

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

3  
4 DEPARTMENT OF LAND CONSERVATION )  
5 AND DEVELOPMENT,                     )

6   )  
7                     Petitioner,                     )

8   )  
9             vs.                                     )

10    )  
11 KLAMATH COUNTY,                     )

12    )  
13                     Respondent,                    )

14    )  
15             and                                    )

16    )  
17 JOHN M. SCHOONOVER,                    )

18    )  
19                     Intervenor-Respondent.                    )

LUBA No. 92-003

FINAL OPINION  
AND ORDER

20  
21  
22             Appeal from Klamath County.

23  
24             Jane Ard, Salem, filed the petition for review and  
25 argued on behalf of petitioner. With her on the brief was  
26 Charles S. Crookham, Attorney General; Jack Landau, Deputy  
27 Attorney General; and Virginia L. Linder, Solicitor General.

28  
29             No appearance by respondent.

30  
31             G. Philip Arnold, Ashland, filed the response brief and  
32 argued on behalf of intervenor-respondent. With him on the  
33 brief was Drescher & Arnold.

34  
35             HOLSTUN, Chief Referee; SHERTON, Referee, participated  
36 in the decision.

37  
38                     REMANDED                               05/18/92

39  
40             You are entitled to judicial review of this Order.  
41 Judicial review is governed by the provisions of ORS  
42 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision granting a building  
4 permit for a nonforest dwelling.

5 **MOTION TO INTERVENE**

6 John M. Schoonover, the applicant below, moves to  
7 intervene on the side of respondent. There is no opposition  
8 to the motion, and it is allowed.

9 **FACTS**

10 An 80 acre parcel (Tract 1214) contains 16 five acre  
11 lots. Tract 1214 is designated Forest by the Klamath  
12 County Comprehensive Plan and Land Development Code. The  
13 challenged decision grants a building permit for one of the  
14 16 five acre lots.

15 Tract 1214 is subject to a Land Conservation and  
16 Development Commission enforcement order. See ORS 197.319  
17 to 197.335. Under the terms of that enforcement order, the  
18 county is prohibited from issuing building permits or mobile  
19 home placement permits for the 16 lots in Tract 1214, unless  
20 six criteria stated in the enforcement order are satisfied.

21 **ASSIGNMENT OF ERROR**

22 "The county failed to make adequate findings  
23 supported by substantial evidence that a building  
24 permit for Tract 1214 meets the criteria set out  
25 in Enforcement Order No. 89-EO-419 and the Klamath  
26 County Land Development Code. In addition, the  
27 [county] incorrectly interpreted the criteria  
28 applicable to the decision on the building  
29 permit."

1           One of the six approval criteria specified in the  
2 enforcement order provides as follows:

3           "The proposed nonforest use is situated upon a  
4 parcel of land generally unsuitable for the  
5 production of forest crops and livestock,  
6 considering the terrain, adverse soil or land  
7 conditions, [drainage] and flooding, vegetation,  
8 location and size of tract. 'Generally  
9 unsuitable' means land does not have a timber  
10 productivity rating of I through VI or is [not]  
11 required to be reforested under the [Forest  
12 Practices Act,] unless findings and reasons are  
13 provided which thoroughly explain why other  
14 factors present make the land generally unsuitable  
15 for the production of forest crops and livestock.  
16 For example, having only generalized soils mapping  
17 shall not be used to find that property containing  
18 cubic foot site [class] V is generally unsuitable  
19 for forest use." (Emphasis in original.)  
20 Supplemental Record 8.

21           Under the above quoted criterion, land with a timber  
22 productivity rating of class I through VI is presumptively  
23 suitable for forest use. The subject property contains  
24 soils with a timber productivity rating of class V, and may  
25 be expected to yield 50 to 85 cubic feet of timber per year  
26 per acre.

27           The county's decision appears to be based on arguments  
28 by the applicant that the property (1) contains soils of  
29 below average timber productivity and has not been very  
30 productive in the past, (2) presently suffers from a pine  
31 beetle infestation, and (3) is too small for a commercially  
32 feasible forest operation.

33           Regarding the first point, petitioner presented  
34 testimony during the local proceedings that only a very

1 small percentage of privately owned forest lands in eastern  
2 Oregon have a site class productivity rating that is  
3 superior to that of the subject property. While the timber  
4 productivity of the subject property may be below the  
5 national average, petitioner argued during the local  
6 proceedings, based on United States Forest Service  
7 statistics, that land in eastern Oregon with a site class  
8 such that the land will produce more than 50 cubic feet of  
9 timber per acre per year should be considered suitable for  
10 timber production.

11 In essence, the county and petitioner disagree about  
12 whether property which will yield 50 to 80 cubic feet of  
13 timber per acre per year is suitable for forest use.  
14 Petitioner, the agency that adopted the enforcement order's  
15 generally unsuitable standard, argues that it is; the county  
16 argues that it is not. Without a more focused and detailed  
17 effort by the county to explain why the subject property  
18 should not be considered suitable for forest use, we agree  
19 with petitioner that the county has failed to demonstrate  
20 that such is the case.

21 The only specific reasons offered by the county to  
22 explain why this property should be considered generally  
23 unsuitable for forest use, even though it contains soils of  
24 site class I through VI, are that the property includes some  
25 timber with pine beetle infestation, and the lot is too  
26 small by itself to be used for commercial forest purposes.

1 Neither of these reasons is sufficient to show the property  
2 is generally unsuitable for forest use.

3         Intervenor does not argue the pine beetle infestation  
4 represents a permanent or long term limitation on the timber  
5 productivity of the property. In fact, intervenor  
6 apparently plans to remove the diseased trees. The pine  
7 beetle infestation therefore does not support the county's  
8 general unsuitability conclusion. Neither does the small  
9 size of the subject lot. The lot is part of an 80 acre  
10 tract. There is no attempt to demonstrate the 5 acre lot or  
11 80 acre tract could not be managed with other larger  
12 forested parcels in the area. Without such a demonstration,  
13 the size of the subject property provides no basis for  
14 concluding it is generally unsuitable for forest use.  
15 Samoilov v. Clackamas County, \_\_\_ Or LUBA (LUBA No. 91-131,  
16 December 12, 1991), slip op 3-4.

17         We agree with petitioner that the challenged decision  
18 fails to demonstrate the subject lot is generally unsuitable  
19 for forest use, as the above quoted enforcement order  
20 criterion requires. We therefore sustain the first  
21 assignment of error.

22         The county's decision is remanded.<sup>1</sup>

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<sup>1</sup>We do not consider petitioner's arguments that other enforcement order criteria are violated by the challenged decision. ORS 197.835(9)(a) requires that we decide all issues when reversing or remanding a decision, to the extent we can do so consistent with the deadline established for issuing our final opinion and order. Resolution of the remaining issues raised by petitioner concerning the other enforcement order criteria would

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require further extensions of the statutory deadline for issuing our final opinion and order.