

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

3
4 MICHAEL MOHLER and TERESA MOHLER,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 JOSEPHINE COUNTY,)
11)
12 Respondent.)
13
14

LUBA No. 93-073

FINAL OPINION
AND ORDER

15 Appeal from Josephine County.

16
17 Michael Mohler and Teresa Mohler, Grants Pass, filed
18 the petition for review. Michael Mohler argued on his own
19 behalf.

20
21 No appearance by respondent.

22
23 HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,
24 Referee, participated in the decision.

25
26 REMANDED 09/02/93

27
28 You are entitled to judicial review of this Order.
29 Judicial review is governed by the provisions of ORS
30 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision approving a permit
4 for a forest dwelling on a 39 acre Woodland Resource (WR)
5 zoned parcel.

6 **FIRST ASSIGNMENT OF ERROR**

7 Under the first assignment of error, petitioners make a
8 number of arguments generally concerning the county's
9 application of Josephine County Zoning Ordinance (JCZO)
10 4.030(1). In the WR zone, JCZO 4.030(1) allows single
11 family dwellings that are "necessary and accessory [sic] to
12 carry out commercial resource use * * *." In order to
13 obtain approval for a dwelling in the WR zone, JCZO 4.030(1)
14 requires a resource management plan (RMP) which "shall serve
15 as the basis for justifying that a forest dwelling is
16 necessary for and accessory to a forest use." JCZO 4.030(1)
17 contains detailed content requirements for RMPs.

18 **A. JCZO 4.030(1) Informational Requirements**

19 The RMP required by JCZO 4.030(1) must include an
20 "Estimate of Timber Resources and Value" and an explanation
21 of the "Effects of Activities on Priorities."¹ Petitioners

¹JCZO 4.030(1) provides that an RMP "shall include the following:

"* * * * *

"Description of Tract

"* * * * *

1 argued below and argue in their petition for review, that
2 the RMP submitted by the applicant in this matter does not
3 include this information.

4 We are not able to find the explanation of "effects of
5 activities on priorities" that is required by JCZO 4.030(1).
6 This part of the subassignment of error is sustained.

7 Regarding the "Estimate of Timber Resources and Value,"
8 the RMP generally describes the characteristics of the site,
9 and the challenged decision explains that the estimated
10 Cumulative Internal Rate of Return stated in the RMP
11 satisfies this requirement "because it is an estimate of
12 value commonly used in the timber industry." Record 168.
13 Petitioners do not challenge this finding. Therefore, we
14 reject this part of the subassignment of error.

15 This subassignment of error is sustained in part and
16 rejected in part.

"(4) Access

"* * * * *

"Characteristics of the Property

"* * * * *

"(6) Estimate of Timber Resources and Value

"Projected Forestry Activities

"Effects of Activities on Priorities

"* * * * *"

1 **B. Necessary for and Accessory to Requirement**

2 Petitioners' arguments under this subassignment of
3 error appear to be founded on a misreading of the county's
4 decision. Petitioners suggest the county erroneously found
5 the "necessary [for] and accessory to" requirement of JCZO
6 4.030(1) was met by the mere existence of the RMP.

7 JCZO 4.030(1) requires that the RMP "shall serve as the
8 basis for justifying that a forest dwelling is necessary for
9 and accessory to a forest use." We construe the county's
10 decision as determining that the RMP in this matter is
11 adequate to demonstrate that the dwelling is "necessary for
12 and accessory to" the proposed forest use. Although the
13 question is a close one, we do not agree with petitioners'
14 suggestion that the county found it could blindly defer to
15 the RMP without regard to whether that RMP, in fact, is
16 adequate to demonstrate the proposed dwelling is necessary
17 for and accessory to forest use.²

18 Citing 1000 Friends of Oregon v. LCDC (Lane County), 83
19 Or App 278, 283, 731 P2d 457, modified 85 Or App 619 (1987),
20 rev'd in part, aff'd in part 305 Or 384 (1988), and DLCD v.
21 Yamhill County, 22 Or LUBA 466 (1991), petitioners also
22 argue that the findings show the RMP relies on improper
23 factors in concluding the proposed dwelling is necessary for

²However, as explained below, the county's findings explaining why it believes the RMP is sufficient to demonstrate the proposed dwelling is necessary for and accessory to forest use are inadequate.

1 and accessory to forest use. Petitioners fault the
2 applicant's expert's statements concerning the comparative
3 benefits of intensive forest management by resident, as
4 opposed to absentee, managers. Petitioners also contend any
5 benefits associated with the proposed dwelling, with regard
6 to fire deterrence, maintenance of access roads and
7 deterrence of firewood theft and illegal dirt bike riding,
8 are insufficient to show the dwelling is necessary for and
9 accessory to forest use.

10 The line separating dwellings that merely make forest
11 management more convenient and dwellings that are necessary
12 for and accessory to forest use admittedly is nebulous. See
13 Champion International v. Douglas County, 16 Or LUBA 132,
14 138-39 (1987). The factors cited by petitioners and set out
15 in the preceding paragraph appear to have been important in
16 the county's decision. While such factors certainly may not
17 in all cases be adequate by themselves to establish that a
18 proposed dwelling is necessary for and accessory to forest
19 use, to the extent petitioners suggest these factors are
20 irrelevant, we do not agree.

21 The RMP the county relied upon in this case is not as
22 limited as petitioners suggest. The RMP sets out in detail
23 the kinds of forest management tasks that are to be
24 undertaken and includes detailed estimates of the number of
25 hours those tasks will take. Record 267-83. The RMP
26 estimates that initial treatment will take 2012 hours, that

1 follow-up activity will take 632 hours and that ongoing
2 management activities will take 362 hours annually.

3 The above described estimate of required hours for
4 forest management activity might well provide a basis for
5 the county to explain how the required hours of management
6 activities demonstrate the dwelling is necessary for and
7 accessory to forest uses. However, the county's findings
8 make no attempt to do so. The findings at Record 166-67
9 simply recite the view of the applicant's expert and make no
10 attempt to explain why the county believes the anticipated
11 time commitment shows the dwelling is necessary for and
12 accessory to forest use. Such findings are inadequate. See
13 Barnett v. Clatsop County, 23 Or LUBA 595, 597 (1992);
14 Marineau v. City of Bandon, 15 Or LUBA 375, 379 (1987);
15 Jackson-Josephine Forest Farm Assn. v. Josephine County, 12
16 Or LUBA 40, 42 (1984).

17 **C. Burden of Proof**

18 Petitioners complain that certain findings adopted by
19 the county at Record 171 show the county improperly shifted
20 the burden of proof in this proceeding.³

³Petitioners do not cite the particular findings at Record 171 that they believe show the hearings officer improperly shifted the burden of proof. We assume petitioners refer to the following findings:

"* * * * *

"There is nothing in the Record, written evidence or the oral testimony submitted by the appellant that significantly refutes the basic orientation of the Resource Management Plan, or the implementation of that plan for commercial woodlot management,

1 While a local appellant may have the burden under local
2 code provisions of demonstrating error in a lower local
3 decision maker's decision, the applicant for permit approval
4 retains the burden of proof concerning compliance with all
5 applicable approval criteria throughout the local appeals
6 process. See Strawn v. City of Albany, 20 Or LUBA 344, 350-
7 51 (1990). We read the findings at Record 171 as an
8 explanation of why the hearings officer chose to rely on the
9 RMP submitted by the applicant, rather than evidence and
10 testimony submitted by petitioners. We do not believe the
11 findings at Record 171 show the hearings officer improperly
12 shifted the burden of proof to petitioners.⁴ See Washington
13 Co. Farm Bureau v. Washington Co., 21 Or LUBA 51, 64 (1991).

14 The first assignment of error is sustained, in part.⁵

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioners contend the county's findings fail to show
17 compliance with JCZO 15.229(a) and (c), which require that

or development of the homesite as necessary and accessory to the forest use, as outlined in the Management Plan. The appellant expresses opinion on many issues, but there is a significant difference between opinion and the factual evidence necessary for a governing body to reach a decision." Record 171.

⁴Some of the hearings officer's other findings in this matter come closer to suggesting the hearings officer may have improperly shifted the burden of proof to petitioners. However, petitioners do not cite these findings.

⁵Petitioners also argue the county failed to justify an exception to Statewide Planning Goal 4 (Forest Lands). However, the county did not attempt to take an exception to Goal 4, and petitioners make no attempt to explain why an exception might be required. Petitioners' arguments about a Goal 4 exception provide no additional basis for reversal or remand.

1 the county find the following conditions exist before
2 granting an administrative permit:

3 "(a) The authorization of the permit shall not be
4 detrimental to the character of the adjoining
5 land uses and will not infringe upon the
6 continued uses of the adjacent land."

7 "(c) The authorization of the permit will not have
8 a significant detrimental impact on the
9 neighborhood."

10 The county found "that due to parcel size (39 acres)
11 and the preparation and content of the RMP, the home site
12 will not have a significant detrimental impact on the
13 neighborhood * * *." Record 167. Petitioners contend these
14 findings are impermissibly conclusory.

15 We agree with petitioners. The challenged decision
16 must include findings identifying the relevant neighborhood
17 and character of adjoining land uses. The findings must
18 also explain why the proposed use will not detrimentally
19 impact the neighborhood or infringe upon the continuation of
20 adjoining uses.

21 The second assignment of error is sustained.

22 **THIRD ASSIGNMENT OF ERROR**

23 The nature and extent of the access available to the
24 subject property over an easement that crosses petitioners'
25 property was disputed below. The record includes a great
26 deal of documentary evidence and testimony concerning that
27 easement access. Although no applicable comprehensive plan
28 or JCZO provision explicitly requires that the applicant

1 prove a particular kind of access is available, petitioners
2 contend, and we do not understand the county to have
3 disputed below, that JCZO 4.030(1) requires the applicant
4 show the access to be used for the proposed commercial
5 forest activities.⁶

6 After reviewing the evidence submitted by the parties
7 concerning the disputed easement, the county adopted the
8 following findings:

9 "If the [petitioners] wish to argue the legitimacy
10 of the easement [serving the subject property],
11 the issue should be taken to a civil court of
12 competent jurisdiction for resolution. However,
13 for the purposes of implementing the [JCZO], the
14 Hearings Officer finds that the access requirement
15 of [JCZO] 4.030(1) has been met by the
16 application." Record 171.

17 We understand the above finding to conclude that JCZO
18 4.030(1) does not require an applicant to provide a final
19 legal determination concerning the existence of access
20 adequate to carry out the proposed use. The hearings
21 officer concluded that while the evidence concerning the
22 nature and scope of the easement is conflicting, it is
23 sufficient to comply with the requirement of JCZO 4.030(1)
24 that access be shown.⁷

⁶JCZO 4.030(1) simply requires that the RMP include a "Description of Tract" showing "Access." See n 1, supra.

⁷Petitioners cite other findings adopted by the hearings officer concerning the disputed easement. We do not read those findings as being intended to constitute a final binding determination concerning the scope of the applicant's legal right to use the disputed easement. The hearings

1 Recognizing that only the circuit court can provide a
2 final determination concerning the nature and scope of the
3 disputed easement, we find no basis for faulting the
4 hearings officer's conclusion concerning the access
5 easement.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 In its decision, the board of county commissioners
9 found that petitioners' "appeal did not comply with the
10 requirements of Josephine County and State law pertaining to
11 such matters." Record 21. Petitioners challenge that
12 finding.

13 The challenged finding is simply the board of
14 commissioners' ultimate conclusion that petitioners did not
15 demonstrate error in the hearings officer's decision. The
16 finding is based on other findings concerning petitioners'
17 arguments below, and was not intended as an independent
18 basis for denying petitioners' local appeal. Therefore, the
19 finding provides no independent basis for reversal or remand
20 of the challenged decision.

21 The fourth assignment of error is denied.

22 The county's decision is remanded.

officer clearly understood that he lacked jurisdiction to render a decision
on the scope of the easement.