BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS DODD and DORIS DODD, Petitioners, and OREGONIANS IN ACTION, Intervenor-Petitioner, vs. HOOD RIVER COUNTY, Respondent, and OREGON DEPARTMENT OF FISH AND WILDLIFE, OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, OREGON DEPARTMENT OF FORESTRY, and 1000 FRIENDS OF OREGON, Intervenors-Respondent.	LUBA No. 91-116 FINAL OPINION AND ORDER

Appeal from Hood River County.

Richard M. Stephens, Sacramento, California, filed a petition for review and argued on behalf of petitioners. With him on the brief was the Pacific Legal Foundation.

David B. Smith, Tigard, filed a petition for review and argued on behalf of intervenor-petitioner.

Teunis Wyers, Hood River, filed a response brief and argued on behalf of respondent.

Jane Ard, Salem; Melinda L. Bruce, Salem; and Penny H. Harrison, Portland, filed a response brief on behalf of intervenors-respondent Oregon Department of Land

Conservation and Development, Oregon Department of Fish and Wildlife, and Oregon Department of Forestry. Jane Ard argued on behalf of the state agency intervenors-respondent.

Peter Livingston, Portland, filed a response brief and

argued on behalf of intervenor-respondent 1000 Friends of Oregon.

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

AFFIRMED 02/24/92

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal the county's denial of their consolidated request for permits and zone and comprehensive plan map amendments to allow construction of a single family dwelling on their 40 acre parcel.

MOTION TO INTERVENE

Oregonians in Action moves to intervene on the side of petitioners. There is no opposition to the motion, and it is allowed.

The Oregon Departments of Fish and Wildlife, Land Conservation and Development, and Forestry move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

1000 Friends of Oregon moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The 40 acre parcel at issue in this appeal is subject to Statewide Planning Goal 4 (Forest Lands) and is designated on the comprehensive plan and zoning maps as Forest (F-1). The minimum parcel size in the F-1 zone is 40 acres. The Primary Forest (F-2) zone establishes a minimum parcel size of 80 acres. The subject property is surrounded by parcels designated and zoned F-1 and F-2.

The property is assessed for tax purposes as forest

land.[1] At present approximately 32% of the property is covered with Douglas fir, the remainder with oak, brush and other vegetation. The County Forest Manager estimated during the local proceedings that if the property were logged, the value of the merchantable timber on the property, after deducting logging costs and the cost of reforesting the property, would be $10,000.

Petitioners purchased the subject property in November 1983 for $33,000. At that time the property was zoned F-1, but the F-1 zone at that time did not require that dwellings be "necessary [for] and accessory to" forest use. At the time the property was purchased, it had been illegally partitioned. The property was legally partitioned on January 24, 1984.

The planning director denied petitioners' requests for a land use permit and conditional use permit to allow a dwelling on the subject property. The planning director also recommended denial of petitioners' requests for plan and zone changes to allow construction of a dwelling on the subject property. The planning commission conducted two public hearings on petitioners' requests and denied the permit applications and recommended denial of the plan and zone changes. The board of county commissioners conducted a

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[1]For tax deferral purposes, forest land is ranked FL-1 through 6. FL-1 is the most productive forest land and FL-6 is the least productive. The subject property is ranked FL-3.

public hearing limited to the record before the planning commission and denied the permits and requested plan and zone changes. This appeal followed.

RESERVATION OF CLAIMS PENDING IN FEDERAL COURT

A related action is pending in the federal District Court of the District of Oregon. Petitioners reserve their right to have their federal claims adjudicated in federal court and do not submit them for review by LUBA.

FIRST ASSIGNMENT OF ERROR (DODD)

> "The respondent erred in denying petitioners' application for a land use permit because it improperly construed the applicable law by limiting the types of forest uses * * * which a dwelling must be necessary [for] and accessory to * * *."

Under Hood River County Zoning Ordinance (HRCZO) 5.10(I)(1), a single family dwelling may be approved in the F-1 zone if the applicant demonstrates that the dwelling is "necessary [for] and accessory to a forest use." Under the first assignment of error, petitioners contend the county erred by limiting the "forest uses" a dwelling must be "necessary [for] and accessory to," to include only commercial forestry or forest resource management. Petitioners contend that under HRCZO 5.00, forest uses include "retention of watershed productivity, recreation and other compatible uses." Therefore, according to petitioners, the county's interpretation of "forest uses" that a dwelling might be necessary for and accessory to is

too narrow.

The primary difficulty with petitioners' argument under this assignment of error is that the county explicitly considered petitioners' contentions and found that the dwelling was not necessary for and accessory to watershed management. Therefore, while the portions of the findings cited by petitioners may, read in isolation, suggest the county believes permanent dwellings may be allowed in the F-1 zone only where necessary for and accessory to commercial forest management, and only then in rare circumstances, that view did not limit the county's review of petitioners' application in this case. In other words, the county effectively applied the zoning ordinance in the manner petitioners contend is required, and found petitioners failed to demonstrate the proposed dwelling is necessary for and accessory to watershed management.

Petitioners Dodd's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (DODD)

> "The respondent erred in denying petitioners' application for a land use permit because it improperly construed the requirement that a dwelling must be 'necessary and accessory' to a forest use."

Under this assignment of error, petitioners contend the county applied an unnecessarily stringent interpretation of the HRCZO 5.10(I)(1) requirement that the proposed dwelling be necessary for and accessory to forest uses. According to petitioners, the county's interpretation of the "necessary

and accessory" requirement effectively makes approval of a dwelling in the F-1 zone impossible.

In view of our disposition of petitioners Dodd's third assignment of error, we need not address petitioners' contentions under this assignment of error at length. However, we reject petitioners' suggestion that the "necessary and accessory" test adopted by HRCZO 5.10(I)(1) is not a stringent standard.

The "necessary [for] and accessory to" test adopted by HRCZO 5.10(I)(1) was adopted to comply with Goal 4. Therefore, it is appropriate to interpret the terms in a manner consistent with the explanation of those terms provided by the appellate courts of this state. The appellate courts have made it very clear that the "necessary and accessory" requirement is a significant limitation on the approval of permits for construction of single family dwellings on lands planned and zoned for forest uses in accordance with Goal 4. In 1000 Friends of Oregon v. LCDC (Lane County), 83 Or App 278, 282-83, 731 P2d 457 (1987), on reconsideration, 85 Or App 619, 737 P2d 975, aff'd 305 Or 384 (1988), the Court of Appeals explained its understanding of the "necessary" component of the "necessary and accessory" requirement as follows:

> "* * * The dictionary definition [of necessary] is 'that cannot be done without: that must be done or had: absolutely required.' Webster's Third New International Dictionary 1511 (1976). That definition is compatible with LCDC's use of

> 'necessary' and with Goal 4's requirement that forest lands be preserved for forest uses. Lane County's criteria would allow dwellings which can be done without, need not be had and are not absolutely required for a forest use; they therefore do not comply with the goal.
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> "* * * Living on the land may help deter arsonists, and thereby enhance production, but that fact does not render a forest dwelling necessary. For a forest dwelling to be necessary and accessory to wood fiber production, it must, at least, be difficult to manage the land for forest production without the dwelling. The purpose of the dwelling must be to make possible the production of trees which it would not otherwise be physically possible to produce. * * *"

On review, the Oregon Supreme Court explained the question of whether a dwelling may properly be approved on lands subject to protection under Goal 4 did not turn so much on the meaning of the terms "necessary and accessory" as on whether the relationship between a proposed dwelling (a nonforest use) and forest uses of the property is such that the dwelling may nevertheless be considered a forest use. 1000 Friends of Oregon v. LCDC (Lane County), 305 Or 384, 752 P2d 271 (1988). LCDC argued in that case that the requirement in the county's plan for a forest management plan provided an adequate substitute for a case by case "necessary and accessory" finding in approving requests for approval of dwellings on forest land. The Supreme Court rejected the adequacy of the forest management plan to assure the required connection between the dwelling and forest uses, explaining as follows:

> "* * * LCDC must show the necessary legal connection between the policy of conserving forest land for forest uses and allowing dwellings on forest land. Goal 4 sets a high standard when it requires that '[e]xisting forest uses shall be protected unless proposed changes are in conformance with the comprehensive plan.' This court is not prepared to suggest that no dwelling could be considered necessary and accessory to a forest use, 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."[2] Id. at 396.

We find nothing in the county's decision to indicate that the county interpreted and applied the necessary and accessory test in a manner inconsistent with the above.[3]

Petitioners Dodd's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (DODD)

> "Respondent's decision that petitioners' proposed dwelling is not necessary and accessory to any forest use is not supported by the evidence."

Petitioners contend under this assignment of error that

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[2]See also Champion International v. Douglas County, 16 Or LUBA 132, 138-39 (1987). We also note LCDC has adopted amendments to its administrative rules implementing Goal 4. These rules make it clear that the agency views the "necessary and accessory" standard as a stringent one. OAR 660-06-027.

[3]One of the findings cited by petitioners suggests the county believes a dwelling is only necessary for and accessory to forest use if it will further the county's goal of diversifying its economy. We are satisfied that the county actually viewed the necessary and accessory test as requiring the county to determine whether a dwelling is necessary for and accessory to forest use of the subject property, in view of the circumstances extant on the property, and to impose a stringent standard requiring more than mere enhancement of forest uses.

watershed enhancement is properly viewed as a forest use, and petitioners submitted evidence that approval of the dwelling would allow "protection and enhancement of the vegetation" and "aid in the deep percolation of rain," allowing more consistent aquifer yields throughout the seasons. Record, Appendix 3 at 75.

Petitioners complain that the only response to this evidence was that the watershed enhancement activities proposed by the petitioners did not require a dwelling to be located on the property. Petitioners do not dispute it is possible to pursue the watershed enhancement activities they propose without placing a dwelling on the property, but argue as follows:

> "Petitioners made clear that they had no motive to aid in watershed retention unless they were allowed [to] dwell on their property. The reality is that the petitioners are not going to spend time and effort developing the watershed for others unless they are allowed to live on their property." Petition for Review 18.

If we understand petitioners correctly, they suggest that because they are unwilling to perform the watershed enhancement activities they described during the local proceedings if they are not permitted to build a dwelling on the property, the dwelling is therefore necessary for and accessory to such watershed enhancement.

We do not believe petitioners' individual motives are particularly relevant in determining whether a dwelling is necessary for and accessory to forest use. Such individual

motivations certainly may not be the dispositive factor. The property is approximately five miles from the nearest urban growth boundary. Even if we accept as true petitioners' statement that they are unwilling to and will not conduct watershed enhancement activities on the property if permission to build a dwelling on the property is denied, that fact does not mean the proposed dwelling is necessary for and accessory to such watershed enhancement activity. Petitioners' unwillingness to conduct watershed enhancement activities unless they can also live on the property does not constitute an adequate basis for concluding the proposed dwelling is either necessary for or accessory to, such watershed enhancement activities.

The remaining arguments presented under this assignment of error are directed to the county's findings that the proposed dwelling would be incompatible with forest uses on adjoining lands. These arguments appear to be premised on petitioners' understanding that the proposed dwelling could be approved under HRCZO 5.00 if the dwelling is shown to be compatible with adjoining forest uses. HRCZO 5.00 provides, in part, as follows:

> "The [F-1] Zone is established to designate and reserve areas for the purpose of maintaining renewable forest resource production, retention of watershed productivity, recreation and <u>other compatible uses</u>."
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> "* * * * *" (Emphasis added.)

Petitioners misread HRCZO 5.00. HRCZO 5.00 is the

purpose and intent section of the F-1 zoning district. That section is followed by sections which identify permitted uses, conditional uses, prohibited uses and preexisting and nonconforming uses, as well as sections imposing a variety of approval criteria. It is these subsequent sections of the HRCZO that establish the allowable uses in the F-1 zone and establish the relevant approval standards. HRCZO 5.00 does not provide that a dwelling may be allowed on lands zoned F-1, solely by virtue of its compatibility with adjoining uses.[4]

Petitioners Dodd's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (DODD)

> "Respondent improperly construed the conditional use permit provision in Article 4 of the HRCZO by requiring that a dwelling pursuant to the provision must be 'necessary and accessory to a forest use.'"

FIFTH ASSIGNMENT OF ERROR (DODD)

> "Respondent's decision that petitioners' proposed conditional use is not consistent with the zone and to deny petitioners' conditional use permit application is not supported by the evidence."

HRCZO 4.00 provides, in relevant part, as follows:

> "[A] proposed use or structure <u>not expressly listed under 'conditional uses'</u> may be considered by the Planning Commission or Planning Director as a conditional use <u>if said use or structure is</u>

[4]HRCZO 5.30 requires that dwellings shown to be necessary and accessory for forest uses <u>also</u> be "compatible with the forest use Goals, Policies, Strategies and Land Use Designations and Standards of the Hood River County Comprehensive Plan * * *."

consistent with the subject zone and/or with other conditional uses listed in the subject zone." (Emphasis added.)

Petitioners argue they sought approval of the proposed dwelling under HRCZO 4.00 as a dwelling "consistent with the subject zone and/or with other conditional uses listed in the subject zone," but the county erroneously required that they also show the dwelling is "necessary [for] and accessory to forest use," when such a finding is not required for approval under HRCZO 4.00.

A dwelling which is "necessary [for] and accessory to forest use" is allowable as a permitted use in the F-1 zone on both conforming parcels and nonconforming parcels (i.e., parcels smaller than the 40 acre minimum parcel size established in the F-1 zone).[5] Additionally, on nonconforming parcels, but not on conforming parcels, permanent dwellings which are not "necessary [for] and accessory to forest use," may be allowed as a conditional use in the F-1 zone, subject to certain approval criteria and site development standards.[6]

Petitioners argue that because dwellings other than those "necessary [for] and accessory to forest use" are not specifically listed as a conditional use on conforming lots,

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[5]HRCZO 5.60(A) establishes special standards for approving dwellings "necessary [for] and accessory to forest use" on nonconforming parcels.

[6]HRCZO 5.60(B) provides that "[n]on-forest dwellings shall be allowed only on land generally unsuitable for commercial forest use."

HRCZO 4.00 provides an independent provision under which such dwellings may be allowed on conforming lots, so long as the dwelling is "consistent with the subject zone and/or with other conditional uses listed in the subject zone."

Permanent dwellings other than those allowable as dwellings "necessary [for] and accessory to forest use," such as the dwelling proposed by petitioners, are "expressly listed under 'conditional uses.'" HRCZO 5.20(M); 5.60. However, such dwellings are only allowable on nonconforming parcels. Because permanent dwellings not satisfying the "necessary and accessory" requirement are listed as conditional uses, HRCZO 4.00 is inapplicable and does not operate to provide a separate criterion by which petitioners' proposed dwelling may be approved.

To the extent it is possible to construe HRCZO 4.00 in the manner petitioners argue, we reject that construction as unreasonable and incorrect. We believe the purpose of HRCZO 4.00 is to provide a standard whereby the county may allow certain uses that the county failed to expressly list as conditional uses. The construction petitioners argue would frustrate the clear intent that conditional use approval of dwellings, other than those which are shown to be "necessary [for] and accessory to forest use," be limited to nonconforming parcels.

The fourth and fifth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR (DODD)

> "Respondent failed to follow applicable procedures to petitioners' application in a manner which prejudiced the rights of petitioners by prohibiting oral argument on their behalf on whether a denial of petitioners' applications would effect a taking of their property."

TENTH ASSIGNMENT OF ERROR (DODD)

> "Respondent improperly construed the law applicable to petitioners' proposed zone and comprehensive plan change by failing to consider the potential for public liability for taking the property to be a part of the public interest relative to the requesting change."

ELEVENTH ASSIGNMENT OF ERROR (DODD)

> "Respondent's decision to deny petitioners' zone and comprehensive plan change is not supported by substantial evidence in the record."

One of the standards applicable to petitioners' request for a zoning map and comprehensive plan map amendment is HRCZO 60.10(A), which provides the applicant must demonstrate that "[g]ranting the request is in the public interest * * *." Petitioners contend that if the county fails to grant one or more of the approvals requested so that the proposed dwelling may be constructed on the subject property, the county's action will result in a regulatory taking of their property under Article I, section 18, of the Oregon Constitution, forcing the county to purchase the property.[7] We understand petitioners to contend the county

[7]Article I, section 18, of the Oregon Constitution provides as follows:

was required to determine whether denial of the requested plan and zoning map amendments would result in a regulatory taking under Article I, section 18, of the Oregon Constitution, causing adverse fiscal impacts on the county. Petitioners argue the county was required to determine whether the requested plan and zoning map amendments are in the "public interest" under HRCZO 60.10(A), because they would allow the county to avoid such potential adverse fiscal impacts.

Based on the above argument, petitioners contend the county committed procedural error by denying petitioners an opportunity to rebut legal arguments offered by the planning director to the planning commission at its January 23, 1991 public hearing. Petitioners contend they were informed at the hearing that "the taking issue was beyond the commission's purview," and that the planning commission would not hear petitioners arguments on the subject. Record 117-18. Petitioners contend the board of commissioners similarly refused to hear legal arguments concerning the taking issue.[8] Because the county ultimately adopted findings in which it concluded its decision in this matter

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> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered."

[8]Petitioners submitted evidence in support of their takings argument, and we do not understand petitioners to argue the county refused to accept relevant evidence concerning the taking issue.

does not violate the Oregon constitutional proscription against taking private property without payment of just compensation, petitioners contend the county's refusal to allow argument in rebuttal of the planning director's argument was reversible error.

We do not believe the county was required to consider petitioners' regulatory taking arguments in determining compliance with the "public interest" criterion of HRCZO 60.10(A). Simply stated, we do not believe that criterion requires the county to anticipate whether this Board, a trial court or an appellate court might ultimately conclude that application of relevant statutory, statewide planning goal or local plan or land use regulation requirements to a particular request for land use approval constitutes a taking under Article I, section 18, of the Oregon Constitution. The U.S. Supreme Court has candidly admitted the extremely uncertain and ad hoc nature of the inquiry that must be applied in determining whether a regulatory taking has occurred under the Fifth Amendment to the United States Constitution.

> "* * * The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the 'Fifth Amendment's guarantee [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' this court, quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by

> public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons. Indeed we have frequently observed that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" (Citations omitted.) Penn Central Transp. Co. v. City of New York, 438 US 104, 124-25, 98 S Ct 2646, 2659, 57 L Ed2d 631 (1978).

We address petitioners' takings arguments under Article I, section 18, of the Oregon Constitution, infra. As with regulatory takings arguments under the Fifth Amendment to the United States Constitution, the judicial precedent concerning regulatory takings under Article I, section 18, of the Oregon Constitution is somewhat uncertain. We do not believe HRCZO 60.10(A), or any statutory provision we are aware of, requires that the county consider and adopt findings concerning the possibility of a successful "regulatory takings" challenge to a county decision to deny land use approval based on applicable statutory, statewide planning goal, comprehensive plan or land use standards.

Notwithstanding our conclusion above that the county was not required to consider petitioners' regulatory taking arguments in reaching its decision in this matter, here the county did adopt findings that its decision does not constitute a regulatory taking. However, because the county is not required to consider the regulatory taking issue, its findings, even if erroneous, would provide no basis for reversal or remand. See Lowrie v. Polk County, 19 Or LUBA

363, 365 (1990); Bonner v. City of Portland, 11 Or LUBA 40, 52-53 (1984) (nonessential findings provide no basis for reversal or remand of a land use decision).

Unlike Hood River County, this Board is explicitly required by statute to consider arguments that a land use decision is unconstitutional. See Dunn v. City of Redmond, 303 Or 201, 735 P2d 609 (1987). This Board is required to reverse or remand the county's decision if we conclude the decision is "unconstitutional." ORS 197.835(7)(a)(E). In considering petitioners' constitutional arguments, this Board is not bound to grant any deference to the county's legal analysis concerning the possibility that a regulatory taking has occurred. Moreover "when considering disputed allegations of unconstitutionality of the decision, * * * [this Board] may take evidence and make findings of fact on those allegations. ORS 197.830(13)(b). In view of our independent obligation to consider petitioners' allegations concerning the constitutionality of the county's decision, to the extent the county erred by allowing argument concerning the regulatory takings issue from the planning director and failing to allow petitioners an opportunity for rebuttal, the error was harmless.[9]

[9]Even if the alleged procedural error was of a nature that might provide a basis for reversal or remand, petitioners failed to object to the county's refusal to allow rebuttal argument on the takings issue. We have held on numerous occasions, that parties who fail to enter a timely objection to procedural errors during local proceedings, may not raise such procedural errors at LUBA. Torgeson v. City of Canby, 19 Or LUBA 511, 519

Petitioners Dodd's sixth, tenth and eleventh assignments of error are denied.

NINTH ASSIGNMENT OF ERROR (DODD)

> "Respondent exceeded its jurisdiction by taking a conservation easement in petitioners' property in limiting the use of their property to ensure its use for forest uses in violation of ORS 271.725."

SECOND ASSIGNMENT OF ERROR (OREGONIANS IN ACTION)

> "The county, by denying the land use approval, conditional use application, and zone change of petitioners', violated ORS 271.725(1) by taking, without the voluntary consent of the petitioner, a conservation easement in the private property of the petitioners through enforcement of policies and procedures to maintain and retain forest land for forest production, retain water shed productivity, prevent adverse effects on big game winter wildlife range and habitat, and retain recreation and other compatible uses on the petitioners' private forest land."

ORS 271.725(1) provides as follows:

> "The state, any county, city or park and recreation district may acquire by purchase agreement or donation, but not by exercise of the power of eminent domain, unless specifically authorized by law, conservation easements[10] in

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(1990); Miller v. City of Ashland, 17 Or LUBA 147, 153 (1988); Mason v. Linn County, 13 Or LUBA 1, 4-5 (1984), aff'd in part, rev'd in part on other grounds 73 Or App 334, rev den 299 Or 314 (1985); Dougherty v. Tillamook County, 12 Or LUBA 20, 24 (1984). Neither do petitioners demonstrate how the alleged error prejudiced their substantial rights, in view of the full opportunity extended to petitioners to present their regulatory takings arguments to this Board. Id.; ORS 197.835(7)(a)(B).

[10]ORS 271.715(1) defines "conservation easement" as follows:

> "'Conservation easement' means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real

> any area within their respective jurisdictions whenever and to the extent that a state agency or the governing body of the county, city or park and recreation district determines that the acquisition will be in the public interest." (Emphasis added.)

Petitioners argue the effect of the county regulations applicable to the subject property is to subject that property to a conservation easement, without the owners' permission and without compensation, in violation of both ORS 271.725(1) and Article I, section 18, of the Oregon Constitution. Intervenor-petitioner supports its arguments under this assignment of error by citing statutes that direct state agencies to encourage land owners to protect and manage various natural resource values through voluntary means and by citation of the Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) Implementation Guideline 7 direction to local governments to investigate use of easements to implement Goal 5.

As respondents point out, petitioners' assumption under these assignments of error that the county may not seek to achieve its resource protection objectives by either regulatory means or by conservation easements, as it chooses, is erroneous. To the extent petitioners are arguing the county's land use regulatory scheme as applied

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> property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical architectural, archaeological, or cultural aspects of real property."

to the subject property is identical to a conservation easement, such that it must be characterized as such, we do not agree. Conservation easements are property interests that may be "conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements." ORS 271.725(2). Although the county presumably could achieve many of the same objectives it now achieves through its comprehensive plan and land use regulations by purchasing conservation easements, we see nothing in the statutes cited by petitioners to suggest that the provisions concerning conservation easements were intended as a limitation on the county's authority to adopt land use regulations.

Petitioners Dodd's ninth assignment of error and intervenor-petitioner Oregonians in Action's second assignment of error are denied.

SEVENTH ASSIGNMENT OF ERROR (DODD)

> "Respondent's findings on the issue of whether denial of the applications works a taking of petitioners' property [are] not supported by the evidence."

EIGHTH ASSIGNMENT OF ERROR (DODD)

> "Respondent's decision is unconstitutional because it works a taking of petitioners' property in violation of Article I, Section 18[, of the Oregon Constitution]."

FIRST ASSIGNMENT OF ERROR (OREGONIANS IN ACTION)

> "The county, by denying the petitioners' land use approval, conditional use application, and zone change, violated Article I, Section 18 of the

> Oregon Constitution by taking, without payment of just compensation, the property of petitioners through enforcement of policies and procedures to maintain and retain forest land for forest production, retain water shed productivity, prevent adverse effects on big game winter wildlife range and habitat, and maintain recreation and other compatible uses on the petitioners' private forest land."

As an initial point, we reject petitioners' attempts to characterize the disputed plan and land use regulations as a "physical invasion" of petitioners' property.[11] Where government action amounts to a nuisance or physical invasion or occupation of private property, a right to compensation is more readily found. See Thornburg v. Port of Portland, 233 Or 178, 376 P2d 100 (1963); Cereghino v. State Highway Comm., 230 Or 439, 370 P2d 694 (1962); Tomasek v. Oregon State Highway Com'n, 196 Or 120, 248 P2d 703 (1952); Morrison v. Clackamas County, 141 Or 564, 568, 18 P2d 814 (1933). The plan and land use regulations challenged in this proceeding admittedly impose significant limitations on petitioners' use of their property. They do not, however, for purposes of considering petitioners' Article I, section 18 claims, amount to either a nuisance or physical invasion or occupation of petitioners' property.

The legal test for determining whether a land use regulation violates Article I, section 18, of the Oregon

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[11]As explained under the previous assignments of error, the county has taken neither an easement nor other property title interest in petitioners' property.

Constitution is set out in Fifth Avenue Corp. v. Washington Co., 282 Or 591, 609, 581 P2d 50 (1978), as follows:

> "* * * Where a [land use regulation] allows a landowner some substantial beneficial use of his property, the landowner is not deprived of his property nor is his property 'taken.' * * *"

As noted earlier in this opinion, the factual and legal inquiry as to whether a landowner affected by restrictive land use regulations retains "some substantial beneficial use" is somewhat uncertain by virtue of the lack of Oregon appellate court cases explaining the meaning of the ultimate legal test and applying that test to particular factual situations.[12]

The Oregon Supreme Court cases cited by the court in Fifth Avenue, in adopting the "some substantial beneficial use" test, do not provide much assistance in determining at what point a land use regulation does not leave the property owner "some substantial beneficial use."[13] However, in one

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[12]Additionally, Fifth Avenue Corp. v. Washington Co., supra, drew a distinction between situations where the government is seizing title or possession of the affected property (its enterprise capacity) and where the government is imposing a regulation (its arbitral capacity). Following Fifth Avenue Corp. v. Washington Co., the Oregon Supreme Court cases considering takings claims have all dealt with precondemnation actions rather than strictly regulatory takings claims such as is presented in this appeal.

[13]Oregon Investment Co. V. Schrunk, 242 Or 63, 71, 408 P2d 89 (1965)(denial of access to commercial parking lot from one street does not take such property for public use without compensation where the parking lot is accessible from other streets); Morris v. City of Salem et al, 179 Or 666, 673, 174 P2d 192 (1946)(installation of a city parking meter on private property does not constitute an unconstitutional taking); Kroner v. City of Portland et al, 116 Or 141, 151-52, 240 P 536 (1925)(application of

of the Court of Appeals decisions cited by the court in Fifth Avenue, Joyce v. City of Portland, 24 Or App 689, 546 P2d 1100 (1976), the plaintiff's allegations "that their property 'is not suitable or economically usable for agricultural purposes' and that 'the soil of the area cleared sufficient to be farmed is considered poor for agricultural purposes" were taken to be a tacit admission "that their property can be beneficially used for agricultural purposes, albeit not as suitably or economically as it could have been used [for other purposes] before the zone change."[14] Id. at 692.

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a zoning district which prohibits construction of a creamery to property on which construction of a creamery had been proposed does not constitute a taking of such property).

[14]Although the court was not specifically addressing the meaning of "some substantial beneficial use" the following discussion in Suess Builders v. City of Beaverton, 294 Or 254, 258-59, 656 P2d 306 (1982) suggests the Oregon Supreme Court does not believe the standard is violated simply because there may be a severe reduction in the value or use of affected property:

> "[Regulation] happens to many forms of business enterprise and private investment, not peculiarly to investment in real property, where it perhaps stirs special atavistic memories of the feudal and pioneering past. And land use control is not the only kind of regulation directed to specific identifiable property. The generality of a rule often safeguards against biased and unequal political decisions, but that alone does not turn a more narrowly focused ruling into a taking. A newly adopted health or environmental regulation may forbid the use of a fuel or the production of certain wastes and thereby cause the closure of a large plant. A tightened safety standard may devastate an investment in expensive machinery or product inventory. New building codes or other rules concerning fire safety or access for handicapped persons may make it uneconomic to maintain a hotel or residential building, with consequent financial loss. Business invests with the knowledge of such governmental power to make laws for its conduct and the

Intervenor-petitioner argues at length that we should construe the requirement of Article I, section 18 consistently with recent U.S. Supreme Court Fifth Amendment takings cases. We decline intervenor-petitioner's invitation in view of the Oregon Supreme Court's rejection of similar arguments in Seuss Builders v. City of Beaverton, supra.[15] In view of the Oregon Supreme Court's explicit reservation of judgment concerning whether it will look to U.S. Supreme Court Fifth Amendment "takings" jurisprudence to further develop the appropriate tests to be applied in considering Article I, section 18 takings claims, we do not believe it is appropriate for this Board to do so.

Turning to the facts in this case, petitioners' expert testified that 32% of the property (12.6 acres) includes

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> balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for 'just compensation.' * * *." (Footnote omitted.)

[15]In Seuss Builders, supra, 294 Or at 258, the Supreme court stated:

> "Petitioners and amici curiae invite us to reconsider Fifth Avenue Corp. v. Washington Co., supra, to pursue what they claim to be a more sophisticated analysis of 'regulatory takings.' We see no occasion to do so. * * *"

The Supreme Court went on to state the criteria of Article I, section 18 for a "compensable taking" are not necessarily the same as the Fifth Amendment. The Supreme Court pointed out that although the U.S. Supreme Court has applied the concept of "investment backed expectations" in discussing a Fifth Amendment takings claim in Penn Central Transp. Co. v. City of New York, supra, the Oregon Supreme Court has not considered investment backed expectations as an element to be considered in a regulatory taking claim under Article I, section 18. The court also questioned "whether such expectations should take account of governmental power to change the laws." Seuss Builders, supra, 294 Or at 259 n 5.

Ketchly soils and is covered with Douglas fir. The existing stand of Douglas fir is forty to sixty years old, with some grand fir and ponderosa pine mixed in. The expert estimated the growth of this stand over the next two decades to be only 24 cubic feet per acre per year, a rate "generally considered to be less than necessary for commercial timber management." Record (Appendix 3) 59. He also identified 5.7 additional acres of thinner Ketchly soils, covered with Hazel Brush, that he concluded could not economically be reforested with commercially viable conifers. The expert went on to estimate the total current net value of the timber on the property at $691. Record (Appendix 3) 59-65.

A representative of the Oregon Department of Forestry disputed the conclusions of petitioners' expert.

> "[T]he Department finds that the management plan correctly identifies the soils, but information about the forest capability is inconsistent with our data. Information on Ketchly soils in the Soil Conservation Survey of Hood River County (1981), prepared by the United States Department of Agriculture, Soil Conservation Service, establishes that the Douglas-fir 100 year site index is 100 * * *. This site index is for a fully-stocked unmanaged stand * * *. Such stands will produce a mean annual increment of approximately 207 board feet per acre per year up to 90 years of age * * *. This approximates 80 cubic feet per acre per year productivity. Fully-stocked managed stands will likely produce additional volume.
>
> "It appears that the productivity figure of 24 cubic feet referenced in the report * * * was intended to quantify the productivity of the existing stand and not the productivity potential

of the site * * * .

> "Therefore, the portion of the subject parcel containing Ketchly soils is suitable for forest management. As a case in point, forest management is currently being practiced on land adjacent to the east and south * * *. According to the SCS Soil Survey, this land also contains Ketchly soils some of which have greater constraints (due to steep slopes) than the Ketchly soils on the subject parcel * * *." Record 282.

In addition, the County Forest Manager estimated that there are 24 acres on the property that could be used for forest production.[16] The County Forest Manager questioned a number of the assumptions petitioners' expert relied upon and concluded the present value and future forest production potential of the property had been seriously understated.

The County Forest Manager estimated the present volume of timber on the property is almost three times the volume estimated by petitioners' expert. He estimated the current value of the timber on the property as follows:

> "[I]f the volume is approximately 100 MBF or more, you have a total value of forest product of over $15,000 after logging cost. This is based on small salvage sales as recent as 1990, competitive bid sales and would be considered average. Therefore, if you [were] to deduct the reforestation costs and the site preparation, not only on the area that could be harvested, but also

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[16]Petitioners complain that while their expert based his analysis partially on data obtained on-site, the evidence relied upon by the county did not include any consideration of particular on-site conditions. However, the record indicates the County Forest Manager based his estimate on a review of "the area from aerial photographs, and the ground * * *." Record 286-87.

> [on] the are to be converted into forest land, you would still have in excess of $10,000 of profit." Record 288.

In response to the above testimony, petitioners argue that "$10,000 after 20 years work is no return at all on a $33,000 investment, let alone an economically viable one." Petition for Review 31.

We conclude, based on the above, that petitioners have not been denied a "substantial beneficial use of [their] property." It appears that the property has some limitations for forest use, but can produce a net profit if properly managed for timber production. The limited value of the existing timber as well as the lesser value ascribed to the future timber production potential of the property by petitioners' expert appears to have as much to do with past deficiencies in forest management and limited forest management projected in the future, as with the inherent limitations of the property.

Petitioners' arguments rely heavily on the purchase price of the property. We assign no particular significance to the purchase price of the property in this case. At the time the property was purchased, the county had initiated proceedings to change the F-1 zone to include the requirement that dwellings be limited to those necessary for and accessory to forest use. The record shows petitioners' predecessors in interest received written notice of the proposed amendments to the F-1 zone prior to the time the

property was sold to petitioners. As noted earlier, the property was not legally partitioned until after the F-1 zone was amended to include the necessary and accessory standard. In view of these circumstances, we conclude petitioners at the very least had constructive notice at the time the property was purchased that approval of a dwelling on the property might be denied under the necessary and accessory standard. Although petitioners may have failed to consider that uncertainty in purchasing the property for $33,000, they may not use that failure as a basis for claiming they have no substantial beneficial use of the property.[17]

Petitioners Dodd's seventh and eighth assignments of error and petitioner Oregonians in Action's first assignment of error are denied.

TWELFTH ASSIGNMENT OF ERROR (DODD)

> "Respondent improperly construed the law regarding a Goal 2 exception to Goal 4 by limiting the physical development standard to human development and by not considering the negligible use of the property for commercial forest production to be a relevant factor."

Petitioners argue the county erred in finding an exception to Goal 4 could not be justified in this case. The state agency intervenors-respondent point out:

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[17]Petitioners and respondents dispute whether the property is suitable for other uses allowable in the F-1 zone. Because we conclude petitioners' property retains "some substantial beneficial use" for timber production, we do not consider those arguments.

> "The petitioners did not request an exception; they requested a conditional use permit and a plan and zone change. Without a specific request for an exception, the county was under no obligation to consider an exception for this property. Any error that the county may have [committed] in making this finding, therefore, is superfluous and has no legal effect. LUBA is not obligated to consider or evaluate findings that are necessary to the county's decision. * * *"

We agree with intervenors-respondent. See Lowrie v. Polk County, supra; Bonner v. City of Portland, supra.

Petitioners Dodd's twelfth assignment of error is denied.

The county's decision is affirmed.