BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JACK C. SABIN and FRANCES J. SABIN,	)	
Petitioners,	)	LUBA No. 90-077
vs.	)	FINAL OPINION AND ORDER
CLACKAMAS COUNTY,	)	
Respondent.	)	

Appeal from Clackamas County.

Vernon L. Richards, Sandy, filed the petition for review and argued on behalf of petitioners.

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

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

AFFIRMED 09/19/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the Clackamas County Hearings Officer denying petitioners' application to "re-establish an existing residence." Record 65.

FACTS

The subject property is approximately one acre in size, is designated Forest in the county's comprehensive plan, and is zoned General Timber District (GTD). The soils on the property are Douglas Fir Site Class II. The property is located within a forested area. The properties to the south and southeast are owned by a lumber company and are managed for timber production. The property to the west is also managed, at least in part, for timber production. Other adjacent property, as well as the property across the road, is managed, in part, for farm use. The challenged order provides the following additional facts:

> "The property slopes down from the north and south to a small stream which bisects the property from the northwest corner to the eastern property line. The remains of a * * * residence exists on the property. Vegetation consists primarily of alder and brush." Record 2.

Petitioners submitted an application to the county planning department for a nonforest use, describing that proposed use as follows:

> This request is made to re-establish an existing residence. This property was an existing primary residence for a number of years before [it was] purchased by [the applicant's mother] as a

> principal residence, on or about 1953. The residence was complete with inside plumbing with septic tank and drainfield, pressurized water from existing well with pumping system, electric service and telephone service. I purchased the property January 1978 from my mother as a secondary residence and future retirement principal residence. We propose to rehabilitate the house, repair the sewage system and re-establish the water well. Repair work to be done within the next 2 years." Record 65.

The residential structure on the subject property is approximately 900 square feet in size, is unpainted, does not appear to have windows, and has not been occupied since the 1960's. Petitioners, owners of the subject property, live in the State of California.

The Clackamas County planning division denied petitioners' application. Petitioners appealed to the hearings officer, who denied the appeal. This appeal followed.

INTRODUCTION

The challenged order is primarily directed toward denial of a request for a nonforest dwelling. However, throughout petitioners' assignments of error, they claim a lawful nonconforming residential use has been established on the subject property, and that the nonconforming use has not been discontinued or abandoned. In the first assignment of error, petitioners suggest the existence of the alleged nonconforming residential use of the subject property establishes that reconstruction of the existing residential structure will not materially alter the character of the

neighborhood.[1] This argument is directed toward petitioners' challenge to the merits of the county's denial of a nonforest dwelling. As we understand the second assignment of error, petitioners claim the right to use the property for the alleged nonconforming residential use cannot constitutionally be considered "abandoned" unless the county demonstrates that petitioners intended to abandon all contemplated residential use of the property.[2] In the fourth assignment of error, petitioners claim the county is estopped to deny that a lawful nonconforming residential use exists on the property, because petitioners contend the county assessor has been assessing the property at its value as a "residential" parcel.

Our review is complicated somewhat because the existence of a nonconforming use is not, of itself, the subject of an assignment of error in the petition for review. The issue regarding the existence of a lawful

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[1]The parties do not distinguish between nonconforming residential use of the property and the nonconforming residential structure which is alleged to be on the subject property. However, as we understand it, petitioners are arguing that there exists a right to a nonconforming residential use of the property, which is evidenced by the existing residential structure. While petitioners also suggest that the structure is also a nonconforming residential structure, it is the use of the property for residential purposes which we understand petitioners seek to establish in this appeal proceeding.

[2]Petitioners also argue under the second assignment of error, that the alleged lawful nonconforming residential use of the subject property establishes a vested right to reconstruct the existing residence, a right which the county has unconstitutionally "taken" without due process of law.

nonconforming use is clouded in that the parties state different positions in their briefs regarding the issues of (1) whether the issue of a lawful nonconforming use was raised at all by petitioners below; (2) if the nonconforming use issue was raised, whether that issue was decided by the hearings officer in the challenged order; and (3) if the issue was decided by the hearings officer, whether it was correctly decided. We address these three issues before turning to the specific assignments of error.

PRELIMINARY ISSUES

A. Was the Nonconforming Use Issue Raised Below?

In their application quoted above, petitioners requested approval to "re-establish" a single family dwelling on the subject property. Additionally, in petitioners' "appeal request" the following reasons were given for appealing the planning staff's denial of their application:

> "[o]ur original application was NOT to establish a NEW * * * single family residence in a recently established General Timber District. But, rather to remove a 'cloud' from an established residence, by demanding the Clackamas County Department of Transportation and Development affirm the commitment made over 40 years ago, which established this property as a single family residence. This commitment has been supported annually by Clackamas County, as they assessed it as a 'LEGAL LOT OF RECORD' and collected taxes on this basis.
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> "We hereby, request the Clackamas County Planning Department to reverse their original 'Decision of Denial' and to sanction the continued use of this

> property as a 'LEGAL LOT OF RECORD' with a statutory single family dwelling.
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> "* * * * *" (Capitalization and emphases in original.) Record 62.

We believe it is reasonably clear that the issue of whether the prior residential use of the subject property constitutes a lawful nonconforming residential use was raised below. Accordingly, we conclude that whether there is a lawful nonconforming residential use established on the subject property was an issue before the hearings officer.[3]

B. Did the County Determine Whether a Right to a Nonconforming Residential Use Had Been Established on the Property?"

Petitioners argue that the nonconforming use issue was decided, and was incorrectly decided, by the hearings officer.

The county states in its brief:

> "The issue of nonconforming use was not before the hearings officer and so may not be raised on appeal under ORS 197.385(2) [sic ORS 197.835(2)]. As planner Gary Naylor testified, '[t]his application was made, to my understanding, because there was not a nonconforming use for a residence on the property, but there is no application to identify any decision on that issue.'" Respondent's Brief 8.

Additionally, at oral argument the county stated that the hearings officer did not decide whether a lawful

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[3]The county identifies no procedure in its comprehensive plan and land use regulations, other than the one which petitioners pursued in this case, for obtaining a county determination regarding the existence of a lawful nonconforming use on the subject property.

nonconforming residential use exists on the property.

The challenged decision states the following with regard to the existence of a nonconforming residential use on the subject property:

> "The applicant has maintained that he has a nonconforming use or a vested right to reestablish the previous dwelling on the property. This issue is not subject to disposition under this application. The Hearings Officer would note, however, that the record reflects that the previous use as a dwelling ceased many years ago, and that any nonconforming use would have been lost through nonuse or abandonment. The fact that the property may have been assessed by the County Assessor as a potential homesite is not determinative." Record 5.

We believe the challenged order provides alternate bases for rejecting petitioners' nonconforming use claim. Initially, the challenged order states that the nonconforming use issue "is not subject to disposition under this application." However, in the following sentences, the order determines that to the extent there ever was a lawful nonconforming residential use of the property, it had been abandoned or lost by nonuse. Under these circumstances, where the issue of the existence of a nonconforming use was raised, and where the challenged order states a position on that issue adverse to petitioners, we believe the order includes a decision on the merits of the nonconforming use issue presented.

3. Was the Nonconforming Use Issue Correctly Decided?

Clackamas County Zoning and Development Ordinance

(ZDO) 1206.01 provides:

> "A nonconforming use may be continued although not in conformity with the regulations for the zone in which the use is located."[4]

ZDO 1206.02 provides:

> "If a nonconforming use is discontinued for a period of more than twelve (12) consecutive months, the use shall not be resumed unless the resumed use conforms with the requirements of the ordinance and other regulations applicable at the time of the proposed resumption."[5]

While it is not clear from the county's order, it appears the county determined that to the extent there may have been a lawful nonconforming residential use of the property at one time, it had long since been discontinued or abandoned. While it is also not clear, we believe the county based that determination on ZDO 1206.02. ZDO 1206.02 refers to a loss of an alleged nonconforming use if it is "discontinued" for "a period of more than twelve months." Consequently, if the record supports a determination that the alleged nonconforming residential use of the property

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[4]This provision parallels ORS 215.130(5), which provides:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * *"

[5]This provision parallels and augments ORS 215.130(7), which provides:

> "Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption."

was discontinued under ZDO 1206.02, then the county's determination that any nonconforming residential use of the property had been lost must be sustained.

It is the nature and extent of the lawful use in existence at the time the use became nonconforming, which is the reference point for determining the scope of permissible continued use. Polk County v, Martin, 292 Or 69, 364 P2d 952 (1981); City of Corvallis v. Benton County, 16 Or LUBA 488, 497 (1988); see also Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), slip op 29. The proponent of a nonconforming use bears the burden of establishing whether a nonconforming use has been lawfully established. Webber v. Clackamas County, 42 Or App 151, 600 P2d 448, rev den 288 Or 81 (1979).

The GTD zoning was imposed on the subject property in 1979. The nature and extent of the prior residential use is not clear. However, it appears that the structure was used as the principal dwelling for a relative of petitioners from 1954 until sometime in the 1960's. Record 14. Petitioners apparently acquired the subject property from that relative in 1967. We are cited to no evidence in the record regarding what sort of use, if any, was made of the property between the time petitioners' relative owned the parcel and petitioners' acquisition of the property. It appears from the record that no one has used the property as a residence for any duration since petitioners' acquisition.

Petitioners admit that no one has lived in the structure since the "1960's" (Record 18). Petitioners do not claim that during their ownership they attempted to rent or use the structure as a principal, secondary, or vacation residence before, during or at any time since 1979. Thus, it appears there was no residential use of the property in existence on the date the property was zoned GTD.

Under these circumstances, we fail to see how petitioners could have established that any residential use of the property existed at the time the GTD zoning was imposed in 1979 which could have become nonconforming in the first place. However, because the county decision is based on a finding that any lawful nonconforming residential use of the property existing at the time the GTD zoning was imposed had been discontinued, we consider whether that determination is correct.

Petitioners argue the residential use of the property continues to exist in perpetuity, notwithstanding that the structure on the property is no longer occupied or maintained as a residence, so long as petitioners establish that they did not intend to "abandon" the residential use of the property. Petitioners cite Renken v. Young, 300 Or 352, 711 P2d 954 (1985) and Dober v. Ukase Investment Co., 139 Or 626, 10 P2d 356 (1932), for the principle that a nonconforming use cannot be abandoned without a demonstration that the owner possess an intent to abandon

the nonconforming use.

Regardless of what the cases cited by petitioners say about the elements required to establish "abandonment" of a water right, ZDO 1206.02 does not predicate loss of a nonconforming use on abandonment.[6] ZDO 1206.02 states that a nonconforming use shall not be resumed if it has been "discontinued" for more than 12 months. It appears that under ZDO 1026.02, a nonconforming use is lost if not used for a specified period of time, regardless of any subjective intent to continue the use at sometime in the future. Therefore, ZDO 1206.02 operates in the nature of a forfeiture, as described in Renken v. Young supra.[7] In any event, petitioners supply no argument to establish that the term "discontinued" in ZDO 1206.02, is the legal equivalent of "abandonment," or that an intent to discontinue a nonconforming right must be established before a

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[6]There is no issue raised in this appeal proceeding regarding consistency between ZDO 1206.02 and ORS 215.130(7). However, we note that ORS 215.130(7) states that a nonconforming use may not be resumed after a period of interruption or abandonment. We interpret the provision of ZDO 1206.02 regarding loss of a nonconforming use after such use is "discontinued" for more than twelve months, to be the period of interruption of a nonconforming use after which such use may not be resumed, referred to in ORS 215.130(7). Accordingly, we believe the county's finding regarding loss of any nonconforming residential use of petitioners' property through "abandonment" is surplusage.

[7]We do not read Renken v. Young, supra, to determine that forfeiture by nonuse is the legal equivalent of "abandonment" of a right to use water. The court made it reasonably clear that a statutory provision creating forfeiture of a water right, where such a water right was not used for a particular period of time, did not require a demonstration of an intent to abandon before such water right could be lost. See Renken v. Young, 300 Or at 361.

nonconforming use may be deemed to have been "discontinued" by nonuse for a specified period. Additionally, petitioners supply no argument to establish that ZDO 1206.02 or ORS 215.130(7), by allowing a nonconforming use to be lost by discontinuance of the use without requiring an intent to abandon, violates some constitutional provision.[8]

We, therefore, conclude that any nonconforming residential use of petitioners' property was lost if the use was discontinued for a period of twelve months or more. ZDO 1206.02.

To establish that a nonconforming residential use of the property has not been discontinued,[9] petitioners argue (1) the residential structure was once occupied as a residence before the GTD zoning was imposed, (2) the county tax assessor has continuously assessed the subject property at true cash value for residential use, and petitioners have continuously paid the taxes on that assessed valuation, and (3) petitioners have always intended to construct a retirement dwelling on the subject property.

While we note there is evidence in the record that

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[8]It is petitioners' responsibility to establish a basis upon which we might grant relief, and they have not done so here. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

[9]Petitioners appear to argue only that the alleged nonconforming residential use of the property has not been "abandoned." However, because the scope of petitioners argument is not clear, we address whether the alleged nonconforming residential use of the property has been "discontinued."

petitioners at one time visited the property to avoid an adverse possession claim, we are cited to no evidence petitioners stayed on the property during that visit, maintained, or stayed in the dwelling at any time during their ownership, or that they had rented, or attempted to rent or sell the dwelling to others. Further, there is undisputed evidence in the record that the residential structure on the property is "beyond the point of repair."[10] Record 31.

We do not believe the fact that the county assessor may have assessed the property at its value as a "residential" or "buildable" parcel as petitioners allege is particularly important. As we discuss below, petitioners apparently never applied for approval of a forest dwelling, or for any other kind of a structure on the subject property which is consistent with the GTD zone. Further, petitioners have not established the basis upon which the assessor has assessed the parcel, or the factors the assessor considered in making particular assessments over the years. Additionally, neither the fact of a particular kind of an assessment (if one had been established) nor that petitioners had paid taxes on the basis of a particular kind of tax assessment, of itself, establishes that petitioners have demonstrated a nonconforming residential use of the property which has not

[10]We note that if an intent to discontinue the alleged nonconforming use were required, this is strong evidence of such an intent.

been discontinued for a period of more than twelve months.[11]

ORS 308.235 requires county tax assessors to consider the zoning of property in determining the true cash value upon which a tax assessment is based. However, ORS 308.235 also directs the assessor to consider other factors.[12] Simply because a parcel is zoned for resource use does not establish that a parcel so zoned is not subject to assessment as a residential homesite, how that residential homesite is valued, or the kind of residential use which forms the basis for the residential homesite valuation. See ORS 308.229 (forest homesite valuation); Chapin v. Dept. of Revenue, 290 Or 931 (1981) (unpartitioned one half acre parcel of land underlying farm house, included in a 111 acre parcel zoned exclusive farm use, is properly assessed at its

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[11]It is not at all clear that the subject parcel is assessed as a "residential," as opposed to a resource, parcel as petitioners claim.

[12]ORS 308.235(1) provides:

> "(1) Taxable real property shall be assessed by a method which takes into consideration:
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> "(a) The applicable land use plans, including current zoning and other governmental land use restrictions;
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> "(b) The improvements on the land and in the surrounding country and also the use, earning power and usefulness or privileges attached thereto or connected therewith; and
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> "(c) The quality of the soil, and the natural resources in, on or connected with the land, its conveniences to transportation lines, public roads or other local advantage of a similar or different kind."

value for residential use notwithstanding that such one half acre parcel could not lawfully be severed and separately sold from the 111 acre farm).

Further, ORS 308.205 (2) provides:

> "If the property is subject to governmental restriction as to use on the assessment date under applicable law or regulation, true cash value shall not be based upon sales that reflect for the property the value that the property would have if the use of the property were not subject to the restriction unless adjustments in value are made reflecting the value of the restrictions."

Petitioners do not explain why they believe the assessed value of the subject property has not been adjusted to reflect the value of the subject property considering restrictions of the GTD zone. Absent some explanation from petitioners, we will not presume that the assessed value of the subject property was improperly established, or that when it was established the assessed value failed to take into consideration and was not adjusted for the GTD zoning of the subject property.

Additionally, a county assessor is only required to appraise property once every six years. ORS 308.243. Petitioners cite nothing establishing when the last appraisal, for taxation purposes was performed for the subject property. Even if petitioners were correct that there was a lawful residential use of the subject property in 1979, and that there was (at least for a period of time) a lawful nonconforming residential use of the property, in

view of ORS 308.243, having a particular assessed value does not establish that a nonconforming use presently exists on the property. If there were a nonconforming residential use established on the property at the time of assessment, a residential tax assessment could be consistent with that nonconforming residential use, but there would not necessarily have been a later assessment to reflect any subsequent loss of that right. We cannot tell from the record whether there was any real residential use of the property either before or after the last tax assessor's appraisal of the property, or when the last tax appraisal of the property occurred. In short, we do not believe the fact that petitioners paid taxes on a particular tax assessment, in this case, is enough to establish a right to a nonconforming residential use of the property.

Petitioners have not established that either a lawful nonconforming residential use existed on the subject property in 1979, or if it did, that it was not discontinued for a period in excess of twelve months sometime between 1979 and the present. We believe there is substantial evidence in the record to support the county's determination that the alleged nonconforming residential use of the subject property was discontinued for more than a year.

SECOND ASSIGNMENT OF ERROR

> "The public body, Clackamas County, has exercised their right of eminent domain by inverse condemnation by their regulation of land use,

> without just compensation to the land owner, constituting a forfeiture. Further, the "Abandonment" regulation, of the county ordinances constitutes a taking of property without just compensation in violation of Amendment V of the United States Constitution and Art I Sec. 18 of the Oregon Constitution."

Citing Keystone Bituminous Coal Assn. v. DeBenedictis, 409 US 470 (1986); First Church v. Los Angeles County; 482 US 304 (1986); and Penn Central Transp. Co. v. New York City, 438 US 104 (1978), petitioners contend that by zoning the subject property GTD instead of applying a residential zoning designation, the county has unconstitutionally "taken" their property right to use the subject property residentially. Petitioners contend the county has "taken" this alleged right without due process of law in violation of the 14th Amendment to the United States Constitution. Petitioners argue the GTD zoning has resulted in the loss of "all beneficial use" of their property. Petition for Review 6-7. Petitioners claim that as residentially zoned property, the subject land is assessed "in excess of $10,000," and that as timber land, the value of the property is "$300 to $500." Petition for Review 7.

The county argues:

> "* * * longstanding Oregon case law validates respondent's zoning ordinance. 'Where a zoning designation allows a landowner some substantial beneficial use of his property, the landowner is not deprived of his property nor is his property taken; such a loss is, if any, damnum absque injuria.' Fifth Avenue Corp. v. Washington County, 282 Or 591, 609, 581 P2d 50 (1978). A

> landowner is not entitled to compensation just because the property cannot be used as suitably or economically after a zone change, Joyce v. City of Portland, 24 Or App 689, 692,546 P2d 1100 (1976), or because the property would have greater value or be more profitably used if zoned otherwise, Multnomah County v. Howell, 9 Or App 374, 380, 496 P2d 235 (1972). Thus, neither the fact that petitioners' property may sell for less as forest land than as residential land, nor the fact that respondent allows petitioners to use their land for forest production but not for residence, [sic] make respondent's General Timber District zoning a compensable taking." Respondent's Brief 8-9.

There are several different uses which are permitted, or permitted subject to review, in the GTD zone.[13] Petitioners complain they have been denied one category of use, a nonforest dwelling.[14] As far as we can tell, petitioners have made no effort to apply for, or to establish, any of the other uses authorized under the ZDO in the GTD zone. Similarly, petitioners have not demonstrated the value of the subject property if one of those uses could be established, and we have no reason to believe that none

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[13]ZDO 404.03 specifies the following classes of uses which are permitted in the GTD zone: timber production and milling; "[c]urrent employment of land for general farm uses * * *;" "[p]ublic and private conservation areas and structures for the conservation of water soil open space forest or wildlife resources;" "[c]onstruction of roads and bridges and the quarrying and processing of rock and forest management purposes;" "[a]ccessory buildings and uses customarily incidental to any of the uses listed as a principal use permitted in subsection 404.03;" and "[p]roduce stands * * *." ZDO 404.04 states that the following classes of uses are authorized in the GTD zone subject to review: dwellings in conjunction with a principal use and home occupations.

[14]The correctness of the county's denial of the proposed nonforest dwelling is reviewed under the first assignment of error considered below.

of those uses could be established on the property, based on this record. Additionally, as we have explained above, petitioner has not shown the county tax assessment of the property reflects a valuation of the property inconsistent with other potential uses of the property under the GTD zone, including residential uses.

We agree with the county that petitioners have not established their property has been "taken" without due process, within the meaning of the 14th amendment to the United States Constitution.[15]

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "The land use hearings officer did not properly apply the facts to this case when he determined that the petitioners did not meet the criteria set out in Clackamas County zoning and development ordinance Subsections 404.05(A)(1), (3), (4) and (5)."

Clackamas County Zoning and Development Ordinance (ZDO) 404.05(A)(1), (3) and (4) provide:

> "Establishment of single-family dwelling structures not provided in conjunction with a principal use shall be subject to review and approval by the planning director subject to the provisions of [ZDO] 1305.02. Approval shall not be granted unless the planning director finds that

[15]Petitioners also argue that the county's decision is a taking of their "vested right" to reestablish a nonconforming residential use of the property. However, under our discussion of preliminary issues above, we determined that petitioners had no nonconforming residential use right. Accordingly, we do not believe petitioners have established there has been any "taking" of such a right.

the proposed nonforest use meets all the following criteria:

"1. Is compatible with forest uses described in [ZDO] 404.03 and Goal 4 of the Statewide Planning Goals and Guidelines.

"* * * * *

"3. Does not materially alter the stability of the overall land use pattern of the area.

"4. Is situated upon generally unsuitable land for the production of farm and forest products, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract."

In denying an application, the county need only adopt findings demonstrating that one or more approval standards are not met. Douglas v. Multnomah County, ___ Or LUBA ____ (LUBA No. 89-086, January 12, 1990), slip op 16; Garre v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-131, February 27, 1989), aff'd without opinion, 102 Or App 123 (1990). Accordingly, we need only determine that one of the county's bases for denial of the nonforest dwelling is adequate.

The challenged order contains the following findings regarding the suitability of the subject parcel for forest uses:

"* * * This property does suffer from terrain characteristics which limit its suitability for the production of farm products, but not forest products. The slopes on the property shown on the site plan would restrict agricultural production. There is no information, however, that those slopes limit its suitability for forest production.

"The soils on the property are suitable for the production of forest products. The record establishes that the primary soil found on the property is Saum silt loam. The Douglas Fir site index is 2, considered to be highly suitable for the production of timber.

"The property is bisected by a year-around stream. This drainage characteristic is a limiting factor because of the constraints it would impose on some forest management practices, such as aerial spraying, and constraints of the Forest Practices Act on harvesting in the immediate vicinity of a stream.

"The location of the property imposes no limitation on its suitability for forest production. The property is located in an area of large parcels primarily in farm and forest use, and is located immediately adjacent to properties which could utilize the subject property in their forest production activities.

"The size of the property is a limiting characteristic. One acre is not large enough to be managed separately for forest production. However, the property can be combined with adjacent property, also suitable for forest production, and incorporated into the management plan of the larger parcel.

"The vegetation on the property does limit its suitability. The record reflects that the property is wooded but primarily with alder and some brush. The property would have to be cleared before planting to Douglas Fir, incurring additional expense.

"In summary, there are characteristics of the property which limit its suitability for the production of forest products, but those characteristics, either individually, or in combination, are not sufficient to cause the property to be generally unsuitable for the production of forest products. Because of the good soils and the availability of combining this property with a larger parcel for the production

> of forest products, the property is found to be generally suitable for the production of forest products.
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> "This criterion is not met." Record 3-4.

Petitioners argue the county's findings are inadequate to establish the subject parcel is suitable for the production of farm crops and livestock.[16] Petitioners contend the challenged decision recognizes the subject one acre parcel, standing alone is generally unsuitable for the production of farm and forest products.[17] Petitioners state the challenged order only recognizes the general suitability of the subject property for the production of forest products if the property is combined with other land. Petitioners suggest that if the subject parcel is too small to be managed for the production of forest products on its own, then there is nothing which requires the parcel be combined with other land in order to be managed for the production of forest products. Petitioners argue:

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[16]It is not clear whether petitioners are also challenging the evidentiary support for the county's findings that there is other nearby land managed for the production of forest products, with which the subject parcel could be combined. We note that there is substantial evidence in the whole record to support these findings, in that a lumber company owns land directly to the south and southeast of petitioners' property, and the neighboring Marshall and Rhinevalt properties are, at least in part, managed timber.

[17]It is undisputed that the subject parcel was used for pig foraging, and that surrounding properties are managed for farm uses. While not challenged, we question the county's determination that the subject parcel is generally unsuitable for the production of farm products. See Stefan v. Yamhill County, ___ Or LUBA ___ (LUBA No.89-118, February 16, 1990).

> "The fact [that the subject parcel] can be combined with adjoining property for forest production clearly overlooks the fact that the applicant and present owner of the one acre parcel does not desire to acquire additional property." Petition for Review 5.

Both this Board and the Court of Appeals have interpreted approval standards nearly identical to ZDO 404.05(A)(4). Specifically, in Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977), the Court of Appeals interpreted statutory language requiring that nonfarm dwellings be located on lands which are generally unsuitable for the production of farm crops and livestock. The statutory language at issue in Rutherford, ORS 215.213(3), is nearly identical to the language of ZDO 404.05(A)(4).[18] The only difference between the statutory language interpreted in Rutherford and ZDO 404.05(A)(4), is that ZDO 404.05(A)(4) provides that prior to the approval of a nonforest dwelling the county is required to determine whether the subject land is generally unsuitable for the production of farm and forest products. The Court of Appeals stated:

> "[t]he fact that the property cannot be farmed as an economically self-sufficient unit is irrelevant

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[18]At issue in Rutherford, was ORS 215.213(3), which at that time provided in relevant part:

> "[The proposed nonfarm dwelling i]s situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation and size of the tract * * * "

> if it is otherwise suitable to produce farm crops and livestock." Rutherford, 31 Or App at 1327.

See also Stefan v. Yamhill County, supra.

Petitioners do not dispute the county's findings that the land itself, composed of Douglas Fir Class II soils, and adjacent to land managed for forest production, is suitable for the production of forest products within the meaning of ZDO 404.05(A)(4). Petitioners argue only that they do not wish to combine the subject parcel with another parcel to produce forest products, and do not believe the county's finding that the subject property is not generally unsuitable for the production of forest products is reasonable under these circumstances.

As we understand it, the county's order states the limitations on the property's capacity for the production of forest products could be overcome if the parcel is combined with other land and managed for forest production so combined. Additionally, the county's findings indicate that there is land managed for forest production reasonably close to the subject parcel. We conclude that the county's findings illustrate a correct interpretation of ZDO 404.05(A)(4), and are supported by substantial evidence in the whole record. The county did not err in determining the subject parcel is not generally unsuitable for the production of forest products.

Because we determine one of the county's bases for denial of a nonforest dwelling is adequate, we need not

review petitioners' other subassignments of error regarding the adequacy and evidentiary support for the other justifications for the county's denial.

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The 'Notice' requirement of the ordinance to rezone the property by the governing body is not sufficient to provide the land owner due process under the Fifth and Fourteenth Amendments of the United States Constitution.
>
> "The 'Notice' requirement of the governing body's planning and zoning changes also violates the Fourteenth Amendment, the equal protection clause and Art 1 Section 20 of the Oregon Constitution."

In this assignment of error, petitioners challenge the 1979 zone change of their property. The subject of this appeal, however, is the county's May 21, 1990 decision applying the ZDO, and not the ZDO itself. The notice of intent to appeal does not identify the 1979 zone change as the subject of the appeal. No appeal was filed within 21 days of the adoption of the 1979 zone change. City of Corvallis v. Benton County, 16 Or LUBA at 492-493 (1988). Consequently, we do not believe the adoption of the county plan and ZDO provisions establishing the GTD zoning of the subject property is properly before us in this appeal proceeding.

However, even if it were appropriate for petitioners to challenge the 1979 zone change in this appeal proceeding, we note that petitioners' only contention is that the published

notice of the 1979 zone change of the property to GTD, is inadequate.

As far as we can tell, the GTD zoning was imposed on the subject property in a legislative rezoning proceeding, and petitioners do not contend otherwise. There is nothing unconstitutional about providing only published notice of legislative rezoning. See Allison v. Washington County, 24 Or App 571, 575, 548 P2d 188 1975).[19]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The County of Clackamas is estopped to deny the land owner the right to the nonconforming use for a building site because they have been taxing the property on the basis that it is a legal buildable lot of record."

Petitioners assume because the county tax assessor has ascribed a particular value to the subject property and has been collecting taxes based on that value, that value must be attributable to the parcel being a "residential building site." Petition for Review 11-12. Petitioners contend that because the tax assessor allegedly assessed the property in

[19]We note that ORS 215.503 provides a requirement for individual written notice of proposed legislative rezoning. However, ORS 215.508 states that such individual written notice is not required for proposed legislative rezoning where there is no county charter provision which requires such notice, and where the Department of Land Conservation and Development (DCLD) does not make funds available for such notice. Petitioners provide no argument regarding these statutory provisions. We are cited to no Clackamas County charter provision requiring individual written notice of legislative rezoning, and petitioners have not argued that DLCD funds were available for provision of such notice.

this way, the county is estopped from contending that a nonforest dwelling may not be established.

In Coos County v. State Of Oregon, 303 Or 173, 180-181, 743 P2d 1348 (1987) (Coos County), the Supreme Court stated the following with regard to the doctrine of equitable estoppel against a governmental body:

> "'This doctrine of equitable estoppel or estoppel in pais is that a person may be precluded by his act or conduct, or silence when it was his duty to speak, from asserting a right which he otherwise would have had.'
>
> "The elements of equitable estoppel [are]:
>
> > "'To constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts, (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it.'
>
> "Courts generally have held that the misrepresentation must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or conclusions of law. * * * The party seeking estoppel must demonstrate not only reliance, but a right to rely upon the representation of the estopped party. * * * Reliance is not justified where a party has knowledge to the contrary of the fact or representation allegedly relied upon. * * *" (Citations omitted.)

As we stated in our discussion of the preliminary nonconforming use issues, the county tax assessment is presumed to be based upon proper consideration and

adjustment of the value of the property with its GTD zoning, as well as other factors. Even if petitioners are correct that the assessment of the property shows the assessor believes a residence could be placed upon the parcel, that is not a determination by the assessor which is necessarily at odds with the county's determination in this case, that a nonforest dwelling can not be allowed on the subject property.[20] We fail to see how the assessment of the property over the years constituted a "false representation" by the assessor as required under the first element of the Coos County analysis stated above.

If petitioners believe that the assessor has not properly adjusted and considered the restrictions of the GTD zone, their remedy is with the county board of equalization and not with this Board. ORS 305.275.

The fourth assignment of error is denied.

The county's decision is affirmed.

[20]For example, a forest or a farm dwelling is authorized, under certain conditions, in the GTD zone. We express no opinion on whether a farm or forest dwelling could be approved on the subject parcel.