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

ERIC CARLSON
Petitioner,
vs.
BENTON COUNTY,
Respondent,
and
ROBERT and LUCINDA MOSER,
Intervenor-Respondent.

LUBA No. 96-105
FINAL OPINION
AND ORDER

Appeal from Benton County.

Annette Talbott, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

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

GUSTAFSON, Chief Administrative Law Judge; LIVINGSTON, Administrative Law Judge, participated in the decision.

REMANDED 02/06/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a forest
4 template dwelling.

5 **MOTION TO INTERVENE**

6 Robert and Lucinda Moser (intervenors), the applicants
7 below, move to intervene on the side of respondent. There is
8 no opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject property is a 19.6-acre parcel within the
11 county's Forest Conservation (FC) zone, a zone that implements
12 Goal 4 and related regulations in chapter 660, division 6 of
13 the Oregon Administrative Rules. The property is surrounded
14 by FC zoned properties, of which the dominant land use is
15 large tract resource use, both farm and forest. The subject
16 property slopes gently east to west. The western half of the
17 property contains stands of Oregon white oak interspersed with
18 meadow, and a stand of approximately 30 fruit trees. The
19 eastern half has a mix of Douglas fir, hardwoods and brush
20 remaining from a 4.5-acre clearcut in 1994. The property
21 benefits from a forest tax deferral.

22 The Natural Resource Conservation Service (NRCS) soil
23 study for the county shows that the subject property is
24 composed of 70 percent Bellpine soils, 20 percent Witham
25 soils, 8 percent Waldo soils, and 2 percent Dupee soils. The
26 Bellpine soils have an NRCS productivity rating of 155 cubic

1 feet per acre per year (cf/ac/yr) of wood fiber. The NRCS
2 does not rate the productivity of the other soils. The
3 absence of a NRCS productivity rating in this context means
4 that the soil is "typically used for agriculture" and has been
5 evaluated only for crop production; a nonrating does not
6 determine whether the soil is productive for growing wood
7 fiber. Record 251, 260. The Oregon Forestry Department (OFD)
8 rates the productivity of Witham soils in the county at
9 approximately 80 cf/ac/yr of wood fiber, and Dupee soils at
10 approximately 70 cf/ac/yr of wood fiber.¹

11 In 1994, intervenors applied to the county for a farm
12 dwelling permit in conjunction with a proposal to expand the
13 existing orchard to 500 trees. The county denied the
14 application because it did not meet the applicable farm
15 dwelling criteria. In that decision, the county determined
16 that "90 percent of the subject property was estimated to
17 contain soils which have productivity ratings in excess of 80
18 cubic feet per acre per year" of wood fiber. Record 37.

19 In 1995, intervenors applied for a "forest template"
20 dwelling pursuant to ORS 215.750(1), OAR 660-06-027(1)(d), and
21 Benton County Code (BCC) 60.108(2), each of which provide for
22 a dwelling on land located within a forest zone if:

23 "* * * the lot or parcel is predominantly composed
24 of soils that are:

¹We refer below to these and other soils not rated by the NRCS as "nonrated" soils, notwithstanding that the ODF has supplied a productivity rating for Witham and Dupee soils.

1 "(a) Capable of producing 0 to 49 cubic feet per
2 acre per year of wood fiber if:

3 "(A) all or part of 3 other lots or parcels
4 that existed on January 1, 1993 are within
5 a 160 acre square centered on the center
6 of the subject tract; and

7 "(B) at least 3 dwellings existed on January 1,
8 1993 on the other lots or parcels * * *."
9 (Emphasis added.)

10 OAR 660-06-005(2) defines "cubic feet per acre per year"
11 for purposes of the forest template test. It states that:

12 "'Cubic Foot Per Acre' means the average annual
13 increase in cubic foot volume of wood fiber per acre
14 for fully stocked stands at the culmination of mean
15 annual increment as reported by the [NRCS]. Where
16 [NRCS] data are not available or are shown to be
17 inaccurate, an alternative method for determining
18 productivity may be used. An alternative method
19 must provide equivalent data and be approved by the
20 Department of Forestry." (Emphasis added).

21 Thus, the county can approve a forest template dwelling on the
22 property only if intervenors establish through a method
23 provided by OAR 660-06-005(2) that the property is
24 predominantly composed of soils capable of producing 0 to 49
25 cf/ac/yr of wood fiber.

26 To meet their burden of proof under ORS 215.750 and
27 OAR 660-06-005(2), intervenors submitted a soils study to
28 "overcome" the county's prior conclusion and the NRCS data
29 that showed that the property was predominantly composed of
30 soils capable of producing over 80 cf/ac/yr of wood fiber.²

²Intervenors submitted both a soils study and a report by a forestry consultant, at Record 270-88 and Record 268-69, respectively. We refer to both documents collectively as intervenors' "soils study."

1 Intervenor's soils study is based on a more intensive survey
 2 scale than the NRCS survey. It states that the NRCS survey
 3 "correctly identified" the major soil delineations on the
 4 property, but attributes the significant differences between
 5 the two surveys to the larger map scale and higher intensity
 6 of mapping in the soils study. Record 272.

7 Intervenor's soils study determines that (1) the Bellpine
 8 soils on the property have inclusive pockets of Chehulpum-
 9 Steiwer and other nonrated soils; and (2) the Witham soils on
 10 the property are growing few if any Douglas fir trees.
 11 Intervenor's soils study assigns a productive capability of
 12 zero to the Witham soils based on the absence of Douglas fir
 13 growing on that soil. It presumes a productivity of 0 to 49
 14 cf/ac/yr for the other nonrated soils on the property, based
 15 apparently on a conclusion that nonrated soils are unsuitable
 16 for commercial timber production. The soils study then
 17 recalculates the relative percentages of soils, and ultimately
 18 concludes that 51.2 percent of the property is composed of
 19 soils with a capability of producing less than 50 cf/ac/yr for
 20 wood fiber.³

³The differences between the NRCS survey and intervenor's soil study are depicted in part on the following simplified chart:

NRCS Name	% of site (NRCS)	Productivity Rating (ODF)
Bellpine	40.51 (70)	155 cf/ac/yr
Jory	2.29 (0)	155 cf/ac/yr
McAlpin	6.01 (0)	Nonrated (169 cf/ac/yr Lane Co.)
Subtotal:	48.81%	
Chehulpum-Steiwer	14.42 (0)	Nonrated
Witham	20.87 (20)	Nonrated (~80 cf/ac/yr)

1 After local appeals of approvals by planning staff and
2 the planning commission, the county board of commissioners
3 (commissioners) approved intervenors' application. The
4 county's decision determines that NRCS data are available and
5 accurate, but nonetheless applies intervenors' soils study to
6 "overcome" the NRCS data. Based on the soils study, the
7 county concludes that the subject property is predominately
8 composed of soils capable of producing 0 to 49 cf/ac/yr of
9 wood fiber, specifically Douglas fir.

10 This appeal followed.

11 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

12 Petitioner challenges the county's conclusion that the
13 subject property is predominantly composed of soils capable of
14 producing 0 to 49 cf/ac/yr of wood fiber. Petitioner argues,
15 in the first assignment of error, that the county's conclusion
16 rests on a misinterpretation of applicable state law, and, in
17 the second assignment of error, that the conclusion is not
18 supported by substantial evidence.

19 Petitioner contends that the challenged decision is
20 contrary to OAR 660-06-005(2) because it (1) relies on an
21 alternative soils study when NRCS data are determined to be
22 accurate and available; and (2) erroneously determines that
23 intervenors' soils study meets the standards at OAR 660-06-
24 005(2) for an alternative method for determining the

Waldo	14.98	(8)	Nonrated
Dupee	.92	(2)	Nonrated (~70 cf/ac/yr)
Subtotal:	51.19%		

1 productivity of soils. Petitioner contends that OAR 660-06-
2 005(2) requires that soil productivity be measured by NRCS
3 data, and an alternative method to measure soil productivity
4 may be used only if NRCS data are found to be unavailable or
5 inaccurate.

6 As stated above, OAR 660-06-005(2) provides that, in
7 determining the capacity of soil to produce wood fiber,

8 "* * * [w]here [NRCS] data are not available or are
9 shown to be inaccurate, an alternative method for
10 determining productivity may be used. An alternative
11 method must provide equivalent data and be approved
12 by the Department of Forestry."⁴

13 The county's decision determines that OAR 660-06-005(2) does
14 not apply because NRCS data are available and accurate. In
15 the alternative, the county determines that, if OAR 660-06-
16 005(2) applies, the soils study meets its standards for an
17 acceptable alternate method of determining the productivity of
18 pertinent soils. The county explicitly interprets the absence
19 of a productivity rating for nonrated soils to constitute
20 "available" data within the meaning of the rule. Similarly,
21 it determines that NRCS data regarding Bellpine soils are
22 "accurate" within the meaning of the rule, because the NRCS
23 survey contemplates the existence of inclusive nonrated soils
24 in Bellpine soils. Because NRCS data are "available" and

⁴The parties do not dispute that the ODF approval criterion is met in this case. ODF submitted a letter approving the method that intervenors' soils study used to generate its soil data. Record 262. The ODF letter does not address or purport to approve the soils study's analysis or its conclusion that the subject property is predominantly composed of soils capable of producing less than 50 cf/ac/yr of wood fiber.

1 "accurate," the county concludes that OAR 660-06-005(2) does
2 not apply and thus does not impose any standards on
3 intervenors' soils study. This finding implicitly interprets
4 OAR 660-06-005(2) to impose no obligation to use NRCS data, or
5 to restrict the use of alternate soils studies, so long as the
6 county makes a threshold determination that the existing NRCS
7 data are available and accurate.

8 **A. Application of OAR 660-06-005(2)**

9 Petitioner argues that OAR 660-06-005(2) requires that
10 soil capability be measured by NRCS data, and that alternative
11 soil studies are authorized only when an applicant shows that
12 NRCS data are either unavailable or inaccurate. Because the
13 county determined the NRCS data to be available and accurate,
14 petitioner contends, the county cannot consider any
15 alternative soil data.

16 Intervenors dispute that OAR 660-06-005(2) requires an
17 applicant to use NRCS data to demonstrate soil capability, or
18 imposes any standards on alternative soil studies in this
19 circumstance. Intervenors argue, in effect, that OAR 660-06-
20 005(2) applies only when NRCS data are unavailable or
21 inaccurate. Because the county found NRCS data available and
22 accurate in this case, intervenors contend, the county
23 correctly determined that the requirements in the second
24 sentence of OAR 660-06-005(2) are not applicable. Even if OAR
25 660-06-005(2) applies, intervenors contend that their soils
26 study meets the standard for an acceptable alternative method,

1 providing "equivalent data" generated through an approved
2 method of determining the productivity of the relevant soils.

3 In our view, OAR 660-06-005(2) applies here, and plainly
4 requires that decisions regarding soil capability be based on
5 NRCS data, unless the local government finds that data
6 inaccurate or unavailable, in which case it may consider
7 "equivalent data" generated by an approved method of
8 determining the capability of soils to produce wood fiber. We
9 therefore reject intervenors' position that OAR 660-06-005(2)
10 is inapplicable where the county determines the NRCS data are
11 accurate and available. Rather we agree with petitioner that
12 where, as here, the local government determines that the NRCS
13 data are accurate and available, the rule precludes any
14 consideration of an alternative soils study.

15 Petitioner does not assign as error the county's
16 determination that NRCS data are available and accurate.
17 Nonetheless, our analysis above compels us to address that
18 determination in order to reach and resolve petitioner's
19 remaining challenges.

20 **1. Accurate Data**

21 Intervenor's soil study fundamentally revises the NRCS
22 data, particularly in changing the percentage of Bellpine
23 soils from 70 percent to 40.51 percent. The NRCS has stated
24 in this record that it will use intervenors' soils study to
25 identify "inaccuracies" in its survey of the area. Record
26 260. The county expressly finds that the soils study

1 "overcomes" the NRCS data regarding Bellpine soils. Record
2 37.
3

1 Against this background, the county's determination that
2 NRCS data are "accurate" elevates semantics over substance.
3 The clear import of intervenors' soils study is that the NRCS
4 data are significantly inaccurate, contradicting the
5 straightforward conclusion drawn from the NRCS data that the
6 property is predominately composed of soils capable of
7 producing 155 cf/ac/yr of wood fiber. Accordingly, we
8 conclude that the county misapplied OAR 660-05-005(2) in
9 finding the NRCS data accurate.

10 **2. Available Data**

11 The county interprets "available" data for purposes of
12 OAR 660-06-005(2) to include the absence of an NRCS
13 productivity rating. It further interprets "data" to mean any
14 information, and notes that, according to the NRCS Soil Survey
15 for Benton County, a soil not given a productivity rating by
16 the NRCS is "not suitable for commercial timber production."
17 Record 41.⁵ The county determines that this information is
18 available "data" within the meaning of the rule, and
19 furthermore "data" that translates into a soil productivity
20 rating below the statutory threshold of 0 to 49 cf/ac/yr of
21 wood fiber.

22 We disagree with the county that the absence of an NRCS
23 productivity rating is "available" data within the meaning of

⁵Neither the decision nor the soils study cite to where this statement is found in the NRCS Soil Survey for Benton County. The parties do not identify its location among the excerpts from the NRCS Soil Survey in the record.

1 OAR 660-06-005(2). The evident purpose of OAR 660-06-005(2)
2 is to define standards for assessing soil productivity for use
3 in determining whether soils on a particular parcel fall below
4 the productivity levels stated in ORS 215.750. Productivity
5 for purposes of OAR 660-06-005(2) and ORS 215.750 is a
6 quantitative measurement expressed as cubic feet per acre per
7 year. A NRCS nonrating provides no information, quantitative
8 or otherwise, pertinent to the statutory test: whether the
9 soil is capable of producing defined levels of wood fiber.
10 See Record 83, 239, 251, 260.⁶ We conclude that the absence

⁶James Hecker, NRCS Resource Conservationist, commented that

"There is a misunderstanding when soils are not rated for forest production. It does not mean these soils are 'non-productive,' but rather are 'typically' used for agriculture and have been rated for that use with predicted yields and given a Capability Class Rating for crop production." Record 260.

Thor Thorson, NRCS Soil Data Quality Specialist, provided the following response to a question posed by petitioner:

"Does the lack of [NRCS] data on site productivity indicate a soil is unsuitable for timber production?" No; only that suitable timber sites were not measured at the time the survey was conducted, or since the survey was completed. The soils therefore may or may not be capable of timber production at some level." Record 251 (bold in original).

James Johnson, Farm/Forest Coordinator with the Department of Land Conservation and Development, stated that for purposes of OAR 660-06-005(2):

"The applicants cannot simply depend on a 'nonrating' to make a case that soils located on a site are not productive. OAR 660-06-005(2) * * * requires the applicants to provide other methods, with equivalent data, to show the productivity of the subject soils. A statement that the soils are unrated does not provide a method with data equivalent to NRCS data used to determine productivity." Record 239.

Marc Barnes, petitioner's forestry expert, testified that

1 of an NRCS productivity rating for a particular soil means
2 only that NRCS data regarding that soil are "not available"
3 within the meaning of OAR 660-06-005(2). The county erred in
4 interpreting OAR 660-06-005(2) to the contrary.

5 It follows from our analysis that in the present
6 circumstances the county could accept and consider an
7 alternative soils study that met the standards of OAR 660-06-
8 005(2). Accordingly, we turn to petitioner's arguments that
9 the soils study does not in fact meet those standards.

10 **B. Standards for Alternative Methods**

11 The county determines that, to the extent OAR 660-06-
12 005(2) applies, intervenors' soils study meets the rule's
13 standards for alternative methods of determining the
14 productivity of soils on the property.

15 Petitioner contends that the county misinterprets the
16 standards of OAR 660-06-005(2) and ORS 215.750, and
17 erroneously determines that intervenors' soils study complies
18 with those standards. In particular, petitioner argues (1)
19 that the county erroneously interprets "wood fiber" to mean
20 only Douglas fir wood fiber to the exclusion of other
21 commercial forest species; and (2) that it erroneously
22 interprets "equivalent data" to include unquantified and

"the lack of wood fiber productivity data in the Soil Survey of Benton County for certain soil types does not mean that the soil type is unsuitable for wood-fiber production, only that at the time the survey was conducted, wood fiber productivity data was not collected for these soil types, since they were being used predominately for other purposes -- mainly agriculture." Record 83.

1 erroneous assumptions about the productivity of nonrated
2 soils.

3 **1. Wood Fiber**

4 The county expressly interprets the term "wood fiber" in
5 ORS 215.750 to mean Douglas fir wood fiber, to the exclusion
6 of other commercial forest species. That interpretation is
7 based on the testimony of an ODF staff person, Steve Laam, who
8 presented to the planning commission his understanding of the
9 legislative intent behind ORS 215.750.⁷ The county states on
10 this point:

11 "[The commissioners rely on] the testimony of Steve
12 Laam of the Department of Forestry that the
13 Legislature intended to rely on the productivity of
14 Douglas fir as the indicator species in Western
15 Oregon for purposes of authorizing forest dwellings
16 in House Bill 3661. Moreover, the legislative
17 history provided by the applicants shows that the
18 Legislature, in establishing the criteria for
19 dwellings like the one sought by applicants,
20 explicitly relied on earlier LCDC rules that
21 measured soil productivity in terms of 'commercial
22 tree species.' Moreover, the Oregon Department of
23 Forestry, in defining 'forest tree species' in ORS
24 527.620(6), expressly excluded hardwood timber from
25 that definition. In the absence of a definition of
26 'commercial tree species' in OAR 660-06-005 it is
27 reasonable to conclude that the rules intended to
28 limit productivity determinations to ODF's 'forest
29 tree species.' This is particularly so in light of
30 the testimony of Steve Laam.

31 * * * * *

32 "The [commissioners] also believe the most
33 conclusive evidence of the meaning of 'wood fiber'
34 is found in the express language of the rule

⁷We cannot locate in the record Laam's testimony before the planning commission regarding the legislative history of ORS 215.750. The source of Laam's knowledge of legislative history is unknown.

1 defining 'cubic foot per acre per year.' That rule
2 relies, in the first instance, on NRCS data. The
3 only numerical data developed by the NRCS, as an
4 examination of the Soil Surveys for Benton and Lane
5 Counties reveals, reports the productivity of
6 Douglas fir. As Mr. Laam's testimony indicates, the
7 Legislature, hoping to create a system of virtually
8 ministerial decisions, selected Douglas fir as the
9 indicator species for forest land productivity
10 because Douglas fir data was the only data that was
11 already quantified and was readily available. The
12 [commissioners] thus interpret the ambiguous term
13 'wood fiber' and find it means 'Douglas fir.'"

14 Petitioner argues that the "wood fiber" referenced in ORS
15 215.750 and OAR 660-06-027(1)(d)(A) means any commercial tree
16 species, not just Douglas fir. Petitioner contends that if
17 the legislature intended to protect only the subset of soils
18 suitable for growing Douglas fir, it could have easily
19 inserted "Douglas fir" before the term "wood fiber" in ORS
20 215.750.

21 The arguments as framed present an issue of statutory
22 interpretation. We disagree with the county's conclusion that
23 the text, context or legislative history of ORS 215.750 limit
24 the meaning of "wood fiber" to Douglas fir wood fiber. The
25 term "wood fiber" by itself denotes a wide range of tree
26 species. As to context, the county incorrectly interprets the
27 definition of "forest tree species" at ORS 527.620(6) to
28 exclude all hardwoods. On the contrary, ORS 527.620(6)
29 excludes only hardwoods such as cottonwoods that are grown on
30 a rapid rotation and used to manufacture paper products.
31 Further, to the extent the standards at ORS 215.750 are based
32 on pre-1993 rules, those rules refer to "commercial tree

1 species," a much broader category than Douglas fir. See OAR
2 660-06-028(7) (1992). Thus, the text and context of the
3 pertinent statute and rule do not support the county's
4 interpretation. To the extent it is necessary or permissible
5 to reach legislative history, we are not made aware of nor can
6 we discover anything in the legislative history of HB 3661
7 (Oregon Laws 1993, chapter 792), the source of ORS 215.750,
8 that expresses an intent to limit the term "wood fiber" to
9 Douglas fir to the exclusion of other commercial tree
10 species.⁸

11 Accordingly, we conclude that the county errs in
12 interpreting "wood fiber" to exclude other commercial tree
13 species. That interpretation underlies the county's
14 alternative holding that intervenors' soils study is an
15 acceptable alternative method for determining productivity,
16 providing "equivalent data." Consistent with that
17 interpretation, the soils study addresses only the capacity of
18 the nonrated soils to produce Douglas fir. The focus on
19 Douglas fir is most evident with respect to the nonrated
20 Witham soils. Because few or no Douglas fir were observed
21 growing on Witham soils on the property, the soils study
22 concludes and the county finds that Witham soils have a "zero"
23 capability for producing wood fiber. Record 37. No effort is

⁸We do not consider the comments of the ODF staff person to constitute "legislative history" for purposes of statutory interpretation. The decision does not specify what other "legislative history" it relies on.

1 made to determine the capacity of Witham or the other nonrated
2 soils for producing other commercial tree species.
3

1 The county's alternative finding, that the soils study is
2 an acceptable alternate method providing equivalent data, is
3 fundamentally premised on and undermined by the county's
4 incorrect interpretation of ORS 215.750. The soils study
5 fails to determine the capacity of the nonrated soils for
6 producing wood fiber other than Douglas fir, and therefore has
7 not met the standard in OAR 660-06-005(2) that any acceptable
8 alternate method determine the productivity of the soil by
9 generating equivalent data. The county's conclusion to the
10 contrary is inconsistent with ORS 215.750 and OAR 660-06-
11 005(2).

12 **2. Equivalent Data**

13 Petitioner also challenges the county's conclusion that a
14 nonrated soil translates into a low productivity rating of 0
15 to 49 cf/ac/yr. That conclusion appears to rest on a
16 statement in the NRCS soil survey that Waldo, Witham,
17 Chehulpum-Steiwer and other nonrated soils are "not suitable
18 for commercial timber production." Record 41. The county
19 relies on that statement to conclude that "the commercially
20 unsuitable Waldo, Witham and Chehulpum-Steiwer soils on the
21 property * * * produce 0 to 49 cubic feet per acre per year of
22 wood fiber." Id. However, the county's syllogism is missing
23 the essential minor premise: it does not explain how the
24 conclusion that nonrated soils produce 0 to 49 cf/ac/yr is a
25 necessary consequence of its major premise, that nonrated
26 soils are "not suitable for commercial timber production."

27

1 To the extent that conclusion relies on the nonrating of
2 those soils, it is inconsistent with our determination above
3 that, for purposes of OAR 660-06-005(2), the absence of an
4 NRCS productivity rating for a soil says nothing in
5 quantitative terms or otherwise about the soil's capacity to
6 produce wood fiber. To the extent the county's conclusion is
7 based on intervenors' soils study, the soils study suffers
8 from a similar unexplained reliance on a nonrated soil's
9 unsuitability for "commercial timber production" to conclude
10 that the soil is capable of producing only 0 to 49 cf/ac/yr.
11 See Record 275, 277. The soils study makes an effort to
12 determine the level of wood fiber a nonrated soil is capable
13 of producing only with respect to Witham soils, and that
14 effort focuses solely on capacity to produce Douglas fir.

15 That approach runs afoul of the requirement in OAR 660-
16 06-005(2) that an acceptable alternative method measure the
17 "productivity" of the soil by providing "equivalent data."
18 Simply assuming that nonrated soils automatically fall below
19 the statutory threshold does nothing to determine the capacity
20 of soils for producing wood fiber, and does not provide
21 "equivalent data." The county's conclusions to the contrary
22 are inconsistent with ORS 215.750 and OAR 660-06-005(2).

23 The first and second assignments of error are sustained.

24 The county's decision is remanded.