

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)
7 Petitioner,)

LUBA No. 91-113

8)
9 vs.)

FINAL OPINION

10)
11 YAMHILL COUNTY,)

AND ORDER

12)
13 Respondent.)

14
15
16 Appeal from Yamhill County.

17
18 Jane Ard, Salem, filed the petition for review and
19 argued on behalf of petitioner. With her on the brief was
20 Dave Frohnmayer, Attorney General; Jack L. Landau, Deputy
21 Attorney General; and Virginia L. Linder, Solicitor General.

22
23 John C. Pinkstaff, McMinnville, filed the response
24 brief and argued on behalf of respondent.

25
26 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
27 Referee, participated in the decision.

28
29 REMANDED 12/18/91

30
31 You are entitled to judicial review of this Order.
32 Judicial review is governed by the provisions of ORS
33 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the county board of
4 commissioners approving a forest dwelling on land zoned
5 Agricultural/Forestry (AF-20).

6 **FACTS**

7 The subject parcel consists of 26.8 acres, and was
8 heavily forested before it was logged in 1990. The
9 applicant acquired the subject parcel in 1990. In 1991,
10 approximately 20 acres of the subject property was replanted
11 with Douglas fir seedlings pursuant to a forest management
12 plan. Record 5. The remaining six acres is used for
13 grazing cattle. The dwelling is proposed to be located on
14 the six acre portion of the parcel on which the cattle
15 currently graze.

16 The subject parcel is bordered to the north, south and
17 east by properties also zoned AF-20. These properties are
18 forested. Members of the applicant's family own various of
19 the neighboring AF-20 zoned properties and actively manage
20 those parcels for forest uses. Properties to the west of
21 the subject parcel are zoned Exclusive Farm Use.

22 The planning department approved the application and
23 petitioner appealed to the county board of commissioners.
24 The board of commissioners affirmed the planning
25 department's decision, and this appeal followed.

1 **ASSIGNMENT OF ERROR**

2 "The county failed to comply with the requirements
3 for approving a dwelling in conjunction with a
4 forest use on a parcel in the AF-20 Agriculture
5 Forestry zone because the county's final order
6 lacks necessary findings and is not supported by
7 substantial evidence."

8 Yamhill County Zoning Ordinance (YCZO) 403.06(B)
9 requires that forest dwellings satisfy the standards set
10 forth in YCZO 401.06.¹ YCZO 401.06 provides the following
11 relevant standards for approval of forest dwellings:

12 "(a) The dwelling is necessary in order to manage
13 the land for forest use, considering that:

14 "(1) The land cannot reasonably be put to
15 forest use without a dwelling on the
16 site; and

17 "(2) The day-to-day activities of an owner or
18 manager on the property are required to
19 manage the land for specific forest uses
20 and the activities are principally
21 directed to forest use of the land.

22 "(b) The dwelling is secondary or subordinate to
23 the main forest use of the land.

24 "(c) The property is large enough to be managed
25 profitably for forestry uses.

26 "(d) Whenever possible, the dwelling is to be
27 located on land generally unsuitable for the
28 propagation and harvesting of forest
29 products.

30 "(e) The dwelling will not significantly impact
31 forest uses on adjacent and nearby forest

¹Yamhill County's comprehensive plan and land use regulations are acknowledged under ORS 197.251.

1 lands.

2 "* * * * *"

3 The county determined the proposed dwelling would be
4 occupied by a person who would manage the "reforested lands
5 and livestock" on the subject parcel and engage in the
6 "practices normally used in forest management such as
7 competition release, spraying and keeping [the] area clear
8 of underbrush, animal damage control, pre-commercial
9 thinning, fertilization, pruning, harvesting, monitoring,
10 and maintenance." Record 4.

11 The county further found the occupant of the proposed
12 dwelling would provide 24 hour security services for the
13 subject and surrounding family owned parcels necessitated by
14 "specific, documented cases of trespassing, theft, vandalism
15 and fires on the subject parcel and surrounding * * * family
16 holdings. * * *" Record 4a. The county also determined:

17 "* * * the applicant is a member of a family * * *
18 who own over 300 acres of forest land adjacent to
19 the 26.8 acre parcel site, and that the 26.8 acre
20 site was originally acquired for the purpose of
21 providing legal access to other * * * family
22 timber parcels. The Board finds that substantial
23 evidence was adduced that the day-to-day
24 activities of the occupant of the dwelling will
25 include construction, reconstruction, and
26 maintenance of the logging access road through the
27 parcel." Id.

28 The county elaborated on the duties of the occupant of
29 the proposed dwelling as follows:

30 "* * * the 20 acres of newly reforested land will
31 need more labor intensive forest management

1 activities over this rotation * * * and * * * the
2 entire sequence of labor intensive forest
3 management activities will be repeated in future
4 rotations[.] * * *

5 "In light of forest practices anticipated for the
6 property over the long term, there is substantial
7 evidence that the property cannot be reasonably
8 put to such labor intensive forest management
9 activities without the need of a dwelling."
10 Record 7.

11 "None of the other dwellings on adjacent parcels
12 are available to serve the purpose of managing the
13 forest uses on this parcel. The parcel does,
14 however, provide an important access road to the
15 other * * * family forest holdings. The 20 * * *
16 acre parcel can be profitably managed as a
17 separate unit in cooperation with the other forest
18 lands under this arrangement." Record 9.

19 Petitioner argues the findings are inadequate to
20 establish compliance with YCZO 401.06, in that they do not
21 show that it is "necessary" to have someone live on the
22 subject parcel to perform the enumerated duties. Petitioner
23 further contends the findings fail to identify the amount of
24 time required to manage the parcel for timber production and
25 cattle grazing, as well as that required for the
26 construction, reconstruction and maintenance of the logging
27 access road. With regard to the county's findings
28 concerning the need for 24-hour security to service the
29 subject and surrounding family forest holdings, petitioner
30 argues the county has not demonstrated why the subject
31 parcel necessarily cannot be managed for forest uses without
32 24-hour security provided by the resident of the proposed
33 dwelling. Petitioner also contends the alleged need for a

1 dwelling for 24-hour security on the parcel is an inadequate
2 justification for a forest dwelling, citing the Court of
3 Appeals' initial decision in 1000 Friends of Oregon v. LCDC
4 (Lane County), 83 Or App 278, 283, 731 P2d 457 (1987), on
5 reconsideration, 85 Or App 619, rev'd in part, aff'd in
6 part, 305 Or 384 (1988) (LCDC/Lane County).²

7 The county argues the use of the term "necessary" in
8 YCZO 401.06 does not have as absolute a meaning as
9 petitioner contends. The county argues the term "necessary"
10 is defined by the considerations stated in YCZO 401.06(a)(1)
11 and (2), and requires only that the land cannot reasonably
12 be put to forest use without the proposed dwelling, and that
13 the dwelling be secondary to forest uses of the property.
14 The county maintains that to the extent the Court of Appeals
15 or Supreme Court in LCDC/Lane County, supra, gave a
16 different interpretation to the term "necessary," in
17 determining whether unacknowledged provisions of the Lane

²The Court of Appeals determined a Lane County code provision at issue in that case, incorrectly interpreted the term "necessary" as it had been used by LCDC in interpreting Statewide Planning Goal 4 (Forest Lands). Among other things, the Court of Appeals stated:

"Many things can enhance [forest] production without being necessary to it. It may be more convenient for the owner of forest land to do required cultivation work from a nearby residence rather than commuting from a home some distance away, but that does not make it necessary to do so. Living on the land may help deter arsonists, and thereby enhance production, but that fact alone does not render a forest dwelling necessary." (Emphasis in original.) Id. at 283.

1 County code were adequate to comply with Statewide Planning
2 Goal 4, such an interpretation is irrelevant here, because
3 Yamhill County has acknowledged code provisions giving
4 meaning to the term "necessary."

5 We first interpret the term "necessary" as used in
6 YCZO 401.06(a), and then determine whether the findings are
7 adequate to establish compliance with YCZO 401.06(a).

8 **A. YCZO 401.06(a)**

9 YCZO 401.06(a) requires that an applicant for a forest
10 related dwelling establish such dwelling is "necessary" for
11 the forest uses of forest property, considering several
12 factors. It does not follow that the term "necessary" is
13 defined by these factors. Rather, YCZO 401.06(a) requires
14 that the factors set out in (1) and (2) be considered by the
15 county in determining whether a proposed forest dwelling is
16 "necessary" to forest uses of the property.

17 In LCDC/Lane County, supra, the issue was whether LCDC
18 properly acknowledged a local code provision which "deemed"
19 proposed dwellings to be "necessary" for forest uses if
20 certain minimal elements were established. In LCDC/Lane
21 County, the Court of Appeals' stated the term "necessary"
22 meant "that [which] cannot be done without: that [which]
23 must be done or had: absolutely required." LCDC/Lane
24 County, 83 Or App 282-83. Further, the Court of Appeals
25 made it clear in its opinion that the "necessary" standard
26 was not satisfied where a proposed dwelling was merely

1 "convenient" for the continuation of the forest management
2 of forested property. LCDC/Lane County, 83 Or App at 283.
3 After the Court of Appeals' initial decision, and decision
4 on reconsideration in LCDC/Lane County, this Board was
5 called upon to interpret those decisions and stated:

6 "We agree * * * that if we simply rely on the
7 [dictionary definition of necessary] and require a
8 demonstration of 'physical impossibility' before a
9 forest dwelling could be approved, we make LCDC's
10 policy to allow some forest dwellings a nullity.
11 We do not believe LCDC or the Court of Appeals
12 intended that result. * * *

13 "While it is possible to read the Court of
14 Appeals' decision in its entirety to reject a
15 literal 'impossibility' standard for forest
16 dwellings, it is also unmistakable that the Court
17 of Appeals believes substantially more than
18 convenience, enhancement, and cost efficiencies
19 are required to show a dwelling is necessary for
20 forest uses." Champion International v. Douglas
21 County, 16 Or LUBA 132, 138-39, (1987).

22 Subsequent to the Board's decision in Champion
23 International v. Douglas County, supra, the Supreme Court
24 decided LCDC/Lane County, 305 Or 384. While it is not clear
25 whether the Supreme Court fully embraced the Court of
26 Appeals' formulation of what the term "necessary" means, the
27 Supreme Court did state that it was not enough for a
28 proposed dwelling to merely enhance forest uses on forest
29 property.³

³Specifically, the Supreme Court stated:

"* * * This court is not prepared to suggest that no dwelling
could be considered necessary and accessory to a forest use,

1 Notwithstanding that the dispute in LCDC/Lane County,
2 supra, centered on whether unacknowledged code provisions
3 complied with Goal 4, the relevant interpretive issue
4 decided in those cases (the meaning of the term "necessary")
5 is also presented in determining the meaning of
6 YCZO 401.06(a). We conclude YCZO 401.06(a) requires the
7 county to establish that a proposed forest dwelling is not
8 merely for the enhancement, convenience or cost
9 effectiveness of the forest operations on a forest parcel.⁴
10 LCDC/Lane County, 83 Or App at 282-83.

11 **B. Adequacy of the Findings**

12 While the county's findings adequately identify the
13 forest management and security duties to be performed by the
14 occupant of the proposed dwelling, they do not establish the
15 critical link between those activities and the need for an
16 on-site dwelling. Specifically, the findings concerning the
17 episodes of vandalism and trespass are vague about the
18 number of such occurrences, and how recently any such
19 episodes occurred, and do not explain why such occurrences
20 necessitate the provision of 24-hour security. Further, the
21 findings fail to explain why other dwellings in the area on
22 property owned by members of the applicant's family are

but we cannot agree that allowing a dwelling on some part of a
lot simply because it may enhance forest uses on the remainder
of the lot protects existing forest uses to the extent required
by Goal 4." 305 Or at 396.

⁴Neither party argues that OAR Chapter 660, Division 6, has any bearing
on this case, and we do not understand that it does. See OAR 660-06-003.

1 "unavailable" to provide housing for people to perform
2 security services for the subject property and other family
3 holdings.

4 The findings fail to explain why someone living on-site
5 is required to perform any of the duties to be accomplished
6 by the occupant of the proposed dwelling. Consequently, the
7 findings are inadequate to establish that the proposed
8 dwelling is "necessary" within the meaning of
9 YCZO 401.06(a). Because we determine the findings are
10 inadequate, no purpose is served in reviewing their
11 evidentiary support.

12 The assignment of error is sustained.

13 The county's decision is remanded.