

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
) LUBA No. 90-161
CURRY COUNTY,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
R. TODD GOERGEN,)
)
Intervenor-Respondent.)

Appeal from Curry County.

Jane Ard, Assistant Attorney General, Salem, filed the petition for review and waived oral argument. With her on the brief were Dave Frohnmayer, Attorney General, and Virginia Linder, Solicitor General.

M. Gerard Herbage, Gold Beach, represented respondent.

R. Todd Goergen, Coos Bay, represented himself.

HOLSTUN, Referee; Kellington, Chief Referee; Sherton, Referee, participated in the decision.

REMANDED

04/24/91

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

Petitioner appeals a county decision granting approvals for a dwelling and a partition of forest land.

MOTION TO INTERVENE

R. Todd Goergen, one of the applicants below, moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor-respondent and two other persons requested county approval to divide a 54.52 acre Forest Grazing (FG) zoned parcel into two parcels (parcels one and two) of approximately 27 acres each. The property is located on the east side of Highway 101 approximately 16 miles north of Gold Beach and one mile south of Humbug State Park. Property to the north and east is in commercial timber production. A small nonresource parcel and state owned property are located to the west across Highway 101. A large ranch lies to the south.

The county granted approval for a single dwelling to be constructed on parcel one. In addition, parcel one is to "be logged of merchantable timber and replanted with Port Orford Cedar trees for Christmas bough harvesting." Record 4. Parcel two "would be logged of merchantable timber, and cultivated Bonzai trees, Western Shore Pine, and other specialty items for the landscaping and nursery trade in

California would be grown." Id.

ASSIGNMENT OF ERROR

"The County failed to comply with the requirements for approving a division of a forest parcel. The County order lacks necessary findings and is not supported by substantial evidence."

The Curry County Zoning Ordinance (CCZO) does not establish a specific minimum lot size for the FG zone. However, CCZO § 3.056 establishes criteria for creating new "farm," "forest," "nonfarm," and "nonforest" parcels. CCZO § 3.056(B) establishes the following criteria governing creation of new forest parcels:

- "1. Any proposed division of land for forest use must create parcels which are large enough to permit efficient management for the production of wood fiber or other forest uses.
- "2. If the proposed forest use is the production of trees[,] the parcel size shall be consistent with the size of other parcels being managed for the same purpose in the area. Parcels shall be large enough to ensure the long term management of the parcel for timber production or other forest uses. In addition, a management plan for the proposed forest use shall be provided pursuant to Section 4.5.2 of the Curry County Comprehensive Plan. The decision making body shall evaluate the resource management plan to determine if the proposed parcel meets [criterion] (1) above."

Petitioner challenges the adequacy of and evidentiary support for a number of the county's findings concerning

¹The challenged findings are as follows:

- "8. The forest productivity of the land will be increased if the land is actively managed as indicated in the proposed management plans.
- "9. The division of the property will allow more intensive management of the valuable resource lands involved and will provide the maximum economic benefit to be derived due to the applicants wishing to individually manage each parcel according to separate goals as defined in the Management Plan for each parcel.
- "10. Parcel 1 has very good drainage, and as such is quite suitable for the growing of Port Orford Cedar, a species which requires good drainage to prevent root rot.
- "11. The applicants' management plan states that they have expertise in this type of forest production and predict a value of \$500-\$650/acre from 20 acres of production which would yield about \$10,000 to \$13,000 total per year.
- "12. Parcel 2 has more severe limitations than parcel 1, owing to the steeper topography, Winema silty Clay Loam soil and exposure to high winds. As such, it would be best used by growing Bonzai trees, Western Shore Pine, and other specialty items.
- "13. The applicant has produced evidence of 6 other parcels in Curry County which are smaller than the proposed parcels and are used for commercially growing Port Orford Cedar for bough harvesting.
- "14. Some of the forestry parcels in the immediate area of the subject parcel are larger than the proposed parcels; however[,] they are not utilized for the same uses outlined in the applicants' management plan. Three of the resource parcels in the immediate area are smaller than the proposed parcels.
- "15. Based upon all available evidence, the proposed parcels will be large enough to ensure the long term management of the parcel for the proposed forest uses." Record 6-7.

some parcels in the area are larger than the proposed parcel, and three resource parcels in the immediate area are smaller.³

These findings are insufficient to explain why the county believes the two 27 acre parcels will be "large enough to permit efficient management for the production of wood fiber or other forest uses." That there may be small parcels being used for commercial growing of Port Orford Cedar and small resource parcels in the immediate area does not mean either those small parcels or the proposed parcels are "large enough to permit efficient management for the production of wood fiber or other forest uses." The findings provide no additional details concerning the identified resource uses on the small parcels. Neither do the findings explain why the circumstances present on those smaller parcels led the county to conclude the proposed 27 acre parcels could be efficiently managed for "production of

	5.0 Ac.	Zoned R2
"Dale Smith "32-15-8DB T.L. 800 Record 63.	5.0 Ac.	Zoned RR5"

Apparently relying on the above, one of the applicants testified that he had heard of a nursery growing and selling Port Orford seedlings for bough production and that he believed there were resource parcels in the county smaller than the two proposed 27 acre parcels.

³A one page document in the record identifies 12 private ownerships in "close proximity to the subject property." Record 54. Two of those ownerships include over 1000 acres. One contains 62 acres. Nine contain less than 27 acres. Apparently, six of the nine ownerships containing less than 27 acres are nonresource parcels.

wood fiber or other forest uses."

This subassignment of error is sustained.⁴

B. Analysis of Resource Management Plan

Petitioner next contends the county's findings simply conclude that under the proposed management plan "forest productivity of the land will be increased" (finding 8) and "maximum economic benefit will be derived" (finding 9). Petitioner contends the county's findings are inadequate to demonstrate compliance with the CCZO § 3.056(B)(2) requirement that "[t]he decision making body shall evaluate the resource management plan to determine if the proposed parcel meets [the requirements of CCZO § 3.056(B)(1)]."

Findings 8 and 9 are inadequate because they are simply conclusions. DLCD v. Klamath County, 16 Or LUBA 817, 824 (1988); Mill Creek Glen Protec. Ass'n v. Umatilla County, 15 Or LUBA 563, 574, aff'd 88 Or App 522 (1987). Findings 10, 11 and 12 add some factual information about the proposed parcels, but the findings do not explain what it is about the proposed management plans that supports an ultimate conclusion that the proposed parcels will be "large enough to permit efficient management for the production of wood

⁴Because we conclude the findings are inadequate, we do not consider petitioner's evidentiary challenge under this subassignment of error. Benjamin v. City of Ashland, ___ Or LUBA ___ (LUBA No. 90-065, November 13, 1990), slip op 16; DLCD v. Columbia County, 16 Or LUBA 467; 471 (1988); McNulty v. Lake Oswego, 14 Or LUBA 366, 373 (1986).

fiber or other forest uses."⁵

This subassignment of error is sustained.

C. Consistency With the Size of Other Parcels

CCZO § 3.056(B)(2) requires that the size of the proposed parcels "shall be consistent with the size of other parcels being managed for the same purpose in the area."

Parcel two is to be managed for "Bonzai trees, Western Shore Pine and other specialty items for landscaping and nursery trade * * *." Record 4. The county made no findings concerning the size of other parcels in the area being managed for such purposes. Finding 14 (see n 1, supra) can be read to suggest that there are no parcels in the area being managed for precisely the same purposes proposed in the applicant's management plan. However, we cannot determine from finding 14 what area the county considered. Neither can we determine what other types of resource uses are carried out on parcels in that area and whether those resource uses are the same or similar to those proposed for parcels one and two. Finally, we cannot tell

⁵Finding 11 comes the closest to providing a basis for the ultimate conclusion. However, although the applicants may expect a yield of between \$10,000 and \$13,000 dollars a year from the parcel to be planted in Port Orford Cedar, that does not necessarily mean the 27 acre parcel can be efficiently managed for such purposes, as CCZO § 3.056(B)(1) requires. In addition, we do not know what income is expected from parcel two or whether the expected income from that parcel might support a conclusion that it is of sufficient size to be efficiently managed for the proposed forest uses of that parcel.

how large the parcels in the area are.⁶ Finding 14 is, therefore, inadequate to demonstrate the proposed parcel sizes are "consistent with the size of other parcels being managed for the same purpose in the area."

Finding 13 appears to have been adopted to address whether parcel one is consistent with the size of other parcels in the area being managed for Port Orford Cedar. However, finding 13 simply identifies evidence the applicant produced and, therefore, is not a finding of what the county determined the facts to be. Hershberger v. Clackamas County, 15 Or LUBA 401, 403 (1987). In addition, the finding simply suggests there are six other parcels commercially managed for Port Orford Cedar located in the county. Finding 13 does not explain whether there are parcels managed for Port Orford Cedar in the area or, if so, whether the proposed parcel is of a consistent size.

This subassignment of error is sustained.

D. Necessity for the Division

Petitioner finally contends the applicant failed to demonstrate that the "division of land is necessary to carry out the proposed forestry use." Petition for Review 8.

Although CCZO § 3.056(B) requires that new forest

⁶While the document at Record 54, see n 3 supra, may have been intended to identify the parcels in the area and their size, we are unable to assume such is the case. There is no indication either in the county's findings or the document itself that the identified parcels are the "other parcels * * * in the area," within the meaning of CCZO § 3.056(B)(2).

parcels be "large enough to permit efficient management for the production of wood fiber or other forest uses," see discussion of subassignment of error A above, that code section does not require that the division be necessary for such production. Petitioner identifies no other CCZO or comprehensive plan provision requiring a demonstration that a proposed division to create a new forest parcel is necessary to conduct forest uses on the property.

This subassignment of error is denied.

The assignment of error is sustained in part.

The county's decision is remanded.