

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)
7 Petitioner,)

8)
9 vs.)

10) LUBA No. 92-232
11 COOS COUNTY,)

12) FINAL OPINION
13 Respondent,) AND ORDER

14)
15 and)

16)
17 NORMAN BJARNSON and EILEEN)

18 BJARNSON,)

19)
20 Intervenors-Respondent.)

21
22
23 Appeal from Coos County.

24
25 Larry Knudsen, Assistant Attorney General, Salem, filed
26 the petition for review and argued on behalf of petitioner.
27 With him on the brief was Theodore R. Kulongoski, Attorney
28 General; Thomas A. Balmer, Deputy Attorney General; and
29 Virginia L. Linder, Solicitor General.

30
31 No appearance by respondent.

32
33 David B. Smith, Tigard, filed the response brief and
34 argued on behalf of intervenors-respondent.

35
36 SHERTON, Chief Referee; HOLSTUN, Referee, participated
37 in the decision.

38
39 AFFIRMED 04/08/93

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving a
4 conditional use permit for a forest management dwelling.

5 **MOTION TO INTERVENE**

6 Norman Bjarnson and Eileen Bjarnson, the applicants
7 below, move to intervene in this proceeding on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 The subject property consists of approximately 23 acres
12 of land zoned Forest. This undeveloped property was logged
13 40 to 50 years ago, and was not properly restocked or
14 managed. The property currently supports an understocked
15 stand of 80% hardwood and 20% coniferous tree species. The
16 subject property is adjoined on the north and west by
17 Forest-zoned property in a large ownership. To the east and
18 south of the subject property, across Palouse County Road
19 and Palouse Creek, the land is zoned Exclusive Farm Use.

20 Intervenors-respondent (intervenors) propose to manage
21 22 acres of the property for forest uses and to use the
22 remainder for a residence. Intervenors' revised Forest
23 Management Plan (FMP) proposes to gradually convert the
24 managed area to merchantable conifers, by clearing
25 approximately two acres per year and marketing the harvested
26 timber as firewood. The revised FMP also proposes to use a

1 small portion of the property for a seedling nursery and
2 three experimental plots for exotic tree species.¹

3 Intervenor applied for a conditional use permit for a
4 forest management dwelling on the subject property. On
5 February 21, 1992, the county approved intervenors'
6 application. Petitioner appealed the county's decision to
7 this Board. The parties subsequently stipulated that the
8 county's decision be remanded. DLCD v. Coos County, ___
9 Or LUBA ___ (LUBA No. 92-061, May 8, 1992).² On
10 November 12, 1992, after additional public hearings, the
11 board of county commissioners adopted an order approving
12 intervenors' application. This appeal followed.³

13 **FIRST ASSIGNMENT OF ERROR**

14 "The County improperly construed the applicable
15 law by concluding the 'necessary for and accessory
16 to' standard could be satisfied by merely showing
17 that a dwelling is convenient to the forest use."

18 Coos County Zoning and Land Development Ordinance
19 (ZLDO) 4.2.700 (97) (Standard 97) provides that a single
20 family dwelling may be allowed in the Forest zone if

¹The revised FMP explains the seedling nursery will be a combination of a greenhouse and outside beds. It will produce regionally acclimated tree stock for use on the subject property and use by other forest operators. Supp. Record 42. The experimental plots will be planted with ponderosa pine, incense cedar and giant sequoia. If these species demonstrate satisfactory survival rates, the nursery operation may raise them for use by other forest operators. Supp. Record 44.

²The local record submitted to the Board for this prior appeal is part of the local record in this proceeding, and is cited as "Record ___."

³The local record compiled after remand is cited as "Supp. Record ___."

1 findings document that "the dwelling is necessary for and
2 accessory to a permitted forest use * * *."

3 In this assignment of error, petitioner contends the
4 county improperly construed the term "necessary" in the
5 above quoted standard. Petitioner argues the challenged
6 decision improperly defines "necessary" as "will contribute
7 to, be useful to, or be convenient to the particular forest
8 use or uses proposed * * *." Supp. Record 10. According to
9 petitioner, the term "necessary," as used in Standard 97,
10 means a dwelling "must be required for the forest use and
11 not merely convenient or cost effective;" it must be a
12 dwelling "that cannot be done without." Petition for Review
13 7-8.

14 Intervenors agree the challenged decision includes an
15 interpretation of "necessary" in Standard 97 to mean "will
16 contribute to, be useful to, or be convenient to the
17 particular forest use or uses proposed * * *." However,
18 intervenors point out the challenged decision also states
19 the proposed dwelling is "essential" to operation of the
20 proposed seedling nursery (Supp. Record 11), and concludes
21 that "[i]t is essential for an owner occupied dwelling to be
22 on the property in order for [intervenors] to implement the
23 [revised FMP]." (Emphasis added.) Supp. Record 12.
24 Intervenors contend these findings indicate the county also
25 determined the proposed use satisfies the stricter
26 interpretation of "necessary" advocated by petitioner, and

1 argues that if the findings and their evidentiary support
2 are adequate to demonstrate compliance with the stricter
3 interpretation of "necessary," then the county's decision
4 must be affirmed in any case.

5 We agree with intervenors that the challenged decision
6 determines the proposed dwelling satisfies the
7 interpretation of "necessary," as used in Standard 97,
8 advocated by petitioner. In its second assignment of error,
9 petitioner challenges the adequacy of the county's findings
10 and the evidence in the record to support such a
11 determination. Because we deny the second assignment of
12 error, infra, concluding the findings and evidence are
13 adequate to support a determination of compliance with the
14 stricter interpretation of "necessary" urged by petitioner,
15 we must affirm the challenged decision, regardless of our
16 disposition of this assignment of error. We, therefore, do
17 not further consider the first assignment of error.

18 **SECOND ASSIGNMENT OF ERROR**

19 "The County did not make adequate findings of fact
20 in support of its decision that the proposed
21 dwelling is necessary for a permitted forest use,
22 nor is there substantial evidence in the record to
23 support such findings."

24 **A. Findings**

25 **1. Firewood**

26 Petitioner argues the county's conclusion that a
27 dwelling is "necessary for * * * a permitted forest use" is
28 based in part on estimated hours of work needed for cutting

1 and marketing firewood. Petitioner contends it argued below
2 that while cutting and marketing firewood may be an
3 appropriate accessory use of the subject property, it is not
4 an efficient forest use and should not be considered when
5 determining the need for a forest management dwelling.
6 Petitioner argues the county findings improperly fail to
7 address this issue. Norvell v. Portland Area LGBC, 43
8 Or App 849, 604 P2d 896 (1979); Benjamin v. City of Ashland,
9 20 Or LUBA 265 (1990).

10 Petitioner also points out that the third of the four
11 factors the county must address in demonstrating compliance
12 with Standard 97 is "[o]perational requirements for the
13 particular forest or woodlot activity proposed." Petitioner
14 contends the record shows the cutting and marketing of
15 firewood is not necessary for the production of commercial
16 timber on the subject property, but rather that the revenue
17 from the firewood operation is necessary to finance the
18 conversion of the property to commercial timber growing.
19 Therefore, according to petitioner, firewood cutting is not
20 an operational requirement for forest use of the property,
21 and should not be considered in determining the need for a
22 forest management dwelling.

23 The letter petitioner submitted below states, in
24 relevant part:

25 "* * * The management strategy to cut and market
26 firewood is not an 'effective and efficient' means
27 for managing forest land in Coos County. It

1 certainly is appropriate to allow this as an
2 accessory activity to forest management, but it is
3 inappropriate to consider this activity when
4 determining [whether] a dwelling is 'necessary'
5 for the forest management of this parcel."
6 Record 23.

7 The above quoted statement indicates an objection to
8 considering the requirements for cutting and marketing of
9 firewood in determining whether the proposed dwelling is
10 "necessary," but does not explain any legal basis for the
11 objection.

12 The challenged decision includes findings addressing
13 the forest practices required for, the products of and the
14 marketing techniques to be used in the firewood component of
15 the proposed forest management operation. Supp. Record
16 15-16. These findings demonstrate the county considers the
17 proposed firewood operation to be part of the proposed
18 commercial forest management operation. In view of the
19 unfocussed nature of petitioner's complaint below, we
20 believe these findings constitute an adequate response to
21 the issue raised by petitioner.

22 Additionally, Standard 97 states a forest management
23 dwelling must be "necessary for * * * a permitted forest
24 use." (Emphasis added.) Petitioner does not contend the
25 cutting and marketing of firewood is not a permitted forest

1 use in the Forest zone.⁴ Therefore, it is proper for the
2 county to consider the operational requirements of the
3 firewood operation under Standard 97 (iii), regardless of
4 whether one of the reasons for conducting the firewood
5 operation is to obtain revenue to support the stand
6 conversion portion of the proposed forest management
7 operation.

8 This subassignment of error is denied.

9 **2. Insurance and Utilities**

10 Petitioner contends certain county "findings"
11 concerning the unavailability of insurance and electric
12 power without a dwelling located on the subject property are
13 merely recitations of evidence and, therefore, are
14 inadequate to constitute findings. Byrnes v. City of
15 Hillsboro, 18 Or LUBA 494, 508 (1989), rev'd on other
16 grounds 101 Or App 307 (1990).

17 Petitioner is correct that mere recitations of
18 evidence, such as statements that "the applicant testified
19 * * *," are not effective as findings of fact, because they
20 do not express what the decision maker determined to be the
21 relevant facts. Hill v. Union County Court, 42 Or App 883,
22 601 P2d 905 (1979); McCoy v. Linn County, 16 Or LUBA 295,
23 318 n 15, aff'd 90 Or App 271 (1988). However, the findings

⁴We note ZLDO 4.2.300 (Table 4.2b) lists propagation, management, harvesting and primary processing of forest products as a permitted use in the Forest zone.

1 challenged by petitioner here are statements that
2 "[s]ubstantial evidence in the record shows" intervenors
3 cannot obtain insurance for equipment necessary for
4 implementation of the revised FMP, and electric power for an
5 irrigation system may be unavailable, without a dwelling on
6 the subject property. Supp. Record 17. These statements
7 are not recitations of evidence, but rather expressions of
8 what the decision maker believes the evidence in the record
9 demonstrates, and are, therefore, entirely appropriate as
10 findings of fact.

11 This subassignment of error is denied.

12 **B. Evidentiary Support**

13 Petitioner contends there is not substantial evidence
14 in the record to support the county's determination that it
15 is necessary to have a dwelling on the subject property in
16 order to carry out the proposed forest use.⁵ Petitioner
17 also argues the record lacks evidence concerning the
18 availability of other dwellings in the area, the distance of
19 the subject property from residentially zoned land or a
20 history of vandalism in the area establishing a need for
21 around the clock security provided by an onsite operator.
22 According to petitioner, recent decisions by this Board in
23 Barnett v. Clatsop County, ___ Or LUBA ___ (LUBA No. 92-092,

⁵Petitioner specifically challenges the evidentiary support for findings concerning unavailability of equipment insurance and electric power without a dwelling on the property.

1 August 17, 1992), and DLCD v. Yamhill County, 22 Or LUBA 466
2 (1991), found such evidence to be required to support a
3 determination that a proposed dwelling is "necessary" for
4 forest use. Finally, petitioner argues there is evidence in
5 the record from the Oregon Department of Forestry (DOF) that
6 placing a dwelling on the subject property is not required
7 for effective and efficient forest management, and that
8 other parcels in the area are managed for forest use without
9 dwellings, which undermines the county's decision.⁶

10 We are authorized to reverse or remand the challenged
11 decision if the county made a decision not supported by
12 substantial evidence in the whole record.
13 ORS 197.835(7)(a)(C). Substantial evidence is evidence a
14 reasonable person would rely upon in reaching a decision.
15 City of Portland v. Bureau of Labor and Ind., 298 Or 104,
16 119, 690 P2d 475 (1984); Douglas v. Multnomah County, 18
17 Or LUBA 607, 617 (1990). In determining whether a decision
18 is supported by substantial evidence, we consider all the

⁶Although petitioner does not clearly articulate the issue, some portions of petitioner's argument imply petitioner believes that under Standard 97, the county must find that the proposed dwelling is "necessary" for any forest use of the subject property, or for any commercial timber production use of the subject property, rather than for the proposed forest use of the subject property. We disagree. Standard 97 requires the county to find the proposed dwelling is "necessary for * * * a permitted forest use," addressing "[o]perational requirements for the particular forest or woodlot activity proposed." (Emphasis added.) The challenged decision finds that a dwelling on the subject property is essential for the particular forest management activities proposed in intervenors' revised FMP. We see nothing wrong with the county's interpretation and application of Standard 97 in this regard.

1 evidence in the record to which we are cited, including
2 evidence which refutes or detracts from that relied on by
3 the local government decision maker. Younger v. City of
4 Portland, 305 Or 346, 360, 752 P2d 262 (1988).

5 We have reviewed the evidence in the record cited by
6 the parties. The revised FMP, prepared by a professional
7 forestry consulting firm, describes in detail the forest
8 practices required to implement the plan and contains a
9 detailed explanation of why implementation of the plan
10 requires "the continual presence of an on site operator."
11 Supp. Record 44-45. The record also includes the following
12 expert testimony from the principal in that firm:

13 "* * * Based on my firm's accumulated experience
14 in working with small woodlot owners, it is my
15 professional opinion that it is impracticable for
16 [intervenors] to properly implement their proposed
17 management program unless the[y] are able to live
18 on the property.

19 "To the best of my knowledge, [intervenors] have
20 made a diligent, but unsuccessful, effort to
21 maintain their forest operation during this
22 extended permitting process. Due to the travel
23 time and distance involved with not residing on
24 site, [intervenors] have suffered extensive loss
25 of seedling stock from the nursery beds due to
26 lack of water and browsing. Areas that were
27 initially cleared for restocking have become
28 overgrown with brush and will require additional
29 site preparation before being planted." Supp.
30 Record 25.

31 Further, there is no evidence in the record that conflicts
32 with or undermines this expert testimony. The DOF letter,
33 which was written before the submittal of the revised FMP,

1 essentially states that efficient and effective commercial
2 forest management of the subject property is possible
3 without the proposed dwelling, but does not refute
4 intervenors' expert testimony that an onsite dwelling is
5 essential to implement the particular forest management
6 operation proposed in the revised FMP.

7 Although there is evidence in the record concerning the
8 existence of other dwellings in the area (Record 75), we are
9 cited to no evidence in the record concerning their
10 availability, the distance from the subject property to
11 residentially zoned land, or any history of vandalism in the
12 area. However, we do not agree with petitioner that such
13 evidence is essential in this case.

14 Both Barnett v. Clatsop County, supra, slip op at 3-4,
15 and DLCD v. Yamhill County, supra, 22 Or LUBA at 472
16 remanded county decisions approving forest dwellings under
17 "necessary" standards similar to Standard 97 because the
18 findings supporting the challenged decision failed to
19 establish a link between the proposed forest management
20 activities and the need for an on-site dwelling. Here, the
21 county's findings do address why carrying out the proposed
22 forest management activities requires an onsite dwelling.
23 Supp. Record 11-13. What petitioner challenges is the
24 evidentiary support for the county's determination that the
25 proposed onsite dwelling is necessary to carry out the
26 proposed forest management activities. In this case, the

1 revised FMP and forester's testimony provide the necessary
2 evidentiary support.

3 We conclude that, based on the evidence cited in the
4 record, a reasonable person could conclude that a proposed
5 dwelling on the subject property is essential, or
6 "necessary," to carrying out the proposed forest management
7 operation.

8 This subassignment of error is denied.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 "The County did not make adequate findings of fact
12 in support of its decision that the proposed
13 dwelling is accessory to a permitted forest use,
14 nor is there substantial evidence in the record to
15 support such findings."

16 Standard 97 requires that a proposed dwelling be both
17 "necessary for" and "accessory to" a permitted forest use.
18 Under this assignment of error, petitioner challenges the
19 county's determination that the proposed dwelling would be
20 accessory to the proposed forest management operation.
21 Petitioner argues the proposed dwelling does not satisfy the
22 definition of "accessory building or use" in ZLDO 2.1.200.

23 Intervenors argue petitioner cannot raise the issue of
24 whether the proposed dwelling satisfies the "accessory"
25 requirement of Standard 97 before this Board, because it was
26 not raised during the proceedings before the county.
27 ORS 197.763(1), 197.835(2).

28 With regard to quasi-judicial land use decisions,

1 ORS 197.835(2) limits the issues we may consider to those
2 that were raised by a participant during the proceedings
3 before the local hearings body, as provided in ORS 197.763.
4 ORS 197.763(1) requires that issues raised before this Board
5 be raised in the local proceedings "with sufficient
6 specificity so as to afford the governing body * * * and the
7 parties an adequate opportunity to respond to each issue."
8 We have stated ORS 197.763(1) does not require that
9 arguments identical to those in the petition for review have
10 been presented during local proceedings, but rather that
11 "argument presented in the local proceedings sufficiently
12 raise the issue sought to be raised in the petition for
13 review, so that the local government and other parties had a
14 chance to respond to that issue." Hale v. City of
15 Beaverton, 21 Or LUBA 249, 254 (1991); Boldt v. Clackamas
16 County, 21 Or LUBA 40, 46 (1991). The Court of Appeals
17 affirmed our interpretation of the ORS 197.763(1)
18 "sufficient specificity" requirement, stating "* * * the
19 statute requires no more than fair notice to adjudicators
20 and opponents, rather than the particularity that inheres in
21 judicial preservation concepts." Boldt v. Clackamas County,
22 107 Or App 619, 623, 813 P2d 1078 (1991).

23 Petitioner contends the issue of compliance with the
24 "accessory" requirement of Standard 97 was raised below,
25 citing the DOF letter. This letter states in several places
26 that DOF believes the proposed dwelling is not "necessary"

1 to forest management of the subject property. It then
2 states the following conclusion:

3 "* * * In general, [ZLDO] 4.2.700(97) require
4 [sic] findings that document that the dwelling is
5 necessary for and accessory to the intended,
6 permitted forest use. While we concur with
7 [intervenors'] plan for management of the forest
8 land, * * * we do not believe that this
9 application provides the findings necessary to
10 support the proposed conditional use." (Emphasis
11 added.) Supp. Record 48.

12 The DOF letter concentrates on the "necessary"
13 requirement of Standard 97 and makes only a passing mention
14 of the "accessory" requirement of that standard. Further,
15 there is nothing in the DOF letter even hinting that
16 compliance with the "accessory" definition in ZLDO 2.1.200
17 is a matter of concern. In these circumstances we do not
18 believe the submittal of the DOF letter gave the county or
19 intervenors a reasonable opportunity to respond below to the
20 issue that petitioner seeks to raise in this assignment of
21 error.

22 The third assignment of error is denied.

23 The county's decision is affirmed.