BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRANK J. THOMPSON, and VIRGINIA THOMPSON, Petitioners, vs. COLUMBIA COUNTY, Respondent, and EDWARD SCOTT, MARY SCOTT, MICHAEL THOMAS and NANCY THOMAS, Intervenors-Respondent.	LUBA No. 89-016 FINAL OPINION AND ORDER

Appeal from Columbia County.

Gary K. Kahn, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeves and Kahn.

No appearance by respondent Columbia County.

Robert P. Van Natta, St. Helens, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Van Natta and Petersen.

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

REMANDED 06/13/89

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

Kellington, Referee.

NATURE OF THE DECISION

Petitioners appeal an order of Columbia County approving a variance from the minimum lot size requirement of the Primary Forest-76 (PF-76) zone.

MOTION TO INTERVENE

Edward Scott, Mary Scott, Michael Thomas, and Nancy Thomas move to intervene on the side of respondent in this proceeding. There is no opposition to the motion and it is granted.

STANDING

Standing is an issue in this case. Petitioners allege they filed a timely notice of intent to appeal. ORS 197.830(3)(a). Petitioners claim their interests are adversely affected by the county's decision because they own property adjacent to the property at issue. Petitioners also claim they appeared in the county proceedings, asserted a position on the merits, and the county's decision is contrary to their position.[1]

We understand intervenors to contend that petitioners are neither aggrieved nor adversely affected. Intervenors suggest petitioners are not aggrieved by the county's decision because petitioners failed to take a position on the merits. Intervenors assert without explanation that petitioners are not adversely affected by the county's decision.

A person has standing to petition the Board for review if such person filed a notice of intent to appeal, appeared before

the local government and satisfies one of the following criteria found in ORS 197.830(3)(c)(A) and (B):

> "(A) Was entitled as of right to notice and hearing prior to the decision to be reviewed; or
>
> "(B) Is aggrieved or has interests adversely affected by the decision."

Under Jefferson Landfill Comm. v. Marion Co., 297 Or 280, 686 P2d 310 (1984), the test for determining whether a person is aggrieved by a local government decision is as follows:

> "1. The person's interest in the decision was recognized by the local land use decision making body
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> "2. The person asserted a position on the merits; and
>
> "3. the local land use decision-making body reached a decision contrary to the position asserted by the person." Jefferson Landfill Comm. v. Marion Co., 297 Or at 284.

In this case, petitioners appeared before the county board of adjustments, the county planning commission and the county board of commissioners. Petitioners expressed a position on the merits contrary to that adopted by the county. Accordingly, they are aggrieved within the meaning of ORS 197.830(3)(a)(B).

Because petitioners meet the statutory standard for standing as a person aggrieved, we need not decide whether petitioners also meet the statutory standard for standing as persons adversely affected.

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FACTS

Intervenors Scott own 73 acres in the county's PF-76 zone. At some point, the Scotts promised their three children that each would be given a five acre parcel of land. Intervenors Thomas are intervenors Scotts' daughter and son-in-law. Intervenors Thomas requested county approval of a major lot size variance from the minimum lot size standard in the PF-76 zone to allow creation of a five acre parcel as a "proposed homesite-family dwelling."[2] Record 39.

On October 3, 1988, the Columbia County Board of Adjustments approved intervenors Thomas' application for the lot size variance. Petitioners appealed the decision of the board of adjustments to the planning commission. On January 9, 1989, the planning commission held a hearing. At the conclusion of the hearing, petitioners' appeal was denied, and the intervenors Thomas' application was approved. Before moving on to other matters, the planning commission chairman advised petitioners of their right to appeal the planning commission's decision to the county board of commissioners. On January 17, 1989, petitioners filed their notice of appeal of the planning commission's decision to the board of commissioners. On January 20, 1989, the planning commission issued its written order granting intervenors' lot size variance.

On February 15, the board of commissioners held a hearing on petitioners' appeal. The board of commissioners denied

petitioners' appeal and approved the intervenors' application for a lot size variance.

JURISDICTION

Intervenors argue that LUBA lacks jurisdiction to consider this case because the board of commissioners lacked jurisdiction. Intervenors contend that petitioners filed their notice of appeal of the planning commission decision prematurely. According to intervenors, petitioners filed their notice of appeal on January 17, 1989, but the decision of the planning commission did not become final until the planning commission issued its writen order on January 20, 1989. Intervenors argue that because petitioners filed the notice of appeal before the planning commission made its final decision, the board of commissioners never had authority to decide the appeal. We understand intervenors to argue that in order for an appeal to be timely filed, it must be filed after the final written decision is made.

Columbia County Zoning Ordinance (CCZO) Section 1701 sets out the following procedures for appeals:

> "Appeal Procedures:
>
> "1. General Procedure: A decision by the Director, Board of Adjustment, Commission, or the Design Review Board shall be final at the end of ten (10) calendar days following the decision, unless a notice of appeal is filed with the County Clerk's office. A notice of appeal shall contain:
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> "A. The name, address, and telephone number of the person filing the notice;
>
> "B. An identification of the decision sought to

be reviewed, including the date the decision was made; and

"C. The specific reasons why the decision should be modified or reversed.

"2. A person desiring to appeal the decision shall submit the notice with the required fee. Failure to file a notice of appeal, or payment of the required fee, within the designated time limit, shall be jurisdictional defect and shall preclude review. On request (sic) of a notice of appeal, a review or hearing shall be held within thirty (30) calendar days.

"3. Notice of the appeal hearing shall be given in accordance with the provision of a quasi-judicial hearing - Section 1603." (Emphasis supplied.)

Nothing in the CCZO, or in other law to which we have been cited, provides that a notice of appeal may only be filed after the county's decison is reduced to writing and becomes final. Here, petitioners were advised by the planning commission of their right to appeal the decision to the board of commissioners. This discussion of appeal rights occurred at the conclusion of the planning commission's hearing and vote on the matter, but before its decision was reduced to writing and became final. Further, the board of commissioners held a hearing on petitioners' notice of appeal. Neither respondent nor intervenors raised the issue of the timeliness of petitioners' notice of appeal at that hearing.

It is apparent that the county interpreted the CCZO requirement that a notice of appeal be filed "within the designated time limit" as meaning a notice of appeal is properly filed so long as it is not filed later than the

expiration of the ten day period following the final decision. CCZO Section 1701.2. We believe that interpretation of the ordinance is correct and reasonable. See McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

We conclude that petitioners' notice of appeal of the decision of the planning commission was timely. It was filed before the expiration of the ten day period following the decision of the planning commission, and it was, therefore, filed "within the designated time limit." CCZO Section 1701.2. Accordingly, we also conclude the board of commissioners had jurisdiction and authority to decide the issues raised in petitioners' notice of appeal and this case is properly before us.

ASSIGNMENT OF ERROR

> "The County's decision to approve the variance does not comply with the conditions for issuance of a variance and lacks necessary findings."

CCZO Section 1504 sets forth the requirements for authorization of variances.[3] It is uncontested that the variance at issue is a major variance under the CCZO.

Petitioners argue that the county failed to conform to requirements of CCZO Section 1504.1.A.2; 1504.1.A.4 and 1504.1.A.5. We address each of petitioners' arguments regarding the application of Section 1504.1.A separately.

A. CCZO Section 1504.1.A.2

CCZO Section 1504.1.A.2 provides:

"2. The conditions upon which the request for

> variance is based are unique to the property from which the variance is sought and are not applicable generally to other property."

Petitioners argue that this provision unambigously requires a finding that conditions inherent in the land itself are unique. Petitioners point out that the county did not find that the conditions justifying the variance were unique to the land but, instead, found those conditions were personal to the applicant.

The board of commissioners concluded CCZO Section 1504.1.A.2 is satisfied based on the following finding:

> "* * * The conditions are not unique to this property in that other owners in the area can request approval to create an undersized parcel in the Primary Forest-76 zone. The fact that the request is to satisfy a promise by a parent, is unique for the Scotts." Record 4.

While we consider a local goverment's interpretation of its own ordinance on review, "the meaning of local legislation is a question of law which must be decided by the courts and other reviewing of bodies to which it is presented. McCoy v. Linn County, 90 Or App at 275.

CCZO Section 1504.1.A.2. requires that the property for which a variance is proposed have unique characteristics not shared by other land. We have held that similar language must be "interpreted to refer to physical conditions inherent in the property itself and not to the mere inconvenience or expense that may be caused to the landowner." Jarvis v. Wallowa County, 15 Or LUBA 390, 393 (1987).

Although a local government may choose, in its ordinance approval standards of variances, to relax this traditional stringent requirement, Columbia County has not done so. See Sokol v. City of Lake Oswego, ___ Or LUBA ___ (LUBA No. 88-087, February 3, 1989). Under CCZO Section 1504.1.A.2, the conditions justifying a variance must be unique to the property rather than to the people involved. As the county conceded in its decision, intervenor Scotts' promise of land to their children is not a characteristic unique to the particular property for which the variance is sought. Therefore, the county's decision violates CCZO Section 1504.1.A.2.

This subassignment of error is sustained.

B. CCZO Section 1504.1.A.4

CCZO Section 1504.1.A.4 provides as follows:

"4. Strict compliance with the zoning ordinance would create unnecesary hardship."

Petitioners argue that the county's findings do not establish compliance with CCZO 1504.1.A.4. Petitioners maintain that the required hardship must arise from physical characteristics of the land involved and not from conditions personal to the property owner. Petitioners argue the county's findings the hardship is unique to the landowner, rather than find the hardship arises out the conditions inherent to the land that distinguish it from other land. Godfrey v. Marion County, 3 Or LUBA 5, 9 (1981).

The county based its determination of compliance with

CCZO Section 1504.1.A.4 on the following finding:

> "Strict compliance creates a hardship in that the daughter and son-in-law cannot receive a clear deed to their five (5) acre home site. They feel this is the only way to assure clear ownership of their home site." Record 4.

We conclude that the "unnecessary hardship" test in CCZO Section 1504.1.A.4 applies the traditional stringent standard explained in Sokol v. City of Lake Oswego, supra. There is nothing in the decision, findings or record to suggest that the intervenor Scotts' promise of a gift of a five acre homesite could not be fulfilled with other land. More importantly, we are cited to nothing in the findings or the record demonstrating that without the requested variance the subject property would be virtually "useless." See Standard Supply Co. v. Portland, 1 Or LUBA 259, 263 (1980). Accordingly, we agree with peitioners that the county's findings are inadequate to show that "strict compliance with the zoning ordinance would create unnecessary hardship."

This subassignment of error is sustained.

C. CCZO Section 1504.1.A.5

CCZO Section 1504.1.A.5 provides as follows:

> "The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor violate any other provision of the Zoning Ordinance."

Petitioners argue that the "county merely listed the [comprehensive plan] policies and concluded that no conflict would occur."[4] Petition for Review 8. Petitioners argue that the board of commissioners based its conclusion of

compliance with CCZO Section 1504.1.A.5 on the following finding:

> "However, based on the credibility of the applicants' statement the parcel will remain in the family, we do not find this to be in conflict with the forest policy." Record 2.

We agree with petitioners that this finding is incomplete and conclusionary. See Sunnyside Neighborhood v. Clackamas County Commissioners, 280 Or 3, 22, 569 P2d 1063 (1977). This finding does not demonstrate how the comprehensive plan forest policies are satisfied. Accordingly, we conclude the county's order does not demonstrate compliance with CCZO Section 1504.1.A.5.

This subassignment of error is sustained.

The county's decision is remanded.

FOOTNOTES

1

The allegations that petitioners asserted a position on the merits and that the county made a decision contrary to petitioners' position appear in the "Summary of Material Facts" section of their peition for review.

2

CCZO Section 506.1 provides:

"The minimum lot size [in the PF-76 zone] for structures and facilities necessary for and accessory to commercial forest management and commercial agriculture shall be seventy-six (76) acres. the minimum lot size [in the PF-76 zone] for all other permitted uses shall be 20,000 square feet."

In addition, CCZO Section 508 provides:

"Partitions: Any division of land that results in the creation of a parcel smaller than seventy-six (76) acres must be reviewed and approved by the Planning Department and must be for an approved [conditional] use in Section 503 * * *. The parcel created for any of these uses shall not be larger than the minimum size necessary for the use."

The county's order states that the proposal approved is "to allow a variance from the minimum lot size standard in the PF-76 zone to allow the vacation [sic creation] of a five (5) acre parcel which is proposed to be partitioned out of an existing seventy-three (73) acre parcel." Record 1. The county's decision describes the intervenors' request both as "for a non-resource home[site], found in Section 503.9," and as "to site a dwelling on the property that will be used in conjunction with the management of a larger acreage." Record 5. The county's decision cites as relevant, the comprehensive plan policies for both forest dwellings and non-forest dwellings. Record 4. See n 3.

It is unclear to us whether the variance approved by the county is (1) a variance from the 76 acre minimum lot size required by CCZO Section 506.1 for dwellings necessary for and accessory to commercial forest management; or (2) a variance form the requirement of CCZO Section 508 that a parcel created for a non-forest related dwelling be no larger than the minimum size necessary for the use. However, resolution of this issue is not necessary to our disposition of petitioners' assignment of error.

3

"Variances: There are two (2) classes of variances to the standards established in this ordinance. A Minor Variance is defined as a request for a variance of less than 25% from a dimensional requirement such as setbacks, height, lot coverage, lot width, or lot depth, or a request for a variance of less than 10% from the requirement of a minimum lot size requirement. All other variances are considered Major Variances. Use variances are not permitted under this ordinance.

"1. Major Variances: The Board of Adjustment may permit and authorize a variance from the requirements of this ordinance when unusual circumstances cause undue hardship in the application of it. The granting of such a variance shall be in the public interest.

"A. A variance shall be made only when all the following conditions and facts exist:

"1. The granting of the variance will not be detrimental to the public safety, health, or welfare, or injurious to other property;

"2. The conditions upon which the request for a variance is based are unique to the property for which the variance is sought and are not applicable generally to other property;

"3. Approval of the application will allow the property to be used only for purposes authorized by the Zoning Ordinance;

"4. Strict compliance with the Zoning Ordinance would create an unnecessary hardship;

"5. The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor violate any other provision of the Zoning Ordinance.

"B. A variance so authorized shall become void after the expiration of one (1) year if no substantial construction has taken place.

"C. The Board of Adjustment may impose whatever reasonable requirements it feels will fulfill the intent of this ordinance.

"* * * * *"

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[4] The county cited the following as the relevant forest policies of the Columbia County Comprehensive Plan:

"5. Limit the creation of parcels or lots for non-forest uses.

"6. Allow residential uses when it can be shown that such uses are necessary for and accessory to the resource activity occuring on the same lot or parcel, and where it can be shown that siting standards exist which insure compatibility of the proposed residence with adjacent resource uses. Meeting the standards for establishing the buffer woodlot overlay district is one means of showing both necessity and compatibility.

"7. Limit non-forest dwellings to individual lots or parcels where it can be shown that:

"A. The proposed site is on land generally unsuitable for forest uses;

"B. The proposed use will not significantly impact forest uses on adjacent and nearby forest lands;

"C. The proposed use will not significantly increase the costs of forest management on adjacent and nearby forest lands;

"D. The site is limited in size to that area suitable and appropriate only for the needs of the proposed use;

"E. Where necessary, measures are taken to minimize potential negative impacts on adjacent and nearby forest lands; and,

"F. The proposed use is consistant with the forest policies constained in the Comprehensive Plan."