

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

4 PAUL D. TESTA and SHARON C. TESTA,)

5))
6) Petitioners,)
7))

8) and)
9))

10 JACK A. THORSEN and B. ELAINE)
11 THORSEN,)

12))
13) Intervenors-Petitioner,)

14) LUBA No. 95-008

15) vs.)

16) FINAL OPINION
17) AND ORDER

18) CLACKAMAS COUNTY,)
19))

20) Respondent,)
21))

22) and)
23))

24 SAMUEL HALE, LESLIE HALE, DON)
25 MOUSER and BETTY MOUSER,)

26) Intervenors-Respondent.)
27

28
29) Appeal from Clackamas County.
30

31) Paul D. Testa and Sharon C. Testa, Molalla, filed the
32) petition for review. Sharon C. Testa argued on her own
33) behalf.
34

35) Jack Thorsen and B. Elaine Thorsen, Oregon City,
36) represented themselves.
37

38) No appearance by respondent.
39

40) John W. Shonkwiler, Tigard, filed a response brief and
41) argued on behalf of intervenors-respondent Samuel and Leslie
42) Hale.
43

44) John H. Hammond, Jr., West Linn, filed a response brief
45) and argued on behalf of intervenors-respondent Don and Betty

1 Mouser. With him on the brief was Hutchison, Hammond,
2 Walsh, Herndon, Darling & Goss.

3

4 LIVINGSTON, Referee; SHERTON, Chief Referee; GUSTAFSON,
5 Referee, participated in the decision.

6

7

REVERSED

07/05/95

8

9

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the county board of
4 commissioners that the requirements of OAR 660-06-028 do not
5 apply to property located within the Transitional Timber
6 District (TTD) under Clackamas County Zoning and Development
7 Ordinance (ZDO) Section 403.¹

8 **FACTS**

9 Intervenors-respondent Samuel and Leslie Hale and Don
10 and Betty Mouser (intervenors) filed with the county's
11 planning director a "request for interpretation" under
12 ZDO 1305.01(K).² Record 152-55. The request for
13 interpretation asked the following questions:

¹The challenged interpretation applies a superseded regulation to a superseded zone. OAR 660-06-028 was repealed by the Land Conservation and Development Commission (LCDC) effective March 1, 1994. OAR 660-06-003(7), which required the application of OAR 660-06-028 to the approval of nonforest dwellings in forest zones, was also repealed.

ZDO Section 403 was repealed in September, 1994, when the TTD zone was replaced by a new mixed-use zone, Agriculture/Forest (AG/F). Record 2.

²ZDO 1305.01 states in relevant part:

"The Planning Director, or his designate, subject to the direction of the Board of County Commissioners, shall perform the following duties:

"* * * * *

"K. Decide all questions of interpretation or applicability to specific properties of any provision of this Ordinance. The Planning Director's decision may be appealed to the Hearings Officer as an initial administrative action. * * *

"* * * * *"

1 "1. Was the Transitional Timber District (TTD)
2 * * * established for and functions [sic] as
3 a mixed use or agricultural-forest zone to
4 provide a mixture of permitted uses both for
5 farm and forest uses in the same zone?

6 "2. What is the meaning and purpose for the term
7 'transitional' in the TTD zone? Between what
8 two land uses is the zone intended to be a
9 transition?

10 "3. Are the permitted farm uses in the TTD zone
11 * * * part of the overall farm uses submitted
12 to LCDC review for satisfaction of the
13 County's compliance acknowledgement with LCDC
14 Goal [T]hree? When was the applicable
15 compliance acknowledgement and/or periodic
16 review approval granted for the TTD ordinance
17 by LCDC?" Record 153-54.

18 The county planner reviewed the pertinent documents
19 related to the acknowledgment of the TTD, General Timber
20 District (GTD), and General Timber 40 Acre (GT-40) zones and
21 discovered nothing to indicate the county requested
22 acknowledgment of a mixed-use (farm/forest) plan designation
23 or zone. Only separate forest and farm plan and zone
24 designations were proposed, reviewed, and acknowledged by
25 LCDC. Rather than responding to each of the three questions
26 separately, the county planner issued a general
27 interpretation that OAR 660-06-028 applied to a request for
28 a farm dwelling in a forest zone, including the TTD zone.³
29 Record 151.

³OAR 660-06-028 lists the standards under which a local governing body may allow a dwelling not related to forest management to be constructed in forest zones.

1 Intervenors appealed the planner's interpretation to
2 the county hearings officer. Record 150. On March 31,
3 1994, the hearings officer denied the appeal. Record 136.
4 In his findings, the hearings officer observed that
5 intervenors' appeal pertained not to the application of the
6 ZDO itself to a specific property, but involved the
7 applicability of OAR 660-06-028 to the three ZDO zones which
8 implemented the acknowledged county comprehensive plan's
9 Forest designation. Record 132. The hearings officer noted
10 that implicit in intervenors' request for an interpretation

11 "* * * is the intent of [intervenors] to obtain a
12 reviewable interpretation of the land use
13 regulations in effect between January 3, 1993, the
14 effective date of OAR 660-06-028, and March 1,
15 1994, the effective date of the amendments to
16 Goals 3 and 4 and OAR [Chapter] 660, Division 06,
17 which were adopted to implement House Bill 3661."
18 Record 132.

19 The hearings officer found that under OAR 660-06-
20 003(7), OAR 660-06-028 applied to the approval of any
21 nonforest dwelling, until such time as the county amended
22 its land use regulations to incorporate the criteria of
23 OAR 660-06-028.⁴ During the period in question, the county

⁴OAR 660-06-003 states, in relevant part:

"The following rule describes how and when requirements of the amended Forest Lands Goal and Rule apply to local government land use decisions. OAR [Chapter] 660, Division 6 applies to all forest lands as defined by Goal 4. * * *

* * * * *

1 had not so amended its regulations.

2 Intervenor's appealed the hearings officer's decision to
3 the board of commissioners. On December 22, 1994, the board
4 of commissioners reversed the hearings officer's
5 interpretation, finding certain "relevant facts," including:

6 "1. * * * The lands zoned TTD * * * contain such
7 a mixture of agricultural and forest uses
8 that neither Goal 3 nor Goal 4 was intended
9 by the County to be nor can be applied alone.
10 The acknowledged TTD ordinance was in effect
11 during the effective date for OAR [Chapter]
12 660, Division 6 on January 3, 1993, until
13 Clackamas County adopted a new mixed use
14 zone, "Agriculture/Forest" (AG/F), to replace
15 the TTD ordinance in September of 1994. The
16 same lands at issue here were rezoned as
17 AG/F.

18 " * * * * *

19 "6. The [board of commissioners] intended the
20 adoption of ZDO 403 to establish an
21 agriculture/forest zone in accordance with
22 Goals 3 and 4 prior to January 3, 1993; and
23 continuously intends the establishment of
24 such zone thereafter in accordance with these
25 Goals and the subsequently adopted OAR
26 Chapter 660, Division 6." Record 1-3.

"(7) If the governing body is making a decision under only
acknowledged land use regulations, then it shall apply
the requirements of that acknowledged land use regulation
in place at the time the application for the decision is
made, except for decisions related to the provisions of
OAR 660-06-028. Effective January 3, 1993, the governing
body shall apply the provisions of OAR 660-06-028 to the
approval of nonforest dwellings until land use
regulations are updated to incorporate the criteria of
OAR 660-06-028 and such updated land use regulations are
acknowledged.

" * * * * * " (Emphasis added.)

1 The board of commissioners concluded:

2 "1. The Transitional Timber District, ZDO
3 [Section] 403[,] was adopted by the county to
4 establish an agriculture/forest zone allowing
5 dwellings in conjunction with permitted farm
6 uses in accordance with Goals 3 and 4.

7 "2. ZDO 403.04(A)(1) allows approval of farm
8 dwellings by applying the requirements for
9 authorizing such use in the Exclusive Farm
10 Use zone under ZDO 401.04(A); and the TTD
11 zone is thereby in accordance with both Goals
12 3 and 4.

13 "3. After the effective date of January 3, 1993,
14 for the application of OAR Chapter 660,
15 Division 6, ZDO 403 as continuously
16 establishing [sic] an agriculture/forest zone
17 in accordance with the subsequently adopted
18 OAR Chapter 660, Division 6."⁵ Record 3-4.

19 This appeal followed.

20 **FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR**

21 The gist of these assignments of error is that the
22 board of commissioners erred in determining the effect of
23 OAR 660-06-003(7) and 660-06-028 on the county's
24 acknowledged forest zones.⁶ Petitioners specifically allege

⁵For reasons not clear from the record, the decision of the board of commissioners does not reverse the hearings officer's interpretation with regard to the applicability of OAR 660-06-028 to farm dwellings in the GTD and GT-40 zones. We note that the ZDO sections addressing farm dwellings in the TTD, GTD, and GT-40 zones are essentially identical. See ZDO 403.04(A)(1); 404.04(A)(1); and 405.04(A)(1). The application of OAR 660-06-028 to all three zones could be expected to be the same.

⁶The assignments of error allege first, the board of commissioners exceeded its jurisdiction; second, the board of commissioners' decision violates a provision of applicable law and is prohibited as a matter of law; third, the findings are insufficient to support the decision; and fourth, the decision improperly construes the applicable law. Under each

1 the board of commissioners violated OAR Chapter 660,
2 Division 6; Goal 4; ZDO Section 403; and the comprehensive
3 plan goals and policies governing forest lands. Petition
4 for Review 8.

5 This Board is required to defer to a local governing
6 body's interpretation of its own enactment, unless that
7 interpretation is contrary to the express words, purpose or
8 policy of the local enactment or to a state statute,
9 statewide planning goal or administrative rule which the
10 local enactment implements. ORS 197.829; Gage v. City of
11 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.
12 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992);
13 Historical Development Advocates v. Portland, 27 Or LUBA
14 617, 621-22 (1994).⁷

15 There is no dispute that, during the relevant period,
16 the TTD, GTD and GT-40 zones were forest zones. These zones
17 were not acknowledged as farm/forest zones. Record 151;
18 also see Clackamas County Comprehensive Plan (CCCP) Forest

assignment of error are a number of subassignments of error. Although the assignments and subassignments of error vary, the discussion beneath each focuses on essentially the same issue: the board of commissioners' failure to require compliance with OAR 660-06-028 for land zoned TTD. Notwithstanding the technical deficiencies in the petition for review, we believe petitioners' arguments are stated clearly enough for intervenors to respond, and we consider them. See Eckis v. Linn County, 110 Or App 309, 311, 821 P2d 1127 (1991); Heiller v. Josephine County, 23 Or LUBA 551, 554 (1992); Silani v. Klamath County, 22 Or LUBA 735, 736 (1992).

⁷ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the Court of Appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309 (1994).

1 Policy 11.0 (1992).⁸ Forest zones are governed by OAR
2 Chapter 660, Division 6. OAR 660-06-001.

3 OAR 660-06-003, in the form which was in effect during
4 the relevant period, begins:

5 "The following rule describes how and when
6 requirements of the amended Forest Lands Goal and
7 Rule apply to local government land use decisions.
8 OAR [Chapter] 660, Division 6 applies to all
9 forest lands as defined by Goal 4. * * *"
10 (Emphasis added.)

11 The county cannot, through an interpretation of its own
12 ordinance, avoid the requirements of the state regulation.⁹
13 Furthermore, this board may not defer to the county's
14 interpretation of OAR Chapter 660, Division 6, which
15 articulates state law standards with which the county must
16 comply. We must instead determine the correctness of the
17 interpretation in light of what we interpret the regulation
18 to mean.¹⁰ See Sensible Transportation v. Washington

⁸CCCP Forest Policy 11.0 states:

"The General Timber 40 acre (GT-40), Transitional Timber 20
acre (TT-20) and General Timber District (GTD) forest zoning
districts implement the goals and policies of this land
designation; these zoning districts and any other zoning
district developed in the future, which implements these goals
and policies should be applied in Forest areas."

⁹The county appears to give some weight to the fact ZDO Section 403 was
acknowledged. Record 1. However, OAR 660-06-003(7) contains the
equivalent of an "emergency clause," which makes clear OAR 660-06-028 was
intended to take effect notwithstanding inconsistent provisions in
acknowledged ordinances.

¹⁰Where the language of a state regulation itself is clear, we do not
have the discretion to alter it by an "interpretation." See Schoen v.
University of Oregon, 21 Or App 494, 499-500, 535 P2d 1378 (1975).

1 County, 28 Or LUBA 375, 376 (1994).

2 Intervenors argue that under Westfair Associates
3 Partnership v. Lane County, 25 Or LUBA 729 (1993), the
4 county may interpret the TTD zone as a farm/forest zone. In
5 Westfair Associates, the issue was the meaning of a
6 reference, incorporated in the comprehensive plan, to the
7 language of Goal 4. It was not clear whether the reference
8 was to Goal 4 as it existed at the time of the comprehensive
9 plan's adoption or Goal 4 as it existed at the time of the
10 dispute. As required by Clark, supra, and ORS 197.829, we
11 deferred to the county's interpretation of its own
12 ordinance. Id. at 736.

13 However, intervenors' reliance on Westfair Associates
14 is misplaced because, regardless of what the county may have
15 intended, the TTD zone was an acknowledged forest zone, not
16 a farm/forest zone. When LCDC issued new regulations for
17 forest zones, those regulations governed the TTD zone.

18 Intervenors argue that applying OAR 660-06-028 to farm
19 dwellings in forest zones is at best illogical in view of
20 the requirement in OAR 660-06-028(6) that proposed nonforest
21 dwellings, which would include the farm dwellings expressly
22 allowed by the ZDO in the TTD, GTD and GT-40 zones, be
23 disqualified from receiving a farm or forest tax deferral.
24 Even if intervenors are correct, we are not permitted to
25 ignore the clear language of OAR 660-06-003(7), which

1 requires the application of OAR 660-06-028.¹¹ See Schoen,
2 supra.

3 A farm dwelling is indisputably not "related to forest
4 management." Therefore, the county must apply OAR 660-06-
5 028 to applications for farm dwellings submitted during the
6 period when OAR 660-06-003(7) and 660-06-028 were
7 effective.¹²

8 The first through fourth assignments of error are
9 sustained.

10 **FIFTH ASSIGNMENT OF ERROR**

11 Petitioners contend the county's decision is "flawed by
12 procedural errors." To the extent petitioners make new
13 allegations or arguments under this assignment of error,
14 they are not supported by citations to the record.
15 Furthermore, since the county's legal conclusions are
16 erroneous, any procedural errors which may have occurred
17 have no significance.

18 The fifth assignment of error is denied.

¹¹The county has stayed the application of intervenors Samuel and Leslie Hale for a farm dwelling. Intervenors Don and Betty Mouser have appealed to LUBA the county's denial of their application for a farm dwelling. We note that since both the state and county regulations that are the subject of this appeal have been substantially revised, intervenors have an opportunity under existing regulations to apply for farm dwellings on their properties.

¹²It is irrelevant that the county subsequently replaced the TTD zone with a farm/forest zone, as allowed by OAR 660-06-050. ORS 215.428(3) requires the county to base its action on a land use permit application upon the standards and criteria that were applicable at the time the permit application was first submitted.

1 **SIXTH ASSIGNMENT OF ERROR**

2 Petitioners contend the county's decision is not
3 supported by substantial evidence in the record. The
4 decision's sole objective is to interpret the ZDO in light
5 of OAR Chapter 660, Division 6. To the extent "evidence" is
6 required, it is found solely in the regulations themselves.
7 Furthermore, since the county's legal conclusions are
8 erroneous, any failure to support the findings with
9 substantial evidence has no significance.

10 The sixth assignment of error is denied.

11 The county's decision is reversed.