BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| CONSTANTIN SAMOILOV, | ) | |
| | ) | |
| Petitioner, | ) | LUBA No. 91-131 |
| | ) | |
| vs. | ) | FINAL OPINION |
| | ) | AND ORDER |
| CLACKAMAS COUNTY, | ) | |
| | ) | |
| Respondent. | ) | |

Appeal from Clackamas County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 12/12/91

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**

Petitioner appeals an order denying his application for a nonforest dwelling on land zoned General Timber (GT-40).

**FACTS**

The subject parcel is unimproved and consists of 3.73 acres. The soils on the subject parcel are Aspaugh clay loam with 2 to 8% slope. This soil type is "suited to the production of Douglas-fir." Record 45. Cedar Creek runs through the parcel. Surrounding parcels are also zoned GT-40.

The county planning department administratively denied the subject application for a nonforest dwelling, and petitioner appealed to the hearings officer. The county hearings officer denied the application, and this appeal followed.

**SECOND ASSIGNMENT OF ERROR**

> "Respondent improperly interpreted the applicable law by requiring the subject property be aggregated [with] adjacent properties."

Clackamas County Zoning and Development Ordinance (ZDO) 405.05(A)(4) provides that to approve a proposed nonforest use in the GT-40 zone, the county must determine the use:

> "[i]s 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[.]"

The hearings officer adopted the following findings that the proposed nonforest dwelling does not satisfy this standard:

> "* * * The subject property is located immediately adjacent to properties which could utilize the subject property in their farm or forest production activities.
>
> "The size of the property is a limiting characteristic. 3.73 acres is not large enough to be managed separately for forest production, or for most farm uses which require larger amounts of farm land. However, the property can be combined with adjacent property, also suitable for farm or forest production, and incorporated into the management plan of the larger parcel. Properties to the east, south and west have a uniformity of soils and slopes with the subject property, making aggregation particularly appropriate." Record 3-4.

Petitioner argues it is improper to determine that the subject property is not unsuitable for the production of farm or forest products solely because it can be combined with other properties to reasonably be managed for farm or forest use. Petitioner contends there is no requirement in the county's code that the subject parcel be combined with other land which is suitable for farm or forest uses so that the subject parcel may be made suitable for such uses.

In Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977), rev den 281 Or 431 (1978), the Court of Appeals construed a generally unsuitable standard similar to ZDO 405.05(A)(4), governing approval of nonfarm dwellings. In Rutherford, the Court of Appeals determined that small

parcel size alone was an inadequate justification for determining a parcel to be generally unsuitable for the production of farm crops and livestock. Under the Rutherford principle, if a small parcel could be put to farm use if combined with other resource parcels, then the small parcel is not generally unsuitable for farm use. Similarly, here the county determined under ZDO 405.05(A)(4), that the subject parcel is not generally unsuitable for forest use because it can be combined with other resource parcels in the area and be managed for forest use. We believe the Rutherford interpretation of the "generally unsuitable" standard relating to farm uses is equally applicable to the ZDO 405.05(A)(4) "generally unsuitable" standard relating to forest uses. Sabin v. Clackamas County, ____ Or LUBA _____ (LUBA No. 90-077, September 19, 1990), slip op 20-23. Accordingly, the county did not improperly apply the generally unsuitable standard of ZDO 405.05(A)(4) to the subject application for a nonforest dwelling.

According to petitioner, even if the Rutherford analysis is properly considered in applying ZDO 405.05(A)(4), the subject parcel is nevertheless generally unsuitable for forest use regardless of parcel size. See Stefan v. Yamhill County, 18 Or LUBA 820 (1990).

The findings state the subject parcel is suitable for farm or forest uses, and if combined with other resource parcels in the area, can reasonably be managed for the

production of farm or forest products. Consequently, the findings are adequate to establish the subject parcel is not generally unsuitable for farm or forest uses. We address the evidentiary support for the county's findings concerning the parcel's suitability for farm or forest uses below.

The second assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

> "Respondent's decision is not supported by substantial evidence in the record."

Petitioner argues the county's finding that "* * * the subject property is located adjacent to properties which could utilize the subject property in their farm or forest production activities," is not supported by substantial evidence in the whole record.[1]

In order to overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioner to show there is substantial evidence in the record to support his position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioner['s] evidence should be believed." Morley v. Marion County, 16 Or LUBA 385, 393 (1988); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42,

[1]We interpret the challenged finding to determine the subject parcel could reasonably be managed for farm or forest uses in conjunction with adjacent parcels suitable for farm or forest uses.

46 (1982). In other words, petitioner must demonstrate that he sustained his burden of proof of compliance with applicable criteria as a matter of law. Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 619 (1989).

Petitioner first argues the evidence in the record establishes that the adjacent properties are not currently managed for the production of farm or forest products. We assume for purposes of resolving this assignment of error that the adjacent parcels are not currently managed for the production of farm or forest products. However, whether adjacent parcels are currently in farm or forest production is only indirectly relevant in determining whether such properties are suitable for farm or forest use. Reed v. Lane County, ___ Or LUBA ____ (LUBA No. 90-006, June 21, 1990) (whether a particular farmer can make a profit during a particular period of time, on a particular piece of farm land, is at best indirect evidence of whether the land itself is suitable for the production of farm crops and livestock). The relevant question is whether the adjacent properties are suitable for farm or forest uses. Here, respondent cites undisputed evidence in the record which establishes that the adjacent properties are suitable for farm or forest uses. Record 16.

Petitioner next argues there is no evidence in the

record to support a finding that the subject parcel may be combined with these adjacent resource parcels and managed for farm or forest uses.

Petitioner has the burden of establishing that his application for a nonforest dwelling meets each applicable approval standard, including the generally unsuitable standard of ZDO 405.05(A)(4). Once the county determines the evidence supports a determination that adjacent parcels are suited for farm or forest uses, it is reasonable and appropriate (in the absence of evidence to the contrary) for the county to infer the subject parcel could be combined with such adjacent parcels and managed for farm or forest uses.

Petitioner argues there is evidence in the record which establishes that the subject parcel cannot be combined with adjacent parcels. Specifically, petitioner argues the record shows he attempted to sell the subject parcel for a number of years and no one, including the adjacent landowners, has offered to purchase it. However, petitioner cites no evidence that the subject parcel was listed at a price typical for farm or forest parcels, or whether it was listed at its value as a home site. Without such evidence, petitioner's attempts to sell the parcel for a number of years is not sufficient evidence to establish as a matter of law that the parcel cannot be combined with adjacent

properties suitable for farm or forest uses.[2]

The fourth assignment of error is denied.

**FIRST ASSIGNMENT OF ERROR**

> "The notice of public hearing is deficient by failing to state the approval criteria applied by the hearings officer to this application."

**THIRD ASSIGNMENT OF ERROR**

> "The county's decision erroneously construes Goal 4 and Forest Policy No. 4.0 as mandatory approval criteria."

In these assignments of error, petitioner presents arguments concerning the adequacy of the county's notice of hearing and the applicability of Statewide Planning Goal 4 and the county comprehensive plan, which the county applied in denying the subject application.

We must sustain a denial decision if we determine that one applicable approval criterion is not met. Garre v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). We uphold, supra, the county's determination that the proposed nonforest dwelling does not comply with ZDO 405.05(A)(4).[3] We therefore do not consider whether the county erred in applying Goal 4 and provisions of its comprehensive plan.

The first and third assignments of error are denied.

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[2]Further, there is no evidence that the subject parcel cannot be leased for use with adjacent properties.

[3]Petitioner does not contend the notice of public hearing failed to identify ZDO 405.05(A)(4) as an approval criterion.

The county's decision is affirmed.