BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH A. THOMAS, Petitioner, vs. WASCO COUNTY, Respondent.	LUBA No. 95-098 FINAL OPINION AND ORDER

Appeal from Wasco County.

Michael J. Lilly, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Lane Powell Spears Lubersky.

Wilford K. Carey, Hood River, and Bernard L. Smith, County Counsel, The Dalles, filed the response brief. With them on the brief was Annala, Carey & Vankoten. Wilford K. Carey argued on behalf of respondent.

GUSTAFSON, Referee; HANNA, Referee, participated in the decision.

REMANDED 01/12/96

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a conditional use permit for a non-farm dwelling in an EFU zone.

FACTS

The owner of a 20 acre parcel in the county's AF-20 Exclusive Farm Use (EFU) zone applied to the county for conditional use approval for a non-farm dwelling. The topography of the site varies from relatively flat on the north end to slopes up to 48% on the south end. Soil conservation maps show that most of the property contains Class VI soils. Approximately one-third of the property is subject to a Bonneville Power Administration (BPA) power line easement. The parties dispute the effect of this easement on the use of the property.

The surrounding properties are primarily in forest use. As characterized in the county's findings,

> "Areas in this vicinity are wooded with scrub oak and contain slopes up to 30% according to soil survey maps and up to 48% according to site data gathered * * * on behalf of the applicant. Residential use is scattered throughout the general area, with residences/cabins located on two parcels directly north and west of the subject parcel. *(Note: None of the cabins/dwellings in the area are serviced by electricity, water or sanitation facilities. No research has been made as to whether these structures were placed with permits.)* There are several parcels in the area owned by the U.S.A. (Mt. Hood National Forest). Directly south of the subject parcel is a 4,577.15

> acre parcel. All of it is in federal ownership * * *. Two other large federal ownerships exist in Section 35 [adjacent to Section 36 in which the property is located]. These two parcels total 4,673.71 acres and are part of the Mt. Hood National Forest. Due to fire concerns, in order to travel to the subject property, all motor vehicles are required to obtain a travel permit from the Mt. Hood National Forest." (Italics in original.) Record A-1 20.

The planning director denied the application, finding that the soil classification precluded approval of a non-farm dwelling. The planning director also determined the request failed to satisfy several other criteria intended to ensure compatibility of non-resource uses to resource uses in EFU zones.

On appeal, the planning commission allowed the applicant to conduct additional soils studies, using instruments borrowed from the Natural Resource Conservation Service (NRCS).[1] After receiving instruction on the use of the instruments, the applicant's real estate agent conducted additional soils tests, then consulted with an NRCS employee about his findings. The applicant's tests indicated that much of the soils could be classified as Class VII.

After additional hearings on appeal, and in reliance on applicant's soils tests, the planning commission reversed the planning director's decision and approved the

[1]The Natural Resource Conservation Service (NRCS) replaced the Soil Conservation Service (SCS). The NRCS uses the same soils studies and maps and relies on the same soils classifications system as did the SCS.

application. The Board of County Commissioners upheld the planning commission's approval.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner contends the county's findings that the subject property is not suitable for farm or forest uses are inadequate and not based on substantial evidence.

ORS 215.284(2)(b) allows non-farm single-family residential dwellings on parcels created before 1993 if:

> "The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land."[2]

The Wasco County Land Development Ordinance (WCLDO) Section 3.210.E(d) requires a similar evaluation.[3]

The planning director initially found these

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[2]Petitioner's brief relies on ORS 215.283(3)(b). That section was recodified in 1993 at ORS 215.284(2)(b). The substance of that section was not changed. We refer to the statute in its present codification.

[3]WCLDO 3.210.E(d) requires findings establishing that the use

> "(d) Is situated upon generally unsuitable land for the production of farm crops, livestock, and wildlife, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract[.]"

requirements unsatisfied, based upon the soil survey maps which indicate 87% of the soils are Class VI and 13% of the soils are Class VII. Class VI soils are generally considered suitable for forest uses; Class VII soils are not.

The planning commission reversed the planning director's determination, based on the applicant's own tests upon which the applicant concluded the soils are more properly classified as Class VII. In upholding the planning commission's findings, the commissioners found:

> "As provided for in OAR 660-33-030(5) [sic], the applicant provided 'more detailed information' about specific soils on the site. The soil classification in the Soil Survey of Wasco County, Oregon Northern part was successfully challenged by the applicant who demonstrated that as much as 90% of the soils on the site that are classified as class VI in the Soil Conservation Service maps could be reclassified to class VII. The court's findings are partially based upon the following testimony in the record concerning the applicant's representatives [sic] site specific investigation of soil suitability and classification[.] * * * * *." Record 13.

The findings then explain how the applicant's real estate agent borrowed instruments from the NRCS, and conducted studies from which he concluded the slopes were steeper, the soil depths shallower, and the soil rockier than reflected in the SCS soil survey maps.

The commissioners concluded:

> "The applicant met his burden of proof, demonstrating the parcel to be generally unsuitable for farm or forest use by providing

> substantial site specific evidence in the record sufficient to controvert - the generalized information in the NRCS maps published by the Department of Agriculture; statements by the appellant that the subject property is similar in productivity to his own managed lands; and general statements made by Oregon Department of Forestry that the parcel is forest land of 'mediocre' value." Record 14.

Petitioner challenges the county's reliance on soils studies performed by the applicant's real estate agent, arguing both that the county has not established the agent's qualifications to perform such studies, and that the studies themselves are incomplete and unreliable.

In evaluating soils classifications for purposes of determining the suitability of land for forest uses, OAR 660-33-030(6) allows for more detailed studies than is contained on the official SCS maps. OAR 660-33-030(6) provides:

> "More detailed data on soil capability than is contained in the U.S. Soil Conservation Service soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the U.S. Soil Conservation Service land capability classification system."

The rule does not specify the manner in which the "more detailed data" may be collected. However, it does require that the data upon which the county relies be related to the SCS classification system. Accordingly, the county must establish that the source of the more detailed data has the requisite knowledge of the classification system, including

qualifications and expertise to classify soils under that system.

The county's finding does not demonstrate that the applicant's real estate agent had a sufficient expertise of the soils classification system to accurately evaluate the soils as they relate to the standard classification system. The county has not established the agent's credentials to accurately collect and evaluate the data, the accuracy or reliability of the technique used to collect the data, or the accuracy of the results.[4] Consequently, the county's

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[4]We note that the 1995 legislature amended 215.710, which defines high-value farmland for purposes of ORS 215.705, the lot of record statute, to specify when soil classifications can be changed for purposes of that statute, as follows:

> "(5) For purposes of approving a land use application under ORS 215.705, the soil class, soil rating or other soil designation of a specific lot or parcel may be changed if the property owner:
>
> (a) Submits a statement of agreement from the Natural Resources Conservation Service of the United States Department of Agriculture that the soil class, soil rating or other soil designation should be adjusted based on new information; or
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> (b)(A) Submits a report from a soils scientist whose credentials are acceptable to the State Department of Agriculture that the soil class, soil rating or other soil designation should be changed; and
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> (B) Submits a statement from the State Department of Agriculture that the Director of Agriculture or the director's designee has reviewed the report described in subparagraph (A) of this paragraph and finds the analysis in the report to be soundly and scientifically based."

While the county is not bound by this statute in this case, the statute provides guidance to the county for purposes of accepting and evaluating more detailed soils data under OAR 660-33-030(6).

finding that, based on the applicant's own calculations, the soils "could be reclassified to class VII," is inadequate to constitute the "more detailed data" as contemplated by OAR 660-33-030(6).

Moreover, even with the applicant's analysis, the county's findings do not establish the unsuitability of the subject parcel for forest use. A statement that much of the soil "could be reclassified to Class VII" is insufficient to establish either that the soils are Class VII, or that if they are Class VII, such classification renders the site unsuitable for forest use. See 660-33-030(2) (Suitability "requires inquiry into the factors beyond the mere identification of scientific soil classifications.)

The county has not established the subject parcel is unsuitable for forest use, as required by ORS 215.283 and WCLDO 3.210(E)(d).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the county's findings are inadequate and lack substantial evidence to establish that the proposed non-farm dwelling will not materially alter the stability of the overall land use pattern in the area, as required by ORS 215.284(2)(d) and WCLDO 3.210.E.c.[5]

The county's finding that the proposed dwelling will

[5]Petitioner's argument relies on former ORS 215.283(3)(d). Again, our reference is to the statute's current codification at ORS 215.284(2)(d).

not materially alter the stability of the overall land use pattern of the area states:

> "The predominant use in the area is forest use, and the proposed use is not tied to any resource use. Propagation of harvesting of a forest product is a permitted use in the Exclusive Farm Use Zone. Of the 618.44 acres in Section 36 that are available to be placed in a farm or forest tax deferral program, 345.96 acres, or 56% of the land is currently receiving forest deferral. Mt. Hood National Forest ownership (4,500+ acres) lies directly south of the subject parcel. An approval of this single nonfarm dwelling request will not materially alter the land use pattern in the area. Although there are several parcels which are approximately 20 acres in size in Section 36, the subject parcel is unique in that two BPA rights of way run through the upper 1/3 of a the parcel making this area infeasible for timber production. Approval of a permanent dwelling on a unique parcel with non-productive soils will not lead to adverse cumulative effects over time. The combined characteristics of the site set it apart from other parcels in the immediate vicinity. As such it is consistent with criterion (c)." Record A-1 25.

To establish that a non-farm dwelling will not materially alter the stability of the land use pattern in the area, the county must (1) select an appropriate area for consideration; (2) examine the types of uses existing in the selected area; and (3) determine that the proposed non-farm use will not materially alter the stability of the existing uses in the selected area. DLCD v. Crook County, 26 Or LUBA 478 (1994); Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989).

The county's findings address the first two elements of

the required evaluation by identifying the area of inquiry, and defining the uses existing in that area. However, they do not adequately explain how the proposed non-farm dwelling will not materially alter the land use pattern of the area.

The county's conclusion is based primarily on what the county finds is the unique nature of the parcel, in particular the purported non-productivity of the soil and the fact that the property is traversed by a power line. In essence, the county concludes that because of the unique nature of parcel, use of it for a non-farm dwelling will not cause a "domino" effect, notwithstanding the number of similarly sized parcels in the immediate area. This finding does not establish what effect this proposed non-farm dwelling will have on the stability of the existing land use pattern in the area.

In addition, the county has not adequately established that, in fact, this parcel is so unique as to distinguish it from other similarly sized parcels in the area. As addressed in the first assignment of error, the county has not adequately established that the soils are non-productive. Nor has the county established that the soils on the subject property differ from soils in the similarly sized surrounding parcels so as to distinguish potential uses of this property from that of the others.

The county has also failed to factually support its conclusion that the existence of the BPA power line easement

either distinguishes this property from surrounding parcels or makes timber production on the property infeasible. In contrast to the county's conclusion, petitioner presented evidence that the existence of the BPA easement does not distinguish this parcel from other parcels in the area and, in fact, does not preclude use of the parcel for timber production. The county's findings do not address this contention.

The county is not required to address all conflicting evidence in its findings. However, findings must address and respond to specific issues raised in the local proceedings that are relevant to compliance with approval standards. Moore v. Clackamas County, 29 Or LUBA 372 (1995); Suydam v. Deschutes County, 29 Or LUBA 273, aff'd 136 Or App 548 (1995).

The county cannot merely conclude that the BPA easement distinguishes this property from the surrounding properties, sufficient to comply with this criterion, without factually evaluating the nature and scope of the easement. The county must establish that the easement does distinguish this parcel from those surrounding it, and that the existence of that easement will prevent the proposed dwelling from materially altering that pattern. The county's findings do not do so.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner contends the county's findings are inadequate and lack substantial evidence to conclude that the proposed non-farm dwelling is consistent with farm use as required by ORS 215.243(2) and WCLDO 3.210.E(a).[6]

The county's finding of compliance with these requirements states:

> "ORS 215.203 defines farm use and ORS 215.243 is the state's agricultural land use policy. The proposed single family dwelling is, in itself, compatible with farm use as described by ORS 215.203. Incompatibility historically exists between residential dwelling occupants and farm uses. A condition requiring a farm management easement be filed prior to any planning approval on a building permit will help decrease the likelihood of this incompatibility becoming a problem. In regards to consistency with ORS 215.243, subsection 2 identifies the need to preserve 'such land in large blocks' as necessary in maintaining the agricultural economy of the state. Though the lands surrounding this parcel are shown on the Soil Survey to be comprised of predominantly capability class VI soils, the subject parcel has been determined to be non-productive and meets the minimum acreage of the zone. This would be consistent with ORS 245.243. * * * * *" Record A-1 24.

This finding acknowledges an incompatibility between

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[6]WCLDO 3.210.E(a) requires that nonfarm dwellings in EFU zones be

> "compatible with farm use described in subsection 2 of ORS 215.203, and is consistent with the intent and purposes set forth in ORS 215.243, the County's Comprehensive Plan and this ordinance."

the proposed use and farm use. The county does not attempt to establish factually that the incompatibility will not exist in this situation. Rather, the county finds compliance, notwithstanding the incompatibility, based on the applicant's representation that the soils on this particular parcel are non-productive and a condition requiring a farm management easement "to decrease the likelihood of this incompatibility becoming a problem."

A local government may find compliance with applicable criteria by either (1) finding that an applicable approval standard is satisfied, or (2) finding that it is feasible to satisfy an applicable approval standard and imposing conditions necessary to ensure that the standard will be satisfied. Burghardt v. City of Molalla, 29 Or LUBA 223, 236 (1995); Rhyne v. Multnomah County, 23 Or LUBA 442, 447 (1992). The county cannot, however, rely on the imposition of conditions alone; conditions do not excuse the county from first establishing that the relevant criterion can be satisfied.

The alleged nonproductivity of the soils is not relevant to whether the proposed use is compatible with farm use, and the condition requiring a farm management easement does not obviate the county's obligation to first determine that the proposed non-farm dwelling would be compatible with farm use. The county's finding is both unresponsive to the criterion and inadequate to establish that the proposed non-

farm dwelling would be compatible with farm use.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends the county's findings are inadequate and lack substantial evidence to support its conclusion of compliance with WCLDO 3.210.E.6, which requires:

> "The applicant has a bonafide intent and capability to develop and use the land as proposed and has some appropriate purpose for submitting the proposal and is not motivated solely by such purposes as the alteration of property values for speculative purposes." Record A-1 26.

Petitioner disputes petitioner's motive, and contends the only evidence in the record suggests the applicant intends to sell the property.

The county's finding of compliance with this criterion states:

> "There is no evidence to support anything other than the intent stated by the applicant, that being obtaining permanent approval of a single family dwelling for residential purposes." Response Brief 7.

The county's brief elaborates on this finding, adding:

> "The applicant made application for a specific use, a manufactured home on the property. The applicant owns the property and proposes a well, improvement to the road at his expense, a large storage area for water and agrees to comply with all fencing regulations. The applicant represents that he has a diesel tractor with a snow blade for snow removal. * * * * * The criteria does not preclude a person from selling property * * *."

The county's finding of compliance with this criterion concerns not only a question of evidence, but of the county's interpretation of its own ordinance. The county's interpretation of its own enactment is entitled to deference, and LUBA is required to affirm the local interpretation unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); Zippel v. Josephine County, 27 Or LUBA 11 (1994); Melton v. City of Cottage Grove, 28 Or LUBA 1 (1994), aff'd 131 Or App 626, 887 P2d 359 (1995). In addition, when the finding itself is deficient, but a party cites to evidence in the record which clearly supports the county's interpretation, ORS 197.835(11)(b) allows this Board to consider that supporting evidence.

To the extent the county finds the applicant's stated intent satisfies this criterion, the county has interpreted this criterion. The problem with the county's finding, however, is that we cannot discern from it what that interpretation is because the finding does not establish what is required to satisfy this criterion.[7]

[7]In addition, the finding itself does not affirmatively establish that the criterion is satisfied. A finding that there is no evidence to suggest that a criterion is not satisfied is insufficient to sustain the applicant's burden to establish compliance with all criteria.

We will not defer to the county's interpretation when we cannot discern what that interpretation is. Moreover, while under ORS 197.829(2), we may interpret the county's provision in the first instance, we decline to do so in this situation where the purpose of the provision is unclear, and subject to numerous interpretations.

On remand the county must explain its interpretation and how the applicant satisfies this criterion, based on that interpretation.

The fourth assignment of error is sustained.

FIFTH, SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR

Petitioner contends the county has not made adequate findings, supported by substantial evidence, to establish that the proposed dwelling would be compatible with surrounding outright permitted uses, as required by WCLDO 5.020.B, or that proposed dwelling complies with WCLDO 5.020.J and 5.020.K., which require that the proposed use not significantly increase the cost of, or force a significant change in, accepted farm or forest practices on surrounding resource land.

The county's findings acknowledge that the proposed dwelling does not comply with these requirements. With regard to WCLDO 5.020.B, the county found, in part:

> "* * * Operational uses, in this case a residential home site, do conflict with uses of resource land in the terms of hours and mode of operation. If approval is granted, it would be necessary for the owner of the subject property to

> file with the Wasco County Clerk, a forest-farm management easement agreement acknowledging adjacent and nearby forest-farm operator's rights to employ accepted forest or farm management practices. This will ensure a forest-farm operator's ability to remain in or qualify for the forest-farm tax deferral program. * * * * * Additional concerns regarding the hazards of increased fire risk were raised * * *. The fact that 86% of wildfires in Wasco County are started by people, the locations of the property in an extreme fire risk area and the steep slopes that expedite the spread of wildfire all make this a serious operational concern related to locating a single family dwelling in this area. Conditions [regarding compliance with fire standards] are discussed in (c) below that will address this concern with these conditions the proposal is found to be consistent with this criterion [sic]. Record A-1 27.

The county's findings regarding compliance with WCLDO 5.020J and 5.020K also acknowledge the proposed non-farm dwelling may not comply with these criteria, stating, in part, "[i]ntroduction of nonresource dwellings in the area could prevent additional surrounding lands from being placed in resource production, and may negatively impact lands currently in resource use." Record 31. The county nonetheless finds these criteria are satisfied because of the imposition of conditions requiring compliance with fire standards and the filing of a forest-farm management easement.

The county defends these findings by explaining that these criteria (as well as WCLDO 5.020.K, challenged in the sixth assignment of error) "are not mandatory but are to be weighed by the decision maker who shall find that they are

'either met, can be met by observance of conditions, or are not applicable.' [WCLDO] 5.020."

The problem with the county's findings is that they do none of those three alternatives. Rather, the county's findings suggest that the applicable criteria cannot but satisfied, but with conditions of approval, the incompatibility can be mitigated to some extent. WCLDO 5.020 does not provide that alternative.

Conditions of approval cannot substitute for a showing of compliance with the applicable criteria. Burghart, 29 Or LUBA at 236. Before the county can impose conditions of approval, the county must first establish that the criteria can be satisfied with the imposition of those conditions. The county has not done so with regard to any of these criteria.

The fifth, seventh and eighth assignments of error are sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioner contends the county's findings are inadequate to establish that the proposed dwelling will not significantly impair sensitive wildlife habitat, as required by WCLDO 5.020.F.[8] Petitioner contends that the area has

[8]WCLDO 5.020.F states

> "The proposed use will not significantly reduce or impair sensitive wildlife habitat, riparian vegetation along streambanks and will not subject areas to excessive soil erosion."

high value for deer, elk and wild turkey and that it is an important wildlife resource.

The county's finding acknowledges the site's wildlife values:

> "The subject parcel * * * has been identified as low level wildlife range habitat, and is considered an important wildlife area. There is an abundance of deer and smaller wildlife in this area. * * * [T]his is a high value area for deer, elk, and wild turkey. This is an important wildlife resource. If a single family dwelling is approved on this site, the wildlife habitat will be compromised. However, if the request is approved, a condition requiring the applicant comply with the Oregon Department of Fish and Wildlife specifications for fencing will help the request comply with criterion (f)." Record A-1 29.

This criterion requires the county to find that the proposed use will not significantly reduce or impair sensitive wildlife habitat. The county's finding that compliance with fencing specifications will "help the request comply" with this criterion does not factually address and establish compliance with the criterion.

The sixth assignment of error is sustained.

The county's decision is remanded.