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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
COOS COUNTY,)
)
Respondent,)
)
and)
)
LONE ROCK TIMBER COMPANY,)
)
Intervenor-Respondent.)

LUBA No. 91-193
FINAL OPINION
AND ORDER

Appeal from Coos County.

Jerome Lidz, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Dave Frohnmayer, Attorney General; Jack L. Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

David B. Smith, Tigard, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 03/09/92

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the board of
4 commissioners approving a conditional use permit for a
5 nonforest dwelling and a partition of a 5 acre parcel from
6 a 110 acre parcel zoned Forest.

7 **MOTION TO INTERVENE**

8 Lone Rock Timber Company moves to intervene on the side
9 of the respondent in this appeal proceeding. There is no
10 objection to the motion, and it is allowed.

11 **FACTS**

12 The subject parcel is 110 acres in size.
13 Intervenor-respondent (intervenor) applied for a conditional
14 use permit for approval of a nonforest dwelling on the
15 subject parcel, and for permission to divide the proposed
16 five acre homesite from the subject parcel.¹

17 The planning director denied intervenor's application,
18 and intervenor appealed to the planning commission. After a
19 public hearing, the planning commission voted to deny the
20 application. Intervenor appealed to the county
21 commissioners. The county commissioners overturned the
22 decision of the planning commission and approved the
23 application. This appeal followed.

¹Intervenor proposes to continue to manage the remaining 105 acres for timber production.

1 **ASSIGNMENT OF ERROR**

2 "The county erroneously interpreted and applied
3 Review Standards 19 and 31 of the CCZLDO when it
4 approved a division of forest land, without a
5 finding -- and without evidence in the record to
6 support a finding -- that the entire 'parent'
7 parcel is generally unsuitable for forest uses.
8 The findings on which the county relied are
9 legally insufficient to support its decision."

10 Coos County Zoning and Land Development Ordinance
11 (CCZO) Review Standard 19a requires the following be
12 demonstrated for approval of both nonforest dwellings and
13 land divisions:

14 "[T]he proposed site is on land generally
15 unsuitable for forest uses."²

16 The board of commissioners determined:

17 "The 5 acres applicant proposes to partition are
18 lands generally unsuitable for forest uses."
19 Record 5.

20 The challenged decision does not purport to determine
21 that the entire 110 acre parcel is "generally unsuitable for
22 forest uses." In addition, there is no dispute that the
23 subject parcel, save the five acres proposed to be divided,
24 is suitable for forest uses.

25 The issue in this appeal is whether the county may look
26 solely to the five acre portion of the property proposed for
27 the nonforest dwelling to determine compliance with its

²Review Standard 19 applies to conditional uses in the Forest zone. Review Standard 31 requires that a proposed division of Forest zoned land be shown to be in compliance with Review Standard 19.

1 "generally unsuitable for forest uses" standard, or whether
2 the county must examine the suitability of the entire 110
3 acre parcel for forest uses.

4 Petitioner points out that CCZO Review Standard 19a is
5 nearly identical to ORS 215.213(3)(b) and 215.283(3)(d),
6 which provide that a nonfarm dwelling may be approved if:

7 "* * * situated upon generally unsuitable land for
8 the production of farm crops and livestock * * *."

9 Petitioner argues the term "generally unsuitable" is a term
10 of art, the meaning of which is correctly applied equally to
11 both nonfarm and nonforest use requests. Petitioner states
12 the interpretation of the term "generally unsuitable" in the
13 context of nonfarm dwellings is well defined by case law
14 interpreting ORS chapter 215. Petitioner contends that
15 appellate decisions interpreting the "generally unsuitable"
16 standard in the nonfarm dwelling context have made it clear
17 that "general unsuitability" is determined by considering
18 the entire tract, not just the site proposed for the nonfarm
19 use. Smith v. Clackamas County, 103 Or App 370, 797 P2d
20 1058, rev allowed 310 Or 791 (1990); Denison v. Douglas
21 County, 101 Or App 131, 135 n 1, 789 P2d 1388 (1990); Lemmon
22 v. Clemens, 57 Or App 583, 646 P2d 633, rev den 293 Or 643
23 (1982); Meyer v. Lord, 37 Or App 59, 586 P2d 367 (1978).
24 Petitioner also points out that in Grden v. Umatilla County,
25 10 Or LUBA 37 (1984), the Board was asked to interpret a
26 similar "suitability" standard in the context of a nonforest

1 use request.³ In Grden, the petitioners argued the
2 suitability standard at issue there should be read to apply
3 only to the site proposed for the nonforest use, and not to
4 the entire tract. The Board disagreed and decided:

5 "[T]he suitability standard in this case is
6 governed by an understanding that the overall
7 purpose of Goal 4 is the retention of forest land
8 for forest uses. That overall purpose must be
9 kept in mind when establishment of any nonforest
10 use is proposed. * * * Acceptance of the narrow
11 reading proposed by the [respondents] could easily
12 result in the gradual diminution of valuable
13 resource lands. Myriad nonforest uses could be
14 expected to spring up on small, unproductive
15 building sites located on larger parcels
16 containing valuable timber land. In time, these
17 uses could well make a much larger presence known,
18 to the detriment of the values reflected in
19 Goal 4. The Board notes, also, in support of its
20 interpretation, that, in analogous cases arising
21 under Goal 3 (Agricultural Lands) the Court of
22 Appeals has read the law so as to maximize the
23 retention and continuation of existing resource
24 uses. * * *" Id. at 43.

25 Similarly, petitioner argues that CCZO Review
26 Standard 19a is correctly interpreted to require the county
27 to consider the general unsuitability of the entire 110 acre
28 tract for forest uses, rather than simply to evaluate the
29 unsuitability of the five acre portion of the tract proposed

³In Grden, the approval standard at issue was whether the proposed nonforest use (a church) would be:

"* * * situated on lands least suitable for forest production considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation location and size of tract, and the cost of roads, power and telephone lines * * * [.]"

1 to be divided for the proposed nonforest dwelling.

2 Intervenor argues the cases interpreting the term
3 "generally unsuitable" in the nonfarm dwelling context are
4 inapplicable to interpreting a "generally unsuitable"
5 standard in the nonforest use context. Intervenor also
6 argues that at the time CCZO Review Standard 19a was
7 acknowledged by the Department of Land Conservation and
8 Development, the interpretation then ascribed to the
9 "generally unsuitable" standard was not fully developed, and
10 could not have been intended to be applied by the county to
11 CCZO Review Standard 19a. Intervenor contends the
12 interpretation that an entire tract must be considered when
13 applying the "generally unsuitable" standard was never
14 intended by the county when it adopted CCZO Review
15 Standard 19a.

16 The interpretation of local ordinances is a question of
17 law which must be decided by this Board. While some
18 deference is due a local government's interpretation of its
19 own ordinances, it is ultimately this Board's responsibility
20 to determine the correct interpretation of disputed code
21 provisions. McCoy v. Linn County, 90 Or App 271, 275-76,
22 752 P2d 323 (1988).

23 We agree with petitioner that it is correct to
24 characterize the term "generally unsuitable" as a term of
25 art, at least when it is used in the context of nonresource
26 use approvals in resource zones. We also agree with

1 petitioner that because CCZO Review Standard 19a uses
2 language substantially duplicating the statutory "generally
3 unsuitable" standard, it is correct to apply the legal
4 interpretation applicable to the "generally unsuitable"
5 standard developed in the context of nonfarm use approvals
6 in exclusive farm use zones.

7 Samoilov v. Clackamas County, ___ Or LUBA ____ (LUBA
8 No. 91-131, December 12, 1991), concerned a "generally
9 unsuitable" approval standard applicable to applications for
10 nonforest dwelling approvals in a forest zone. In Samoilov,
11 the issue was whether, under that approval standard, it was
12 correct for the county to apply the interpretation of the
13 term "generally unsuitable" developed in the context of
14 nonfarm dwelling approvals in exclusive farm use zones. We
15 stated:

16 "We believe the * * * interpretation of the
17 'generally unsuitable' standard relating to farm
18 uses is equally applicable to the ZDO 405.05(A)(4)
19 'generally unsuitable' standard relating to forest
20 uses. Sabin v. Clackamas County, ___ Or LUBA
21 ____ (LUBA No. 90-077, September 19, 1990), slip
22 op 20-23." Id., slip op at 3.

23 In the present case we also conclude the legal
24 interpretation applicable to the "generally unsuitable"
25 standard in the context of nonfarm dwellings in exclusive
26 farm use zones applies equally to the interpretation of CCZO
27 Review Standard 19a relating to nonforest uses in the Forest
28 zone. The county's interpretation of CCZO Review Standard

1 19a, as reflected in its findings, is incorrect.⁴

2 Petitioner's assignment of error is sustained.

3 The county's decision is remanded.

4

⁴We note that the "generally unsuitable" standard is not required to be applied to nonforest dwellings on forest land by Goal 4 or the Goal 4 rules.