

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the board of county
4 commissioners approving a conditional use permit for a
5 dwelling not in conjunction with farm or forest use in the
6 Forest Agriculture (FA-19) zone.

7 **MOTION TO INTERVENE**

8 Robert Burns, the applicant below, moves to intervene
9 in this proceeding on the side of respondent. There is no
10 objection to the motion, and it is allowed.

11 **FACTS**

12 The subject property is owned by intervenor and
13 consists of 8.9 acres adjoining Walker Road to the west.
14 The subject property is forested, undeveloped and presently
15 used as a woodlot. Record 86. Properties to the north and
16 east of the subject property are zoned Rural Residential, 5
17 acre minimum (RR-5). Properties to the west and south, like
18 the subject property, are zoned FA-19. The FA-19 zone has a
19 19 acre minimum lot size.

20 On September 7, 1988, intervenor applied for, and the
21 county subsequently approved, a major variance from the
22 minimum lot size standard of the FA-19 zone, allowing the
23 creation of two substandard parcels from the subject 8.9
24 acre parcel. Record 92. 109. Within one year after
25 approval of the variance, intervenor applied for
26 partitioning approval to create two 4.45 acre parcels.

1 Record 24. The preliminary partition plan was approved by
2 the county, but the partitioning was never completed by the
3 filing of a deed or legal description of the two parcels.

4 On March 2, 1992, intervenor filed a conditional use
5 permit application for approval of two nonresource dwellings
6 on the subject property. Record 86. Intervenor proposes to
7 put one dwelling on each of the 4.45 acre parcels proposed
8 to be created in 1988. After a public hearing, the county
9 planning commission approved a conditional use permit for
10 one nonresource dwelling on the subject property.
11 Petitioners appealed the planning commission's decision to
12 the board of county commissioners.

13 After conducting a de novo review, the board of county
14 commissioners issued the challenged decision, affirming the
15 planning commission's decision. Conditions imposed by the
16 county include (1) the dwelling must be located on the
17 northerly 4.45 acres of the subject parcel, (2) "all
18 development * * * shall be limited to 1 to 2 [acres] close
19 to Walker Road," and (3) the previously approved variance
20 and minor partition must either be completed or abandoned
21 "before this conditional use permit will be considered
22 approved and before any building permits may be issued for
23 dwellings * * *." Record 20, 21.

24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioners contend the county's determination of
26 compliance with Columbia County Zoning Ordinance (CCZO)

1 404.13.C is not supported by substantial evidence in the
2 record. CCZO 404.13.C requires that conditional use
3 approval for a nonresource dwelling in the FA-19 zone be
4 supported by a finding that the proposed dwelling "does not
5 materially alter the stability of the overall land use
6 pattern of the area."

7 The challenged decision includes the following findings
8 addressing CCZO 404.13.C:

9 "The proposed use of the property is consistent
10 with the overall land use pattern in the area
11 which consists mainly of small residential parcels
12 along Walker Road." Record 18.

13 "The overall land use pattern of the area of the
14 proposed use is commercial forest, farming and
15 5-acre residential. The proposed residences
16 should fit in, if the proper precautions are taken
17 * * *." Record 26.¹

18 Substantial evidence is evidence upon which a
19 reasonable person would rely to support a conclusion. City
20 of Portland v. Bureau of Labor and Ind., 298 Or 104, 119,
21 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or
22 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21
23 Or App 118, 123, aff'd 108 Or App 339 (1991); Douglas v.
24 Multnomah County, 18 Or LUBA 607, 617 (1990). In reviewing
25 an evidentiary challenge, this Board relies on the parties
26 to identify the evidence in the record that supports their

¹Findings 1 through 24 of the May 14, 1992 county staff report, at Record 25-31, are specifically incorporated by reference into the board of county commissioners' decision. Record 20.

1 positions. Eckis v. Linn County, 110 Or App 309, 313, 821
2 P2d 1127 (1991).

3 Petitioners cite evidence in the record that the
4 subject 8.9 acre parcel is part of 30 contiguous acres owned
5 by intervenor. Record 7, 72. The parties cite no other
6 evidence establishing the relevant area for purposes of
7 applying CCZO 404.13.C, the overall land use pattern of such
8 area, or the effect of the proposed nonresource dwelling on
9 the stability of that land use pattern. We, therefore,
10 agree with petitioners that the county's determination of
11 compliance with CCZO 404.13.C is not supported by
12 substantial evidence in the whole record.

13 The first assignment of error is sustained.

14 **SECOND ASSIGNMENT OF ERROR**

15 Under this assignment of error, petitioners challenge
16 the adequacy of the county's findings and the evidence in
17 the record to establish that the proposed nonresource
18 dwelling complies with Columbia County Comprehensive Plan
19 goals and policies and CCZO criteria. Although petitioners
20 do not cite specific plan and CCZO provisions in the
21 assignment of error itself, petitioners do identify plan and
22 CCZO provisions in a section of their petition for review
23 entitled "Statement of Facts Material to the Issues on
24 Appeal" (statement). Therefore, we address those
25 allegations concerning violations of applicable CCZO and
26 plan provisions identified in petitioners' statement.

1 **A. CCZO 404.13.D**

2 CCZO 404.13.D requires that conditional use approval
3 for a nonresource dwelling in the FA-19 zone be supported by
4 a finding that the proposed dwelling:

5 "Is situated upon generally unsuitable land for
6 the production of farm or forest crops or
7 livestock, considering the terrain, adverse soil
8 or land conditions, drainage and flooding,
9 vegetation, location and size of the tract."

10 The only evidence in the record to which we are cited
11 is petitioners' testimony that the subject parcel is
12 suitable for growing timber, has been harvested and
13 reforested and is currently being selectively harvested.
14 Record 7, 39, 73. We also note that the subject application
15 describes the "present use" of the property as a "woodlot."
16 Record 86. Based on this evidence, we agree with
17 petitioners that the county's determination of compliance
18 with CCZO 404.13.D is not supported by substantial evidence
19 in the whole record.

20 This subassignment of error is sustained.

21 **B. CCZO 405.6**

22 CCZO 405.6 establishes the following standard for
23 conditional use approvals in the FA-19 zone:

24 "Development within major and peripheral big game
25 ranges shall be consistent with the maintenance of
26 big game habitat. In making this determination,
27 consideration shall be given to the cumulative
28 effects of the proposed action and other
29 development in the area on big game habitat.
30 Where such a finding is made, development shall be
31 sited to minimize the impact on big game habitat.

1 To minimize the impact, structures shall: be
2 located near existing roads; be as close as
3 possible to existing structures on adjoining lots;
4 and be clustered where several structures are
5 proposed." (Emphasis added.)

6 The county's findings state:

7 "The area is a big game range, as is all of
8 unincorporated Columbia County. The impact on big
9 game habitat will be minimized by keeping
10 development on the east part of the parcels close
11 to Walker Road." (Emphasis added.) Record 28.

12 Also, as mentioned above, the conditions of approval limit
13 development on the subject property to "1 to 2 [acres] close
14 to Walker Road." Record 20.

15 Petitioners contend there is no evidence in the record
16 supporting the above emphasized conclusion that impact on
17 big game habitat will be minimized. Petitioners also argue
18 that an Environmental Impact Statement (EIS) is required to
19 support such a finding.

20 The parties cite no evidence in the record supporting
21 the challenged finding. Accordingly, the county's
22 determination of compliance with CCZO 405.6 is not supported
23 by substantial evidence in the whole record. However, we do
24 not agree with petitioners that an EIS is required to
25 support such a finding. Petitioners identify no applicable
26 plan, CCZO or other provision of law requiring preparation
27 of an EIS in these circumstances.

28 This subassignment of error is sustained, in part.

29 **C. CCZO 406.4**

30 CCZO 406.4 requires all dwellings in the FA-19 zone to

1 comply with the following:

2 "[A] farm or forest management impact statement
3 may be required that shows the relationship
4 between the proposed residential use and
5 surrounding resource uses, including setbacks for
6 any dwellings from forest or farm uses to assure
7 that the [requirements of CCZO 406.1 through .3]
8 are met." (Emphasis added.)

9 Petitioners complain that no farm or forest management
10 impact statement was required by the county.

11 Under CCZO 406.4, the county has the option of
12 requiring a farm or forest management impact statement prior
13 to approving a dwelling in the FA-19 zone. However, it is
14 not required to do so.

15 This subassignment of error is denied.

16 The second assignment of error is sustained, in part.

17 **THIRD ASSIGNMENT OF ERROR**

18 The challenged decision includes the following
19 determination concerning the continued validity of the major
20 variance approved in 1988 allowing the creation of two
21 substandard parcels from the subject 8.9 acre parcel:

22 "The 1988 variance did not expire because at the
23 time it was granted there was no time limit for
24 finalizing variances. * * *" Record 18.

25 Also, as previously noted, a condition of approval requires
26 that the 1988 variance and minor partition be either
27 completed or abandoned prior to issuance of building permits
28 for dwelling(s) on the subject property. Record 21.

29 Petitioners contend the above quoted finding
30 misconstrues the applicable law. According to petitioners,

1 under CCZO 1504.1.B, the 1988 variance became void one year
2 after it was approved, because no substantial construction
3 had taken place. Petitioners argue that, in fact, no
4 construction whatsoever has occurred on the subject
5 property.

6 There is no question that the 1988 variance is a "major
7 variance."² Both when intervenor's application for the 1988
8 variance was filed, and when the challenged decision was
9 made, CCZO 1504.1.B provided:

10 "A [major] variance so authorized [under
11 CCZO 1504.1.A] shall become void after the
12 expiration of one (1) year if no substantial
13 construction has taken place."

14 We agree with petitioners that CCZO 1504.1.B is
15 relevant to determining whether the 1988 variance remains
16 valid. The challenged decision does not interpret and apply
17 CCZO 1504.1.B.³

²At all times relevant to this appeal, CCZO 1504 has defined minor and major variances as follows:

"* * * A Minor Variance is defined as a request for a variance of less than 25% from a dimensional requirement such as setbacks, height, lot coverage, lot width, or lot depth, or a request for a variance of less than 10% from the requirement of a minimum lot size requirement. All other variances are considered major variances. * * *" (Emphasis added.)

There can be no dispute that a variance allowing the creation of two 4.45 acre parcels in a zone with a 19 acre minimum lot size requirement is a major variance.

³We note that the May 14, 1992 county staff report, at Record 24, does purport to interpret and apply CCZO 1504.1.B. However, this portion of the staff report was not incorporated into the board of county commissioners' decision.

1 Because the county has not interpreted and applied
2 CCZO 1504.1.B, and this decision must be remanded in any
3 event, we sustain the third assignment of error and remand
4 the challenged decision so it may do so.

5 The county's decision is remanded.