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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
LINCOLN COUNTY,)
)
Respondent,)
)
and)
)
VERNON WILES,)
)
Intervenor-Respondent.)

LUBA No. 93-099
FINAL OPINION
AND ORDER

Appeal from Lincoln County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief were Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Kurt Carstens, Newport, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Litchfield and Carstens.

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

REMANDED 10/14/93

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 a county order approving a
4 conditional use permit for a nonforest dwelling on land
5 zoned Timber Conservation (TC).

6 **MOTION TO INTERVENE**

7 Vernon Wiles moves to intervene on the side of
8 respondent in this appeal proceeding. There is no objection
9 to the motion, and it is allowed.

10 **FACTS**

11 The subject parcel is 19.55 acres in size. It is
12 bordered on three sides by land managed for commercial
13 timber production. The parcel has steep slopes and is
14 bisected by two small streams, one class I and the other
15 class II.¹

16 The county planning commission approved intervenor's
17 application for a nonforest dwelling. Petitioner appealed
18 the planning commission's decision to the board of
19 commissioners. The board of commissioners affirmed the
20 planning commission, and this appeal followed.

21 **ASSIGNMENT OF ERROR**

22 "Respondent Lincoln County failed to make adequate
23 findings supported by substantial evidence in the
24 whole record that the application for a non-forest

¹Petitioner asserts the stream referred to as a class I stream is really a class II stream. However, all of the evidence in the record to which we are cited states that this stream is a class I stream.

1 dwelling on the subject property meets the
2 criteria for approval of such an application."

3 To approve a nonforest dwelling, Lincoln County Land
4 Use Code (LCLUC) 1.1375(3)(c) requires the county to
5 determine that:

6 "A. The dwelling will be compatible with adjacent
7 farm or forest uses;

8 "B. The dwelling will not materially alter the
9 stability of the overall land use pattern in
10 the area;

11 "C. The dwelling will be located on land
12 generally unsuitable for forest or farm uses,
13 considering adverse soils and land
14 conditions, terrain, parcel configuration,
15 and existing uses on adjacent lands[.]

16 "* * * * *

17 Petitioner makes separate challenges to the county's
18 determinations of compliance with these standards. We
19 address each of those arguments separately below.

20 **A. Compatibility (LCLUC 1.1375(3)(c)(A))**

21 The challenged decision adopts the following findings
22 that the proposed nonforest dwelling is compatible with
23 adjacent forest uses:

24 "The proposed dwelling will be located on the west
25 half of the subject tract, an area with little,
26 usable land for forest production within a totally
27 cleared one acre area, surrounded by an
28 approximate additional acre of nearly bare land.
29 The dwelling would be situated in close proximity
30 to other existing dwellings that have not come in
31 conflict with adjacent farm and/or forest uses.

32 "* * * * *

1 "The Comprehensive Plan policies allow a
2 non-forest residence on a single unit of ownership
3 where the dwelling will be compatible with forest
4 management activities on adjacent properties.
5 This policy is satisfied where the dwelling can
6 meet the location criteria contained in [LCLUC]
7 1.1375(4) * * *. Additionally, the State
8 forester's comment that forest [land] can be
9 managed to the 'doorstep' of residences was taken
10 into consideration in this decision." Record 16-
11 17.

12 Petitioner contends these findings state conclusions
13 without explaining their rationale, and that the findings
14 lack evidentiary support.

15 We agree with petitioner that these findings fail to
16 state an adequate basis for concluding the proposed dwelling
17 will be compatible with adjacent forest uses. The fact that
18 the existing dwellings in the area may not have caused
19 conflicts with area forest uses proves little. The findings
20 fail to establish the proximity between the existing
21 dwellings referred to and area forest uses, and fail to
22 establish whether those existing dwellings have buffering
23 and other characteristics similar to those of the subject
24 parcel.

25 While generally no purpose is served in reviewing the
26 evidentiary support for inadequate findings, we address one
27 of petitioner's evidentiary challenges to these findings.
28 Petitioner argues the county erroneously relied upon a
29 statement from a representative of the Oregon Department of

1 Forestry (DOF).² Petitioner argues the DOF representative's
2 statement was not given to establish that residences are
3 compatible with forest operations. Petitioner states the
4 planning commission minutes more accurately reflect the
5 context in which the testimony of the DOF representative was
6 given:

7 "[The DOF representative] stated that forest uses
8 can be 'managed to the doorstep' of residences
9 adjacent to timber tracts and that in each
10 application for a non-forest use it must be
11 decided whether the site is suitable for forest
12 management.

13 "* * * * *

14 "[A planning commission member asked the DOF
15 representative] what methods could be used to log
16 a topographically isolated area such as this one.

17 "[The DOF representative] answered that loggers
18 are very innovative and could determine a way to
19 do it such as skyline systems.

20 "[The DOF representative] asked if such methods
21 would be practical on a parcel of 10 acres such as
22 the subject parcel.

23 "[The DOF representative] stated that the subject
24 parcel is capable of producing a lot [of timber.]"
25 Record 85.

26 Petitioner points out that after the DOF representative
27 received the planning commission decision, in which it

²Specifically, petitioner challenges the evidentiary support for the following finding:

"* * * In addition, the state forester's comment that forest [land] can be managed to the 'doorstep' of residences was taken into consideration in this decision." Record 17.

1 determined compatibility based on the statement summarized
2 in the minutes above, the DOF representative wrote a letter
3 to the county clarifying the meaning and context of his oral
4 testimony:

5 "The last statement of the finding which indicates
6 that the representative from the [DOF] asserted
7 that management can occur to 'the doorstep' of
8 residences deserves some final word or comment.
9 Actually, what was said was 'I can show you places
10 in Lincoln County where harvest has occurred to
11 the doorstep of dwellings.' We would point out
12 that because something can be done[,] does not
13 mean that it should be done. It is possible to
14 put unprotected pedestrian walkways down the
15 middle of Interstate 5 but that does not mean that
16 its a good idea. In like manner, it is possible
17 to place homes near commercial forest
18 operations[,] but that does not mean this is a
19 good idea either. This comment was made in
20 reference to an assertion by the applicant's
21 attorney on another issue that sufficient
22 development can preclude harvest activities and
23 render a site unsuitable for resource use. One
24 would hope that the planning process is operating
25 well enough to prevent the level of development
26 which ultimately precludes management on resource
27 lands. Fortunately[,] development must stop when
28 it becomes merely incompatible. This comment was
29 meant to point out that it is possible to situate
30 dwellings very near to resource lands and not
31 absolutely preclude harvest. It does not,
32 however, change the [DOF's] written and stated
33 position that dwellings in forest zones are not
34 necessarily compatible with harvesting or other
35 forest management activities." Record 30.

36 The DOF representative's letter clarifies his previous
37 testimony and undermines any inference of compatibility. We
38 agree with petitioner that a reasonable decision maker could
39 not rely upon the testimony of the DOF representative to

1 establish the proposed nonforest dwelling is compatible with
2 forest uses.

3 This subassignment of error is sustained.

4 **B. Stability (LCLUC 1.1375(3)(c)(B))**

5 Under this subassignment of error, petitioner
6 challenges both the adequacy of, and the evidentiary support
7 for, the following findings of compliance with
8 LCLUC 1.1375(3)(c)(B):

9 "With the three dwellings presently existing and
10 two former home sites in close proximity to this
11 subject site, as well as the 19 home sites and two
12 former home sites 'over the hill' to the east on
13 Fruitvale Road there is an established residential
14 flavor to the area. The addition of one home site
15 will not materially alter this stable, existing
16 land use pattern." Record 16.

17 It is well established that to determine whether a
18 nonforest dwelling will materially alter the stability of
19 the overall land use pattern of the area, it is necessary
20 for a county to (1) select an area for consideration, (2)
21 examine the types of uses existing in the selected
22 agricultural/forestry area, and (3) determine the proposed
23 nonresource dwelling will not materially alter the stability
24 of the existing uses in the selected area. Sweeten v.
25 Clackamas County, 17 Or LUBA 1234, 1244-46 (1989); see also
26 Schaad v. Clackamas County, 15 Or LUBA 70, 77-78 (1986). In
27 addition, where during the local proceedings a party raises
28 an issue concerning whether a proposed nonresource dwelling
29 will alter the stability of the land use pattern of an area

1 based on its precedential effect, the local government must
2 address that relevant issue. Norvell v. Portland Area LGBC,
3 43 Or App 849, 853, 604 P2d 896 (1979); Morley v. Marion
4 County, 16 Or LUBA 385, 390-91 (1988). In addressing the
5 relevant issue of the proposed dwelling's precedential
6 effect, the county must consider whether there is a history
7 of progressive partitioning and homesite development in the
8 area or whether there are other similarly situated
9 properties in the area for which similar nonresource
10 dwelling applications would be encouraged. See Fiegi v.
11 Clackamas County, 22 Or LUBA 182, 186 (1991).

12 Here, the county failed to adequately identify an area
13 for consideration or identify the farm and forest zoned
14 parcels within that area of consideration. See Sweeten v.
15 Clackamas County, supra; Schaad v. Clackamas County, supra.
16 In addition, the findings recite that parcels having "former
17 homesites" are properly considered residential parcels for
18 purposes of determining the mix of uses existing within the
19 identified resource area. Petitioner is correct that it is
20 erroneous for the county to determine an area has a
21 residential character based on the existence of former
22 homesites.³ Finally, the county's findings fail to address
23 the relevant issue petitioner raised below concerning the
24 precedential effect of the proposed nonforest dwelling. We

³The challenged decision provides no explanation concerning the legal status of these "former homesites."

1 conclude the county's findings are inadequate.⁴

2 One final point merits comment. Intervenor contends
3 that to the extent the county's findings are inadequate,
4 there is evidence in the record which "clearly supports" a
5 determination that LCLUC 1.1375(3)(c)(B) is satisfied.⁵
6 ORS 197.835(9)(b). We disagree.

7 This subassignment of error is sustained.

8 **C. General Unsuitability (LCLUC 1.1375(3)(c)(C))**

9 Petitioner challenges the evidentiary support for the
10 determination in the challenged decision that the subject
11 parcel is generally unsuitable for farm and forest uses.
12 The challenged decision states:

13 "The proposed dwelling would be located on the
14 west half of the subject tract, an area with
15 little, usable land for forest production within a
16 totally cleared one acre area, surrounded by an
17 approximate additional acre of nearly bare land.
18 * * *

19 " * * * * *

20 "While the entire tract is within soil
21 classifications that indicate viability for timber
22 use, the land conditions on the westerly portion
23 are such that clearing to the extent that has
24 taken place makes reproduction unlikely. The

⁴No purpose is served in reviewing the evidentiary support for these findings, and we decline to do so.

⁵Intervenor also argues that recent administrative rules promulgated by the Land Conservation and Development Department (LCDC) establish the proposed nonforest dwelling will not materially alter the stability of the land use pattern of the area. However, the challenged decision does not address the effect of the rules to which intervenor refers, and we will not apply those rules to the proposal in the first instance.

1 terrain is mountainous and with the abundance of
2 streams [this] severely limits production. The
3 usable portion of the parcel on the east is
4 landlocked with existing surrounding forest uses
5 that would not allow vehicular access onto the
6 easterly portion of the property, the only portion
7 that potentially would otherwise be manageable."
8 Record 16-17.

9 Petitioner cites undisputed evidence that the soils on
10 the subject property are "suited for the production of
11 western hemlock and Douglas fir." Record 114. Petitioner
12 also cites undisputed evidence that the subject property has
13 in the past been managed for timber production and that the
14 subject property is "capable of high levels of wood fiber
15 production." Record 93. Petitioner cites undisputed
16 evidence that the subject property is surrounded on three
17 sides by property with similar characteristics and
18 topography that is managed for timber production. Record
19 89, 107, 121.

20 Intervenor cites evidence from a forestry consultant
21 that only four of the western nine acres of the property are
22 suitable for timber production because the other five
23 western acres have been cleared for the homesite, are steep
24 and include two streams whose riparian areas are "not
25 harvestable." Record 120-21. The consultant goes on to
26 state that the eastern 10-acre portion of the property has
27 limited road access.

28 The challenged decision interprets
29 LCLUC 1.1375(3)(c)(C) to require that the entire parcel be

1 generally unsuitable for farm or forest uses.⁶ That
2 interpretation is not clearly contrary to the words, policy
3 or context of LCLUC 1.1375(3)(c)(C), and we defer to it.
4 Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).
5 However, the evidence to which we are cited in the record
6 does not purport to establish that the cleared areas of the
7 subject property are not suitable for farm or forest uses
8 merely by virtue of being cleared, or that limited access to
9 the eastern portion of the property necessarily means that
10 portion of the property is unsuitable for those uses,
11 particularly as adjacent land is managed for forest use.
12 Therefore, even if a reasonable person could rely on
13 evidence in the record to determine that certain riparian
14 areas of the property are unsuitable because they are "not
15 harvestable," a reasonable person could not conclude, based
16 on the evidence in the record, that the entire parcel is
17 generally unsuitable for farm or forest uses, as the
18 challenged decision determines is required by
19 LCLUC 1.1375(3)(c)(C).

20 This subassignment of error is sustained.

21 The assignment of error is sustained.

22 The county's decision is remanded.

23

⁶We do not understand any party to argue that the challenged decision expresses any other interpretation of LCLUC 1.1375(3)(c)(C).