BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK FURLER, Petitioner, vs. CURRY COUNTY, Respondent, and FRANK E. MAURICE, Intervenor-Respondent.	LUBA No. 95-060
	FINAL OPINION AND ORDER

Appeal from Curry County.

Neil S. Kagan, Gresham, filed the petition for review. Mark Furler argued on his own behalf.

No appearance by respondent.

Michael J. Babbitt, Salem, filed the response brief and argued on behalf of intervenor-respondent.

LIVINGSTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 03/01/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the county board of commissioners approving a conditional use permit for a resource-related dwelling (forest dwelling) on a 40-acre tract in the county's Timber zone.

MOTION TO INTERVENE

Frank E. Maurice (intervenor) moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief, which accompanies the motion. Reply briefs may be allowed if they address new matters raised in a respondent's brief. OAR 661-10-039. Since petitioner's reply brief does little more than reargue the issues presented in the petition for review, the motion is denied.

FACTS

This is the second appeal of a decision approving a forest dwelling on the subject property. In Furler v. Curry County, 27 Or LUBA 546 (1994) (Furler I), we described the property and the intervenor's forest management plan:

> "The subject property is a vacant 40-acre parcel designated for forest use by the Curry County Comprehensive Plan (plan) and zoned Timber. * * * Portions of the property were logged in the late 1950's or early 1960's, and again in 1978. Some areas of the property were replanted with Douglas fir about 15 years ago, but much of the parcel was

> left to reseed itself naturally. Access to the property is provided by Saunders Creek Road and Signal Buttes Trail, one-lane gravel and dirt roads.
>
> "U.S. Forest Service land adjoins the subject property to the east. U.S. Bureau of Land Management land adjoins the property to the north. Privately owned Timber-zoned properties adjoin the subject property to the west and south. The subject property is located approximately five miles east of the urban growth boundary (UGB) of the City of Gold Beach.
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> "* * * Intervenor's forest management plan proposes that a 12-acre area and a 10-acre area of the subject property be replanted with, and managed for, Douglas fir. Under the forest management plan, a 16-acre portion of the property that is very rocky and has poor moisture content will be left in its natural state for wildlife habitat. A two-acre area that is mostly meadow is proposed to be used for the dwelling site (1/2 acre) and wildlife habitat (1 1/2 acre)." Id. at 548. (Footnote omitted.)

Our remand order required that the county make additional findings with respect to certain comprehensive plan and code provisions, among them plan Section 5.12F, Policy 6 (Policy 6) and Curry County Zoning Ordinance (CCZO) 3.042(8)(d). After a hearing on January 10, 1995, at which additional evidence and public testimony were presented, the board of county commissioners again approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner contends the county failed to comply with Policy 6, which provides:

> "Curry County will cooperate with the Department

> of Water Resources and the Department of Fish and Wildlife to obtain more information about groundwater and surface water availability and to conserve water resources for consumptive and nonconsumptive uses to the benefit of the people of the county."

The challenged decision in Furler I finds Policy 6 to be a specific policy applicable to individual developments. Record A10.[1] Because the county's interpretation of Policy 6 was itself susceptible to two different interpretations, one advanced by petitioner and one by intervenor, our remand order required the county to clarify its interpretation. See Furler I, 27 Or LUBA at 551-52.

The challenged decision states the county's interpretation as clarified:

> "The board interprets * * * Policy 6 as not establishing an independent approval standard 'to conserve water'. Rather, Policy 6 requires the County to cooperate with the [WRD] [Department of Water Resources] and ODFW [Department of Fish and Wildlife] (1) to obtain more information about groundwater and surface water availability, and 2) 'to conserve water resources for consumptive and nonconsumptive uses'." Record B8. (Emphasis in original.)

Having interpreted Policy 6, the decision continues:

> "The County cooperated with WRD and ODFW by making more information available concerning the surface and groundwater availability (See facts 4-8 of this order). This would help those agencies conserve water by allowing them to assert their

[1]References to the record in Furler I are to "A ___." References to the record on remand are to "B ___." References to the supplemental record on remand are to "SR ___."

interests at the hearing." Id.

Petitioner contends that the finding that "[t]he County cooperated with WRD and ODFW by making more information available" is not supported by substantial evidence in the whole record. However, petitioner's challenge comes too late. In Furler I we expressly found that petitioner had not challenged the county's determination that it had cooperated with WRD and ODFW. Furler I, 27 Or LUBA at 551. That determination is simply repeated in the challenged decision. It was not appealed to the Court of Appeals then, and it cannot be appealed to LUBA now. See Beck v. Tillamook County, 313 Or 148, 153-54, 831 P2d 678 (1992).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contests the adequacy of the county's findings under CCZO 3.042(8)(d) and contends the findings are not supported by substantial evidence in the whole record.[2] In September, 1992, when intervenor's forest

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[2]CCZO 3.042(8) provides, in relevant part:

> "A single-family dwelling or mobile home required for an accessory to a forest use may be established under the following conditions:
>
> "* * * * *
>
> "d) A single-family dwelling proposed to be in conjunction with forest use may be allowed if it can be shown that a dwelling is required for [or] accessory to a forest use based upon the information provided in a resource management plan as defined in the [plan] Section 4.5.2."

dwelling application was submitted to the county, Statewide Planning Goal 4 (Forest Lands) and OAR 660-06-025(1)(d) and 660-06-027(2) (part of the administrative rules implementing Goal 4) required that a forest management dwelling on designated forest lands be "necessary for and accessory to forest operations." The challenged decision interprets the term "required for," as used in CCZO 3.042(8)(d), to be consistent with the "necessary for" language contained in Goal 4. Record B9. As we stated in Furler I, there is no dispute that the "required for and accessory to a forest use" requirement in CCZO 3.042(8)(d) implements the "necessary for and accessory to forest operations" requirement of Goal 4 and the Goal 4 rule.[3] See Furler I, 27 Or LUBA at 555.[4]

A. The "Necessary" Standard

In Furler I we described the evidence upon which the county relied in concluding a forest dwelling was "necessary." Furler I, 27 Or LUBA at 557-58. We explained that the "necessary" standard is a significant limitation on the approval of permits for construction of single family

[3]To maintain consistent terminology, we refer to the county's "required" standard as the "necessary" standard.

[4]Under ORS 197.829(1)(d), we are not required to defer to a local government's interpretation of its plan or regulations if that interpretation is contrary to a state statute, statewide planning goals or administrative rule which the regulations implement. See Furler v. Curry County, 27 Or LUBA 497, 503 n 7 (1994).

dwellings on lands planned and zoned for forest use. Id. at 556-58. We found the county's findings inadequate because they were limited to a conclusory statement that "it would be 'very difficult' for intervenor to carry out the proposed operations without an on-site dwelling because the property is 'quite remote.'" Id. at 558.

The decision challenged in this appeal makes additional findings:

> "12. Without a dwelling, applicant would be forced to leave equipment on site, and risk loss to vandalism, or load or unload equipment for every trip, which would be a loss of time that could make this low-pesticide use, partially uneven-aged, independent tree management plan impossible to implement. A great number of trips with associated loading would result in a great loss of time.
>
> "Such loss of time can break a forest operation such as this. A dwelling would prevent that loss and enable the owner to effectively implement his plan.
>
> "13. This saving of time with an onsite manager to make the forest operation viable would be the principal purpose of this dwelling.
>
> "This is the link between the forest practices and the need for a dwelling, which is required by applicable law. (See Barnett v. Clatsop County, 23 Or LUBA 595 (1992)).
>
> "14. It was argued by opponents that the approximately 30 minute travel time to the subject property from town is not sufficient to make the case that a dwelling is necessary. The decision of the Board regarding necessary or required for criterion [sic] is based upon a number of factors, not just one in isolation. In looking at all the

factors, the Board finds that the necessary criterion has been satisfied.

"15. It was argued by opponents that the tasks and hours for the management activities contained in the management plan are not necessary concerning current conditions found. The Board recognizes that the management plan pertains to long term forest production and activities during a full rotation, and finds justification for the proposal in looking at the 'big picture.'" Record B11.

We agree with petitioner that, notwithstanding the reference in finding 14 to "a number of factors," these findings justify a forest dwelling on essentially two bases.[5] First, the dwelling will save time, making implementation of the management plan more convenient and cost-effective; and second, it will deter vandalism.

As explained by the Court of Appeals, the "necessary" test is a demanding standard:

"* * * The dictionary definition [of necessary] is 'that cannot be done without: that must be done or had: absolutely required.' Webster's Third New International Dictionary 1511 (1976). That definition is compatible with LCDC's use of 'necessary' and with Goal 4's requirement that forest lands be preserved for forest uses. * * *

"* * * Living on the land may help deter arsonists, and thereby enhance production, but

[5]The challenged decision arguably also has a third basis: "the likelihood of management activities being implemented without the on site presence of the operator/dwelling." Record B10. As we explained in Dodd v. Hood River County, 22 Or LUBA 711, 719, aff'd 115 Or App 139 (1992), aff'd 317 Or 172 (1993), the individual motives of an applicant for a forest dwelling are not relevant in determining whether a dwelling is necessary for and accessory to forest use.

> that fact does not render a forest dwelling necessary. For a forest dwelling to be necessary and accessory to wood fiber production, it must, at least, be difficult to manage the land for forest production without the dwelling. The purpose of the dwelling must be to make possible the production of trees which it would not otherwise be physically possible to produce. * * *" 1000 Friends of Oregon v. LCDC (Lane County), 83 Or App 278, 282-83, 731 P2d 457 (1987), on reconsideration, 85 Or App 619, 737 P2d 975, aff'd 305 Or 384 (1988).

The Oregon Supreme Court explained further:

> "Goal 4 sets a high standard when it requires that '[e]xisting forest uses shall be protected unless proposed changes are in conformance with the comprehensive plan.' This court is not prepared to suggest that no dwelling could be considered necessary and accessory to a forest use, but we cannot agree that allowing a dwelling on some part of a lot simply because it may enhance forest uses on the remainder of the lot protects existing forest uses to the extent required by Goal 4." 1000 Friends of Oregon v. LCDC (Lane County), 305 Or 384, 396, 752 P2d 271 (1988).[6]

As we observed in Barnett, supra, a desire to mitigate inconvenience and the mere possibility of vandalism do not justify the approval of a forest dwelling. 23 Or LUBA at 597. The county's findings fall far short of the demanding standard established by the Court of Appeals and the Oregon Supreme Court.

Because the county's findings are inadequate, we do not dwell on petitioner's additional allegation that the findings are not supported by substantial evidence. See

[6]See also Dodd, supra, 22 Or LUBA at 717-18.

DLCD v. Columbia County, 16 Or LUBA 467, 471 (1988); DLCD v. Columbia County, 15 Or LUBA 302, 305 (1987); McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986). However, we agree with petitioner that the general finding that a forest dwelling is necessary to implement the proposed management plan is not adequately supported by evidence. The challenged decision makes no reference to evidence of past vandalism and contains no discussion of reasonable alternatives to a forest dwelling on the subject property.[7] The challenged decision and the decision in Furler I find the property is located within three to five miles of the Gold Beach UGB, within 30 minutes' travel time from Gold Beach. See Record A3, 7, B10. These facts and the small acreage involved make it highly unlikely a forest dwelling could ever be justified.

B. The "Accessory" Standard

The challenged decision contains the following findings pertinent to the "accessory" standard:

> "8. The phrase 'incidental and subordinate to' is not defined in the county zoning ordinance. For the purpose of this application it is defined as 'a use of the property which is dependent on or affiliated with the principal use of said property and occupying sufficient area to contain the use. Said area shall be subordinate (smaller) in area and extent than the principal use'.

[7]The record contains evidence that during the proceedings on remand, a house adjacent to the subject property was for sale. Record B65, 89.

> "The term 'accessory' is defined in Section 1.030(1) of the County Zoning Ordinance as 'a use or structure incidental and subordinate to the main use of the property and located on the same parcel, tract or lot as the main use'.
>
> "9. The proposed dwelling is subordinate to, incidental to, and accessory to the principal forest management use of the property because it will serve as the base of operation for implementing said plan, will occupy a proportionately smaller area than the main use and be directly affiliated with the principal forest use.
>
> "The proposed dwelling is also accessory to the principal forest management use because the value of the dwelling would be insignificant compared to the timber. * * *" (Emphasis added.) Record 9.

Petitioner makes three challenges to the adequacy of these findings and the evidence supporting them. First, petitioner contends the statement in the first paragraph of finding 9 that forest management will be the "main use" of the property is not supported by substantial evidence.

Substantial evidence is evidence upon which a reasonable person would rely in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339, 815 P2d 233 (1991). Intervenor's own statement shows that he does not intend to live on the subject property during the very years that the county has found will be devoted to initial, high-intensity

work; and thereafter, he will live on the property only half of the year, spending the balance of the time in Baja California. Record A14, B121. We agree with petitioner that the county's finding that forest management will be the "main use" of the property is not supported by substantial evidence.

Second, petitioner points out that we have already decided that a finding that a proposed dwelling will occupy only a small portion of a piece of property is not enough to support a determination of compliance with the "accessory" standard. Furler I, 27 Or LUBA at 559.

Third, petitioner maintains that the part of finding 9 emphasized above, relating to the value of the dwelling itself, does not support the county's finding that the dwelling is an accessory use, because the value of the dwelling is clearly not pertinent under the county's definition of the term "accessory." We agree.[8]

Because the county has failed to make findings, supported by substantial evidence, adequate to satisfy the "necessary" and "accessory" standards, the second assignment of error is sustained.

The county's decision is remanded.

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[8]Petitioner also challenges the analysis upon which the county bases its comparison of relative value between the dwelling and the timber on the subject property. Record 6. We agree with petitioner for the reasons he states and also because the county does not discount to present value the value of timber grown over 60 years.