

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 GERALD WICKWIRE and JOSEPH F.)
5 MACDONALD,)
6)
7 Petitioners,) LUBA No. 91-012
8)
9 vs.) FINAL OPINION
10) AND ORDER
11 CLACKAMAS COUNTY,)
12)
13 Respondent.)

14
15
16 Appeal from Clackamas County.

17
18 Joseph F. Macdonald, Portland, filed the petition for
19 review and argued on his own behalf.

20
21 Gloria Gardiner, Oregon City, filed the response brief
22 and argued on behalf of respondent.

23
24 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
25 Referee, participated in the decision.

26
27 AFFIRMED 06/12/91

28
29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the Clackamas County
4 Hearings Officer denying their application to establish two
5 dwellings in conjunction with forest use.

6 **FACTS**

7 Petitioners own a 48.4 acre parcel designated Forest on
8 the Clackamas County Comprehensive Plan (plan) map and zoned
9 General Timber District (GTD). The subject parcel is
10 forested, primarily with Douglas fir. Approximately 26
11 acres of the property were logged by petitioners in 1989.
12 The property is rated as Douglas Fir Site Class II and III.
13 A perennial stream flows across the southern third of the
14 subject parcel. The property is identified as big game
15 winter range on a plan Natural Resources and Energy Element
16 map.

17 Petitioners applied for approval of two dwellings in
18 conjunction with forest use on the subject parcel. On
19 October 29, 1990, the county planning department denied
20 petitioners' application. Petitioners appealed this
21 decision to the county hearings officer. On January 11,
22 1991, after a public hearing on petitioners' appeal, the
23 hearings officer denied petitioners' application. This
24 appeal followed.

25 **FIRST AND FOURTH ASSIGNMENTS OF ERROR**

26 Under the first assignment of error, petitioners argue

1 that Clackamas County Zoning and Development Ordinance (ZDO)
2 § 404 ("General Timber District") improperly condemns
3 petitioners' right to occupy their property, without
4 requiring demonstration of need or payment of compensation
5 for petitioners' property, as required by ORS 35.235,
6 35.385, 281.510, 496.154 and 496.168. Under the fourth
7 assignment of error, petitioners specifically contend ZDO
8 § 404 is inconsistent with ORS 496.154, which limits the
9 authority of the state Fish and Wildlife Commission to
10 condemn certain property devoted to farm use.

11 The county argues that ZDO § 404 merely regulates how
12 petitioners may use their property. The county further
13 argues that application of ZDO § 404 to petitioners'
14 property does not acquire that property for public use.
15 Therefore, according to the county, the condemnation statutes
16 cited by petitioner do not apply to the challenged decision,
17 and the county has no obligation to compensate petitioners.

18 Under these assignments of error, petitioners argue
19 that ZDO § 404 violates certain statutory provisions
20 concerning the exercise of the power of eminent domain.
21 However, the subject of this appeal is the hearings
22 officer's January 11, 1991 decision applying ZDO § 404, not
23 the ZDO itself. The notice of intent to appeal did not
24 identify the ZDO as the subject of the appeal, and was not
25 filed within 21 days of the adoption of the ZDO. We
26 therefore conclude petitioners may not challenge ZDO § 404

1 in this appeal. City of Corvallis v. Benton County, 16
2 Or LUBA 488, 492-493 (1988); Owens v. City of Dundee, 16
3 Or LUBA 17, 20 (1987).

4 The first and fourth assignments of error are denied.¹

5 **SECOND AND SIXTH ASSIGNMENTS OF ERROR**

6 Under the second assignment of error, petitioners argue
7 that ZDO § 404 is inconsistent with the purpose of ORS
8 526.460 and 526.465, which set out the state's policy
9 towards management of private forest lands, because "it
10 makes long term ownership and management of forest land [an]
11 economic burden to the petitioners and other owners of
12 forest land in the county * * *." Petition for Review 4.
13 Under the sixth assignment of error, petitioners argue ZDO
14 § 404 denies petitioners their right to reside on the
15 subject parcel in order to be able to satisfy state
16 requirements for reforestation and pest control.² ORS

¹Petitioners do not argue that the application of ZDO § 404 in the challenged decision exceeds the authority granted to the county by the cited statutory provisions concerning condemnation and eminent domain. However, we address petitioners' related argument that the challenged decision unconstitutionally "takes" petitioners' property for public use without payment of compensation under the fifth assignment of error, infra, and conclude that the challenged decision does not effectuate such a "taking." In light of this conclusion, we also agree with the county that the challenged decision does not condemn petitioners' property and, therefore, the cited condemnation statutes are inapplicable.

²Petitioners also contend that, in denying them the right to occupy their property, ZDO § 404 violates the prohibition of Article I, section 34 of the Oregon Constitution against slavery and involuntary servitude. However, petitioners provide no legal argument in support of their contention. This Board has consistently declined to consider undeveloped claims of constitutional violations which are unsupported by legal argument. Dolan v. City of Tigard, ___ Or LUBA ___ (LUBA No. 90-029,

1 527.330; OAR 629-24-402, 629-24-502, 629-24-602.

2 Under these assignments of error, petitioners challenge
3 only ZDO § 404 itself, not the hearings officer's decision
4 applying ZDO § 404. As we explain in the preceding section,
5 ZDO § 404 is not the subject of this appeal, and may not be
6 challenged in this appeal.³ City of Corvallis v. Benton
7 County, supra; Owens v. City of Dundee, supra.

8 The second and sixth assignments of error are denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 Petitioners argue the county proceedings did not
11 satisfy the hearing and notice requirements for decisions
12 concerning forest land imposed by ORS 215.431(4) and (5)(b).
13 Petitioners specifically contend the county should have
14 allowed them to appeal the planning department or hearings
15 officer decision to the board of county commissioners.

January 24, 1991), slip op 22; Van Sant v. Yamhill County, 17 Or LUBA 563,
566-567 (1989); Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA
265, 269 (1987).

³Petitioners do not argue that the application of ZDO § 404 in the
challenged decision exceeds the authority granted to the county by the
cited statutory provisions concerning forest land management. However, we
note that petitioners' arguments under these assignments of error appear to
be based on an underlying premise that locating their dwellings on the
subject parcel is necessary to enable them to manage the property for
forestry purposes, consistent with statutory and administrative rule forest
management requirements. Under ZDO § 404, one of the requirements for
approving a dwelling in conjunction with forest use on GTD zoned land is
that "the location of a dwelling on the property is necessary for the
management of the land for the principle use(s) proposed by the applicant."
ZDO § 404.04(A)(5). A determination that location of a dwelling on the
subject parcel is not necessary to manage the property for forest
production was one of the bases for the county's denial of petitioners'
application. Petitioners' challenge to that basis for denial is addressed
under the seventh assignment of error, infra.

1 ORS 215.431(1)-(3) provides that, notwithstanding ORS
2 215.050, 215.060 and 215.110,⁴ a county governing body may
3 authorize a planning commission or hearings officer to make
4 decisions on applications for comprehensive plan amendments,
5 provided such decisions are appealable to the county
6 governing body. However, ORS 215.431(5)(b) provides that
7 ORS 215.431 does not apply to "any lands designated under a
8 statewide planning goal addressing * * * forest lands."
9 Thus, ORS 215.431 does not apply to designated forest lands,
10 and comprehensive plan amendments concerning such forest
11 lands must be adopted by the county governing body.

12 However, the decision challenged in this appeal is not
13 a comprehensive plan amendment, but rather the approval of a
14 "permit," as defined in ORS 215.402(4).⁵ Pursuant to
15 215.406(1) and 215.422(2), it is clear that a county
16 governing body may designate a hearings officer to conduct
17 hearings on permit applications and may provide that the
18 hearings officer's decision is the final county decision.

19 ORS 215.431(4), also cited by petitioners, provides
20 that "[a] decision of a planning commission hearings officer

⁴These sections envision that only the county governing body may adopt and amend comprehensive plans and land use regulations.

⁵ORS 215.402(4) provides:

"'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.293 and 215.317 to 215.438 or county legislation or regulation adopted pursuant thereto."

1 or county governing body under this section" must comply
2 with the postacknowledgment [amendment] procedures of ORS
3 197.610 to 197.625." The decisions "under this section"
4 referred to in ORS 215.431(4) are comprehensive plan
5 amendments. Thus, ORS 215.431(4) is inapplicable to the
6 challenged decision both because the challenged decision is
7 not a comprehensive plan amendment and because ORS
8 215.431(5)(b) makes all provisions of ORS 215.431
9 inapplicable to designated forest lands.

10 The third assignment of error is denied.

11 **FIFTH ASSIGNMENT OF ERROR**

12 Petitioners contend the appealed decision violates
13 Article I, section 18 of the Oregon Constitution because it
14 takes petitioners' property for public use without
15 compensation. Petitioners argue the challenged decision
16 makes it impossible for them to satisfy state statutory and
17 administrative rule requirements that they reforest the
18 portions of the property logged in 1989 and control forest
19 pests and diseases on the property.

20 The county argues that to establish a compensable
21 taking of their property, petitioners must show that they
22 are precluded from making any feasible economic use of their
23 land. Fifth Avenue Corp. v. Washington County, 282 Or 591,
24 614, 581 P2d 50 (1978). The county further argues
25 petitioners have failed to make such a showing. According
26 to the county, evidence in the record, especially

1 petitioners' own Forest Management Plan, demonstrates it is
2 economically feasible to use the subject parcel for
3 producing forest products, a primary permitted use in the
4 GTD zone. Record 70-101.

5 We agree with the county that in order to establish a
6 violation of Article I, section 18 of the Oregon
7 Constitution, petitioners must demonstrate they are
8 precluded from making any feasible economic use of the
9 subject property. Petitioners cite no evidence to support
10 this contention. The evidence cited by the county supports
11 only a conclusion that production of forest products, a
12 principle use in the GTD zone, is a feasible economic use of
13 the subject property.

14 The fifth assignment of error is denied.

15 **SEVENTH ASSIGNMENT OF ERROR**

16 Petitioners allege that the findings supporting the
17 challenged decision are in error. However, the only
18 findings specifically challenged by petitioners are those
19 addressing ZDO § 404.04(A)(5).⁶ Petitioners argue these
20 findings err:

21 "* * * as to the amount of work required to
22 reforestate [sic] the petitioners' property, pests
23 and disease control, underbrush control, thinning,
24 transplanting, removal of damaged trees, marketing

⁶ZDO § 404.04(A)(5) requires that in order to approve an application for a dwelling in conjunction with forest use on GTD zoned land, the county must find "the location of a dwelling on the property is necessary for the management of the land for the [forest] use(s) proposed by the applicant."

1 of suppressed timber and so forth. All these
2 activities require an investment of money and time
3 on the part of petitioners. The loss of the right
4 to occupy their lands leaves [petitioners] with no
5 return on this investment of time and money. The
6 87 mile round trip from the petitioners' [current]
7 homes is too much of a burden." Petition for
8 Review 5.

9 The county argues that in denying an application, the
10 county need only adopt findings demonstrating that one or
11 more approval standards are not met. Douglas v. Multnomah
12 County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990),
13 slip op 16; Garre v. Clackamas County, ___ Or LUBA ___ (LUBA
14 No. 89-131, February 27, 1990), aff'd without opinion 102
15 Or App 123 (1990). According to the county, the decision
16 includes adequate findings, supported by substantial
17 evidence in the record, that petitioners' application does
18 not satisfy ZDO § 404.04(A)(5) and is not consistent with
19 applicable comprehensive plan provisions. The county also
20 cites evidence in the record which supports its decision.

21 We understand petitioners to contend the county's
22 findings of noncompliance with ZDO §404.04(A)(5) are not
23 supported by substantial evidence in the record. The
24 findings provide:

25 " * * * [T]here is no substantial evidence as to
26 why it is necessary that one or two dwellings be
27 located on the property in order to manage it for
28 forest production. Indeed, there is no reason
29 shown by this record why the property cannot
30 continue to be managed as it has in the past, with
31 no resident operator. The applicants have failed
32 to present evidence which establishes that
33 practical difficulties exist which make it not

1 feasible to manage the property for wood fiber
2 production without the presence of a manager's
3 dwelling on the property. Although it may be more
4 convenient to manage the property for forest
5 production with a resident manager, the ZDO
6 requires the dwelling be 'necessary.' This record
7 establishes that the necessary management can be
8 provided by a non-resident manager." Record 3.

9 In challenging a determination of noncompliance with an
10 approval standard on evidentiary grounds, petitioners bear a
11 heavy burden. In Forest Park Estate v. Multnomah County,
12 ___ Or LUBA ___ (LUBA No. 90-070, December 5, 1990),
13 slip op 30, we stated:

14 "* * * It is not sufficient for petitioner to show
15 there is evidence in the record which supports its
16 position. Rather, the 'evidence must be such that
17 a reasonable trier of fact could only say
18 [petitioner's] evidence should be believed.'
19 McCoy v. Marion County, 16 Or LUBA 284, 286
20 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42,
21 46 (1982); see Jurgenson v. Union County, 42
22 Or App 505, 510, 600 P2d 1241 (1979)."

23 In this case, petitioners provide no citations to
24 evidence in the record to support their position. Further,
25 the evidence in the record cited by the county, including
26 testimony by petitioners, a letter from the Department of
27 Land Conservation and Development, and petitioners'
28 application, does not support a conclusion that it is
29 necessary to locate the proposed dwellings on the subject
30 parcel in order to manage the property for forest
31 production. Record 20-25, 27, 38-39, 66, 69.

1 The seventh assignment of error is denied.⁷

2 The county's decision is affirmed.

⁷We also agree with the county that the challenged decision determines petitioners' application is inconsistent with certain applicable comprehensive plan goals and policies. Record 4. This independent basis for denial of petitioners' application is not challenged by petitioners. Therefore, even if we were to agree with petitioners that the county's determination of compliance with ZDO § 404.04(A)(5) is not supported by substantial evidence, sustaining this assignment of error would not provide a sufficient basis for reversing or remanding the county's decision.