

# Friends of Linn County

*Protecting and preserving our farms, forests, and communities*

Linn County Board of Commissioners  
c/o Deborah Pinkerton, Senior Planner  
PO Box 100  
Albany OR 97321

January 28, 2009

## **RE: PD08-0180, Cox accessory farm dwelling**

Dear Commissioners Lindsay, Nyquist, and Tucker:

Friends of Linn County (FOLC) is a charitable organization whose mission is to protect, preserve, and enhance the livability and sustainability of Linn County's farms, forests and cities. FOLC is appearing in these proceedings on behalf of its membership in Linn County. Mr. Just, 39625 Almen Drive, Lebanon OR 97355, is also appearing on his own behalf.

### **I. Introduction**

This is a request to retain an existing accessory farm dwelling on 11S-4W-10 tax lots 200 and 301, an EFU-zoned tract of 127.6 acres. The subject property is located at 35500 Spicer Drive, Lebanon.

A primary dwelling was sited in 1976 on Tax Lot 200 when that parcel was under separate ownership from Tax Lot 301. The accessory farm dwelling was approved on Tax Lot 200 on October 19, 1993, when tax lots 200 and 301 were still under separate ownerships.

### **II. Criteria applicable to the request**

ORS 215.283(1)(f) authorizes "[p]rimary or accessory dwellings and other buildings customarily provided in conjunction with farm use."

ORS 215.130(5) provides that "[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."

The Oregon Supreme Court's decision in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), established that the uses allowed under ORS 215.283(1) are permitted outright, whereas the uses allowed under ORS 215.283(2) may be subject to locally adopted approval criteria. *Brentmar* at 496.

### **III. Analysis**

#### **A. Linn Code is more restrictive than required or allowed by state law.**

LCC 933.410 establishes criteria for the siting of an accessory farm dwelling that are more restrictive than the criteria set forth at OAR 660-033-0130(24)(a). The administrative rule

39625 Almen Drive · Lebanon OR 97355 · Phone: 541-258-6074 · Fax: 541-258-6810

jjust@centurytel.net

distinguishes between an accessory dwelling that is sited on the same parcel as the primary dwelling and an accessory dwelling that is sited on a different parcel. The rule places no restrictions on accessory dwellings sited on the same parcel: if an income test and other criteria are met, the dwelling may be stick-built, and is considered a permanent dwelling. However, if the accessory dwelling is sited on a different parcel than the primary dwelling, the accessory dwelling must be a manufactured dwelling and must be removed should the parcel be sold.

Under the Oregon Supreme Court's ruling in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), counties may not be more restrictive than state law in approving ORS 215.283 subsection (1) uses. Linn County should amend LCC 933.410 to make it consistent with OAR 660-033-0130(24)(a) and to bring it in compliance with ORS 215.283(1)(f) and with *Brentmar*.

As a matter of policy, it is difficult to comprehend why this Board would *want* Linn County Code to be more restrictive than required by state law. This Board should direct the Linn County Planning Department to initiate proceedings to amend Linn County Code to make it consistent with state law.

**B. Linn County exceeded its authority in requiring review and re-approval of an existing accessory farm dwelling.**

**1. The accessory farm dwelling was and is allowed as a permanent "outright" use without restriction on dwelling type.**

ORS 215.283(1)(f) (1993 edition) allowed "[t]he dwellings and other buildings customarily provided in conjunction with farm use." ORS 215.283(1)(f) currently authorizes "[p]rimary or accessory dwellings and other buildings customarily provided in conjunction with farm use."

OAR 660-33-030(1) (1993 edition) provided that a dwelling could be considered to be "in conjunction with farm use" upon finding that the dwelling would be occupied by a person or persons who will be principally engaged in the farm use of the land.

OAR 660-033-0130(24)(a) currently allows accessory farm dwellings (not restricted to manufactured dwellings) if the accessory farm dwelling would be located on the same lot or parcel as the primary dwelling and the accessory dwelling would be occupied by a person or persons who will be engaged in the farm use of the land and whose assistance is required by the farm operator.

The Oregon Supreme Court's decision in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), established that the uses allowed under ORS 215.283(1) are permitted outright, whereas the uses allowed under ORS 215.283(2) may be subject to locally adopted approval criteria. *Brentmar* at 496.

Linn County could not in 1993 and cannot now place restrictions on an accessory farm dwelling that are not found in statute or administrative rule.

**2. Continued use of the dwelling is allowed as of right.**

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ORS 215.130(5) provides that “[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.”

While ORS 215.130(5) is aimed at nonconforming uses - uses which were at one time allowed but have, since initial approval, are no longer allowed uses in the applicable zone and thus have become “nonconforming.” However, ORS 215.130(5) of necessity *presumes* that a lawful use may be continued *in the absence* of the enactment or amendment of any zoning ordinance or regulation making that use “nonconforming.” It would be an absurd result if a county could compel the discontinuance of an allowed use until such time as a change in law makes that use nonconforming, at which time its hands became tied and a county may no longer compel a heretofore conforming use to be discontinued.

The property owner in this case is allowed immediate and continued use of the lawfully established dwelling as a matter of right.

The Linn County Planning Commission exceeded its authority in requiring review and re-approval of an existing accessory farm dwelling. The Planning Commission’s decision should be vacated and any application or other fees paid to the county by the applicant should be refunded.

### **IV. Conclusion**

The Linn County Board of Commissioners need not entertain and may not either approve or deny the applicant’s request to continue the use of the accessory farm dwelling.

Rather, no decision on the application is necessary as the application to continue the use need not have been submitted and should not have been accepted. This Board should vacate the Planning Commission’s decision and order that any application or other fees paid to the county by the applicant be refunded.

This Board should direct the Linn County Planning Department to initiate proceedings to amend LCC 933.410 to bring it into compliance with ORS 215.283(1)(f), OAR 660-033-0130(24), and the Supreme Court’s decision in *Brentmar*.

Friends of Linn County and other parties whose addresses appear in the first paragraph of this letter request notice and a copy of any decision and findings regarding this matter.

Respectfully submitted,

Jim Just  
President