 1511 (1976). That definition is compatible with LCDC's use of 'necessary' and with Goal 4's requirement that forest lands be preserved for forest uses. Lane County's criteria would allow dwellings which can be done without, need not be had and are not absolutely required for a forest use; they therefore do not comply with the goal.
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> "* * * Living on the land may help deter arsonists, and thereby enhance production, but that fact does not render a forest dwelling necessary. For a forest dwelling to be necessary and accessory to wood fiber production, it must, at least, be difficult to manage the land for forest production without the dwelling. The purpose of the dwelling must be to make possible the production of trees which it would not otherwise be physically possible to produce. * * *" (Emphasis added.)

In Champion International v. Douglas County, 16 Or LUBA 132, 138-39 (1987), we explained that the first of the above emphasized sentences suggests a mere "difficulty" standard, while the last sentence suggests an "impossibility" standard

which would preclude approval of forest dwellings in most circumstances. We explained:

> "While it is possible to read the Court of Appeals' decision in its entirety to reject a literal 'impossibility' standard for forest dwellings, it is also unmistakable that the Court of Appeals believes substantially more than convenience, enhancement, and cost efficiencies are required to show a dwelling is necessary for forest use."

See also Tipperman v. Union County, 22 Or LUBA 775 (1992); Dodd v. Hood River County, 22 Or LUBA 717 (1992).

Absent a contrary definition in the LDO or some legislative history to the contrary, we believe the term "necessary" in LDO 218.030(4) has the same meaning it has in the Goal 4 context. Differences between farm uses and management practices on the one hand and forest uses and management practices on the other may affect the result when determining whether a dwelling is "necessary" on these different kinds of resource lands. However, there is no basis for assigning a different meaning to the word necessary.[3]

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[3]We review petitioners' challenges of the hearings officer's interpretation and application of LDO 218.030(4) to determine whether the interpretation is reasonable and correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988). In considering the hearings officer's interpretation, we do not apply the more deferential standard of review that would be required by ORS 197.829 and Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), if the challenged decision had been adopted by the local governing body. Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994); Watson v. Clackamas County, 129 Or App 428, 879 P2d 1309, rev den 320 Or 407 (1994).

Turning to the challenged decision, the hearings officer correctly notes there is evidence in the record that efficiency and productivity of the orchard would be enhanced by allowing on-site dwellings. Among the factors noted in the decision are "frost control, prevention of trespassing, vandalism and theft." Record 9. The findings go on to explain that the existing dwelling on the 108 acres has not prevented trespass, vandalism or theft.[4]

The record is this case does not show the proposed dwellings are necessary for the commercial operation. The findings make no attempt to explain how the requested houses will deter trespass, vandalism and theft, if the dwelling already on the property does not. We also have difficulty seeing how the proposed dwellings will have any deterrent effect with regard to other parcels that make up this large commercial orchard operation. Moreover, as petitioners correctly point out, this commercial orchard has operated for years without the requested dwellings. This strongly suggests that while the dwellings might make the operation more efficient, more profitable and less susceptible to trespass, vandalism and theft, the dwellings are not "necessary" for the continuation of the commercial farm.

We do not mean to minimize the problems identified in the local proceedings that may be associated with the

[4]Intervenor correctly notes pears are significantly easier to steal than are trees.

currently inadequate supply of housing for year-round and seasonal farm workers. However, that shortage does not establish the requested housing on the subject 108 acre parcel is "necessary."[5]

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the hearings officer erred when he considered the commercial farm to be the entire 1500 acres included in intervenor's commercial farming operation.

Petitioners cite no provision of the LDO that would permit or require the hearings officer to consider less than intervenor's entire commercial farming operation. The hearings officer's interpretation and application of LDO 218.030(4) as referring to intervenor's entire commercial farm, not just the subject 108 acre parcel, is consistent with the language of LDO 218.030(4).

The second assignment of error is denied.

REMAINING ISSUES

Intervenor-respondent argues the county's decision should be affirmed in this case, without regard to LDO 218.030(4), because that provision is inconsistent with and

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[5]We do not go so far as to say the county could not establish that the proposed housing is "necessary" within the meaning of LDO 218.030(4). However, in view of the high standard imposed by LDO 218.030(4) and the lack of a requirement for a showing of necessity in the current approval standards that would apply to a new application, the applicant may wish to submit a new application and proceed under current approval standards.

preempted by ORS 197.312(2) and 215.283(1)(f).[6] We reject the argument for two reasons.

First, intervenor's argument that the county erred in applying LDO 218.030(4), and should have found that provision to be preempted by the cited statutes, is properly presented in a petition for review or a cross-petition for review. That challenge to the county's application of LDO 218.030(4) cannot be made in a response brief. McKay Creek Valley Assoc. v. Washington County, 25 Or LUBA 238, 243, rev'd on other grounds, 122 Or App 59 (1993).

Second, testimony submitted on intervenor's behalf to the hearings officer cited a number of statutes, including the statutes it now contends preempt LDO 218.030(4), in support of its contention that there is a need for farm worker housing. Supplemental Record 62. In response to the hearings officer's inquiry concerning whether the evidence of need for farm worker housing provides a basis for imposing a "lesser burden" than required under the LDO,

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[6]ORS 197.312(2) provides:

> "No * * * county may impose any approval standards, special conditions or procedures on seasonal and year-round farm-worker housing that are not clear and objective or have the effect, either in themselves or cumulatively, of discouraging seasonal and year-round farm-worker housing through unreasonable cost or delay or by discriminating against such housing."

ORS 215.283(1)(f) allows the following uses in EFU zones:

> "The dwellings and other buildings customarily provided in conjunction with farm use."

intervenor's representative stated it did not. Supplemental Record 64. We agree with petitioners that intervenor affirmatively waived the issue it attempts to raise in the response brief, i.e., that the county could approve the disputed dwellings without finding they comply with the "necessary" requirement of LDO 218.030(4).[7] See Newcomer v. Clackamas County, 92 Or App 174, 187, 758 P2d 450, modified 94 Or App 33 (1988); Louisiana Pacific v. Umatilla Co., 26 Or LUBA 247, 258 (1993).

The county's decision is remanded.

[7]Because we do not reach the preemption issue intervenor attempts to raise in its response brief, we express no opinion concerning the merits of that argument.