

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

MICHAEL J. LARDY,)	
)	
Petitioner,)	LUBA No. 90-131
)	
vs.)	FINAL OPINION
)	AND ORDER
WASHINGTON COUNTY,)	
)	
Respondent.)	

Appeal from Washington County.

Michael J. Lardy, Banks, filed the petition for review and argued on his own behalf.

David Noren, Hillsboro, filed the response brief and argued on behalf of respondent.

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

AFFIRMED

02/15/91

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 the county's denial of his application for a conditional use permit for a temporary dwelling to be used in conjunction with forest use of his 50 acre parcel zoned Exclusive Forest Conservation (EFC).

FACTS

Petitioner's 50 acres include both merchantable trees and brush. Petitioner wishes to harvest the trees, remove the brush and replant with Douglas Fir to allow a more productive forest. Petitioner also has a full-time job unrelated to the forest use he plans for the 50 acres, and petitioner claims he is unable to devote more than approximately 20 hours a week to forest operations on the property. Small portions of the 50 acres will be cleared at a time, and both clearing and reforestation will be done by hand. Petitioner seeks approval of a temporary dwelling to facilitate planned forest operations and provide an on-site presence to deter vandalism and theft of wood.

Petitioner's request for approval of a temporary dwelling was denied by the Washington County Planning Director. The planning director's decision was appealed to the Washington County Hearings Officer, who affirmed the planning director's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Under this assignment of error, petitioner contends

that county standards governing temporary dwellings in conjunction with forest management are preempted by the Oregon Forest Practices Act, ORS 527.610 to 527.730.

Petitioner did not seek approval of his dwelling as a permanent dwelling under Washington County Community Development Code (CDC) 342-2.3 and 430-37.2E.¹ Rather, petitioner sought approval of his dwelling as a temporary dwelling under CDC 342-2.14, which provides as follows:

"Temporary Dwelling Unit [may be allowed through a Type I procedure in the EFC zone]^[2] when:

"A. Provided in conjunction with management production or harvesting a forest product:

"B. The unit is approved for no more than a one-year period; if the need continues beyond one (1) year, the applicant may reapply;

¹The EFC zone permits permanent dwellings in conjunction with forest use subject to detailed requirements to assure that the dwelling is "necessary and accessory to forest use." CDC 342-2.3; 430-37.2E. For an analysis of the Statewide Planning Goal 4 (Forest Lands) requirement that dwellings on forest lands be limited to those that are necessary and accessory to forest use, see 1000 Friends of Oregon v. LCDC, 305 Or 384, 752 P2d 271 (1988). See also OAR 660 Division 6.

²Under the CDC, Type I decisions are rendered by the planning director without public notice or hearing. Type II decisions require that the planning director, before rendering a decision, provide notice of a proposed decision and an opportunity to comment. Persons submitting comments may request reconsideration of the decision or appeal the decision to the county hearings officer or planning commission. Although the CDC provides for approval of temporary dwellings in the EFC zone following Type I procedures, the county determined that the decision in this case involved sufficient discretion that a Type II procedure was warranted. See e.g. McKay Creek Valley Assoc. v. Washington County, ___ Or LUBA ___ (LUBA Nos. 89-027 and 89-028, September 18, 1989); Kunkel v. Washington County, 16 Or LUBA 407 (1987). Although petitioner objected below to the county's decision to follow Type II procedures in this matter, he does not assign the county's decision to follow Type II procedures as error in this appeal.

"C. A site plan is approved which provides:

"(1) A firebreak of at least thirty (30) feet around all proposed structures;

"(2) Water supply adequate for fire fighting to all structures;

"(3) Identification of fire fighting equipment adequate to contain fire and prevent fire spreading to surrounding forest lands;

"(4) Health Department requirements can be met."

The hearings officer found that the applicant specifically requested approval to locate the dwelling on the property for a period of five years. Record 10. Based on that finding, the hearings officer concluded the proposed dwelling was correctly characterized as permanent rather than temporary. Because CDC 342-2.14(B) requires that temporary dwellings may only be approved for one year, subject to possible extensions, the hearings officer found petitioner's proposal was not consistent with CDC 342-2.14(B). The hearings officer also found that petitioner's proposal violated other requirements of CDC 342-2.14.

Petitioner does not specifically challenge the above findings of noncompliance with CDC 342-2.14, other than to suggest that the county should have treated his application as being only for approval for one year.³ Rather,

³We do not understand petitioner to claim his application was for less than one year, and we reject petitioner's suggestion that the county should

petitioner argues the county is preempted by ORS 527.722 from asserting regulatory authority under CDC 342-2.14 over his proposed dwelling. ORS 527.722(1) and (2) provide in relevant part:

"(1) Notwithstanding any provisions of ORS chapters 196, 197, 215 and 227, and except as provided in subsections (2) and (3) of this section, no unit of local government shall adopt any rules, regulations or ordinances or take any other actions that prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forest lands located outside of an acknowledged urban growth boundary.

"(2) Nothing in subsection (1) of this section prohibits local governments from adopting and applying a comprehensive plan or land use regulations to forest land to allow, prohibit or regulate:

"(a) The establishment or alteration of structures other than temporary onsite structures which are auxiliary to and used during the term of a particular forest operation;

"(b) The siting or alteration of dwellings;

"* * * * *"

Subsection (1) of ORS 527.722 prohibits local governments from regulating forest practices on forest lands located outside acknowledged urban growth boundaries.⁴ Subsection (2)(a) of ORS 527.772 creates an exception to the

have treated the application as seeking a shorter period of approval than petitioner requested.

⁴The subject property is located outside an acknowledged urban growth boundary.

prohibition of subsection (1), by allowing local governments to regulate certain structures. However, petitioner points out the exception allowing local government regulation of structures on forest lands does not extend to "temporary onsite structures which are auxiliary to and used during the term of a particular forest operation [.]". Petitioner contends his proposed dwelling is such a temporary and auxiliary structure and, therefore, the county's regulation of his dwelling under subsection CDC 342-2.14 is preempted by subsection (1) of ORS 527.722.

The county contends that the relevant provision of ORS 527.722 is subsection (2)(b). That subsection creates an exception from the regulatory prohibition in subsection (1) to allow local government to regulate "[t]he siting or alteration of dwellings" on forest lands. Based on this explicit provision allowing regulation of dwellings, the county contends the prohibition against local government regulation of temporary auxiliary structures under ORS 527.722(2)(a) does not extend to structures that are dwellings.

The record includes letters from the Oregon Forestry Department. Those letters suggest that the Oregon Forestry Department understands the prohibition against local government regulation of temporary and auxiliary structures under ORS 527.722(1) and (2)(a) to include removable dwellings such as travel trailers which provide temporary

housing for durations of a few weeks in conjunction with a particular forest operation.⁵ Record 67, 86-88.

Even if we assume a local government's authority to regulate temporary, accessory dwellings is limited in the manner suggested by the Oregon Forestry Department, petitioner's dwelling does not fall within that limitation. As the county points out in its decision, petitioner's dwelling is simply not the kind of temporary dwelling in conjunction with a "particular forest operation" envisioned by ORS 527.722(2)(a). Rather, as we understand petitioner's proposal, the mobile home will be his permanent residence for an indefinite period and would be located on the subject property not to facilitate a "particular forest operation," but rather to facilitate ongoing forest operations in the future. Petitioner's attempts to describe his proposed dwelling as the type of temporary and auxiliary structure protected from local government regulation under ORS 527.722(1) and (2) do not succeed. Assuming ORS 527.722(1) and (2) limit local government authority to regulate temporary dwellings, we agree with the county that the proposed dwelling does not fall within that exception, due to the permanent nature of the proposed dwelling and petitioner's attempted justification of that dwelling as needed for ongoing forest operations rather than for a

⁵In one letter the department suggested a time frame of "1-2 weeks" and in a second letter suggested "two to twelve weeks." Record 67, 87.

"particular forest operation," as the statute requires.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Citing Agins v. City of Tiburon, 447 US 255, 100 SCT 438, 65 LEd2d 106 (1980), petitioner contends in his second assignment of error that the county's decision violates the Fifth and Fourteenth Amendments to the United States Constitution because it denies him economically viable use of his land. Petitioner contends the county's decision will prevent him from logging his property and protecting his equipment from vandalism. Petitioner further argues the county's decision will have an unduly harsh impact on his ability to use his property and will cause him great hardship.

As the county correctly notes, petitioner does not identify evidence in the record which demonstrates that a dwelling on this 50 acre parcel is needed to conduct forest operations or to protect equipment from vandalism. Although petitioner argues a dwelling is needed, there is evidence in the record from the Oregon Forestry Department that, to the contrary, dwellings generally are not needed to conduct forest operations and that even when they are needed, the need exists only for a relatively short period of time while a particular operation is underway. Although it may be, as petitioner argues, that without a dwelling on the property it will be more expensive and difficult for him to conduct

forest operations on the property, the record does not support petitioner's contention that the county's decision denies him economically viable use of his property.⁶

The second assignment of error is denied.

The county's decision is affirmed.

⁶Neither does petitioner identify evidence supporting his claims that the county's decision has an impermissibly harsh impact on him or provide argument that the decision does not advance a legitimate public purpose. Petitioner simply claims that such is the case. This Board has consistently declined to review undeveloped constitutional claims. Dolan v. City of Tigard, ___ Or LUBA ___ (LUBA No. 90-029, January 24, 1991) slip op 22; Faulkender v. Hood River County, 17 Or LUBA 360, 366 (1989); Portland Oil Service Co. v. City of Portland, 16 Or LUBA 255, 269 (1987); Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 165-166 (1985).