

1                   BEFORE THE LAND USE BOARD OF APPEALS  
2                   OF THE STATE OF OREGON

3  
4 GARY VEATCH,                   )  
5                                    )  
6                   Petitioner,                   )  
7                                    )  
8                   vs.                                    )  
9                                    )                   LUBA No. 92-024  
10 WASCO COUNTY,                   )  
11                                    )                   FINAL OPINION  
12                   Respondent,                   )                   AND ORDER  
13                                    )  
14                   and                                    )  
15                                    )  
16 JOHNNIE CAIN,                   )  
17                                    )  
18                   Intervenor-Respondent.                   )

19  
20  
21                   Appeal from Wasco County.

22  
23                   Gary Veatch, Mosier, filed the petition for review and  
24 argued on his own behalf.

25  
26                   No appearance by respondent.

27  
28                   Johnnie Cain, Mosier, filed the response brief and  
29 argued on his own behalf.

30  
31                   KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,  
32 Referee, participated in the decision.

33  
34                   REMANDED                                   07/21/92

35  
36                   You are entitled to judicial review of this Order.  
37 Judicial review is governed by the provisions of ORS  
38 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order approving a conditional use  
4 permit for a nonresource dwelling on land in the Farm/Forest  
5 zone (F-F (40)), and subject to the Columbia River Gorge  
6 (CRG) overlay zone.

7 **MOTION TO INTERVENE**

8 Johnnie Cain, the applicant below, moves to intervene  
9 on the side of respondent in this appeal proceeding.  
10 ORS 197.830(6)(b)(A) and OAR 661-10-050(1) provide that the  
11 applicant for development approval has standing to intervene  
12 in an appeal filed with this Board. The motion to intervene  
13 is allowed.

14 **FACTS**

15 The subject property consists of 13.27 acres.<sup>1</sup> Access  
16 is provided by Proctor Road, a county road, and a steep  
17 private road. A relatively steep private driveway leading  
18 from the private road is to be constructed to serve the  
19 proposed dwelling. The private road apparently serves other  
20 dwellings, although the precise number of other dwellings  
21 served is not clear from the record.

22 Approval of the proposal requires action by the

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<sup>1</sup>The minimum lot size in the F-F(40) zone is 40 acres. Because the subject parcel is 13.27 acres, it does not meet the minimum lot size in the F-F(40) zone. However, there is no dispute that the subject parcel is a substandard lot of record and its small size does not, of itself, preclude approval of a nonresource dwelling.

1 Columbia River Gorge Commission as well as the county.<sup>2</sup> The  
2 planning director approved intervenor's application for a  
3 nonresource dwelling. Petitioner appealed that decision to  
4 the planning commission. The planning commission rejected  
5 petitioner's appeal and approved intervenor's application.  
6 Because no formal written decision was adopted by the  
7 planning commission, the planning commission's decision is  
8 evidenced only by the minutes of its November 13, 1992  
9 meeting. Petitioner appealed the planning commission's  
10 decision to the county court. The county court rejected  
11 petitioner's appeal, affirmed the decision of the planning  
12 commission, and adopted findings supporting its decision.  
13 This appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 "The governing body exceeded its jurisdiction and  
16 failed to make adequate findings when it ignored  
17 the provisions of a relevant local ordinance."

18 **SECOND ASSIGNMENT OF ERROR**

19 "The county misconstrued the applicable law, made  
20 insufficient findings, and made a decision not  
21 supported by substantial evidence in the record as  
22 a whole in concluding that the proposed dwelling  
23 would not alter the overall stability of the land  
24 use pattern of the area."

25 **THIRD ASSIGNMENT OF ERROR**

26 "The county misconstrued the applicable law in  
27 failing to make a finding that the proposed use is

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<sup>2</sup>The record of the proceedings before the Columbia River Gorge Commission is not part of the record of this appeal.

1 not incompatible with farm or forest uses in the  
2 area, and does not interfere with the farm or  
3 forest practices. There is no substantial  
4 evidence in the record to support such a finding."

5 The challenged decision consists of the findings  
6 adopted by the county court and the minutes evidencing the  
7 decision of the planning commission. However, as petitioner  
8 points out, neither of those decisions address several of  
9 the relevant mandatory approval standards contained in the  
10 Wasco County Zoning Ordinance (WCZO).<sup>3</sup> For example, there  
11 are no findings addressing WCZO 11.020(B)(2) and (4)<sup>4</sup> or  
12 WCZO 5.020(A), (B), (E), (H), (I) and (J).<sup>5</sup>

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<sup>3</sup>The minutes of the planning commission do not state what standards the planning commission addressed or how the planning commission determined those standards were satisfied.

<sup>4</sup>WCZO 11.020(B)(2) and (4) require:

- "2. The proposed non-farm or non-forest dwelling is not inconsistent with the farm and forest use policies as provided for in the Comprehensive Plan."
- "4. The substandard lot-of-record shall have a sufficient area and otherwise be capable of being served by a domestic water supply and sewage disposal system approved by the appropriate sanitary authority."

In addition, there are no findings addressing WCZO 3.790(D), (E) and (F), requirements applicable to the proposal by the CRG overlay zone provisions. Intervenor contends that there are findings of compliance with these standards in a decision of the Columbia River Gorge Commission. However, these findings are not included in the record of this appeal. If the county wishes to adopt findings adopted by the Columbia River Gorge Commission, as its own, it must explicitly do so and include those findings in the local record submitted to this Board.

<sup>5</sup>WCZO 5.020 provides, in relevant part:

1           Petitioner's second assignment of error concerns the  
2 requirement of WCZO 11.020(B)(3),<sup>6</sup> that the proposal not  
3 materially alter the stability of the land use pattern in  
4 the area.

5           Interpreting a nearly identical "stability" standard in

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"A.   The proposal is consistent with the goals and objectives of the Comprehensive Plan and implementing Ordinances of the County.

"B.   Taking into account location, size, design and operational characteristics of the proposed use, the proposal is compatible with the surrounding area and development of abutting properties by outright permitted uses.

"\* \* \* \* \*

"E.   The effects of noise, dust and odor will be minimized during all phases of development and operation for the protection of adjoining properties.

"\* \* \* \* \*

"H.   The location and design of the site and structures for the proposed use will not significantly detract from the visual character of the area.

"I.   The proposal will preserve areas of historic value, natural or cultural significance, including archaeological sites, or assets of particular interest to the community.

"J.   The applicant has a bona fide intent and capability to develop and use the land as proposed and has some appropriate purpose for submitting the proposal, and is not motivated solely by such purposes as the alteration of property values for speculative purposes."

<sup>6</sup>WCZO 11.020(B)(3) requires:

"The proposed non-farm or non-forest dwelling does not materially alter the stability of the over-all land use pattern in the area nor substantially add to the demand for increased use of roads or other public facilities and services[.]"

1 an exclusive farm use zone, we determined a three part  
2 analysis is required. First, the county must identify an  
3 area for consideration. Second, the county must identify  
4 what farming practices occur in the identified area. Third,  
5 the county must explain how the proposal will affect those  
6 farm practices. Sweeten v. Clackamas County, 17 Or  
7 LUBA 1234, 1246 (1989). This analysis also applies to  
8 WCZO 11.020(B)(3). However, because the F-F(40) zone is  
9 both a farm and forest zone, the second and third steps of  
10 the analysis must include identification of forest practices  
11 and consideration of how the proposal will affect those  
12 forest practices.

13 Similarly, the WCZO 11.020(B)(1)<sup>7</sup> requirement that the  
14 proposed dwelling not be incompatible or interfere with  
15 adjacent farm and forest uses (the subject of petitioner's  
16 third assignment of error) requires the county to identify  
17 an area zoned for farm and forest uses, determine what the  
18 farm and forest uses are in that identified area and  
19 determine whether the proposed nonresource dwelling will be  
20 "incompatible" with or will "interfere" with those  
21 practices. Blosser v. Yamhill County, 18 Or LUBA 253, 270  
22 (1990).

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<sup>7</sup>WCZO 11.020(B)(1) requires:

"The proposed non-farm or non-forest dwelling is not incompatible with farm and forest uses in the area, and does not interfere with the farm or forest practices[.]"

1           The county's findings of compliance with  
2 WCZO 11.020(B)(1) and (3) are inadequate. Specifically, the  
3 findings fail to identify farm and forest zoned parcels and  
4 uses in an identified area. Further, the findings fail to  
5 explain whether the proposal disturbs the stability of the  
6 identified land use pattern in the identified area, and  
7 whether the proposal seriously interferes with the farm and  
8 forest uses in that area.<sup>8</sup>

9           Intervenor suggests that under ORS 197.835(9)(b)<sup>9</sup> there  
10 is sufficient evidence in the record to "clearly support" a  
11 determination of compliance with WCZO 11.020(B)(1) and  
12 (3).<sup>10</sup> We have reviewed the evidence in the record cited by

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<sup>8</sup>Because we determine the findings adopted to satisfy these standards are inadequate, no purpose is served in evaluating petitioner's arguments that there is not substantial evidence in the record to support the findings of compliance with WCZO 11.020(B)(1) and (3).

<sup>9</sup>ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record \* \* \*."

<sup>10</sup>Actually, intervenor cites findings in the staff reports of both the Columbia River Gorge Commission and county planning department, as both findings and evidentiary support for the challenged decision. Because neither were adopted as findings of the county in the challenged decision, we may not consider them to be findings supporting the challenged decision. Further, because the Columbia River Gorge Commission staff reports are not in the record we may not consider them in any event. However, we may consider, as evidence, the planning department staff reports which are contained in the local record.

1 the parties. That evidence, at best, establishes the  
2 subject parcel is not particularly good farm land. It does  
3 not clearly support a determination of compliance with  
4 WCZO 11.020(B)(1) and (3).<sup>11</sup>

5 The first, second and third assignments of error are  
6 sustained.

7 **FOURTH ASSIGNMENT OF ERROR**

8 "The county misconstrued the applicable law, made  
9 conclusory findings, and made a decision not  
10 supported by substantial evidence in the record as  
11 a whole in concluding that public services 'should  
12 not be significantly burdened.'"

13 WCZO 5.020(C) requires that the proposed nonresource  
14 dwelling:

15 "\* \* \* not exceed or significantly burden public  
16 facilities or services available to the area,  
17 including, but not limited to roads, fire and  
18 police protection, sewer and water facilities,  
19 telephone and electrical service, or solid waste  
20 disposal facilities."

21 The challenged decision contains the following findings of  
22 compliance with this standard:<sup>12</sup>

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<sup>11</sup>Further, we note that even if intervenor were correct that there is evidence to clearly support a determination of compliance with WCZO 11.020(B)(1) and (3), we would still be required to remand the challenged decision for the county to adopt findings of compliance with other mandatory approval standards not addressed by the decision, and for which intervenor does not contend there is evidence to "clearly support" the challenged decision.

<sup>12</sup>While the planning department decision contains certain conditions of approval, neither the minutes of the planning commission decision, nor the county court's decision contain any conditions of approval. As stated above, the county court adopted only the decision of the planning commission, and not the planning department's decision. Further, the

1 "The proposed single family dwelling will not  
2 require service by a public water or sewage  
3 disposal facility. The existing access road,  
4 Proctor Road, is in place. Although it does not  
5 meet the road design standards as outlined in  
6 'Fire Safety Design Standards for Roads,' the  
7 ordinance does not require that. As for the  
8 existing private access drive leading to the  
9 subject property, it is a preexisting road and its  
10 maintenance is left up to land owners. The  
11 private road requirements of [WCZO] Chapter 21  
12 cannot be retroactively imposed. Electrical  
13 services are already available to the parcel.  
14 According to the applicant the parcel currently  
15 supports the needed services. The property is in  
16 the service boundaries of the Mosier Rural Fire  
17 Protection District, a taxing district, and is  
18 patrolled by the Wasco County Sheriff's Office.  
19 Considering the scale of the development, one (1)  
20 single family dwelling, the above services should  
21 not be significantly burdened." (Emphasis  
22 supplied.) Record 9.

23 Petitioner challenges these findings of compliance with  
24 WCZO 5.020(C) with regard to fire protection services.

25 In order to demonstrate compliance with WCZO 5.020(C),  
26 the county must identify the existing level of public  
27 services and facilities in an area available to serve a  
28 proposal, and determine whether the proposal will either  
29 "exceed" or "significantly burden" those available public  
30 facilities and services. At most, the findings in the  
31 challenged decision simply determine that because the  
32 proposal is within a rural fire protection district, the

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planning commission did not adopt the decision of the planning department. Accordingly, the conditions of approval contained in the planning department's decision are not part of the challenged decision of the county court.

1 fire protection district "should not be significantly  
2 overburdened." Record 9. However, the Assistant Fire Chief  
3 and Secretary/Treasurer of the fire district testified  
4 during the proceedings below, as follows:

5 "[The assistant fire chief] testified that  
6 approval will put fire fighters in a difficult,  
7 unsafe position since tankers and pumpers will not  
8 have a turn around on the private road leading to  
9 the proposed dwelling. There is not a condition  
10 requiring a turn around." Record 24.

11 "\* \* \* Proctor Road is substandard and one lane in  
12 places. The private drive is steep and also one  
13 lane in many places. He noted that there was no  
14 turn around room at the end of this private drive  
15 for even his small 4X4 pickup \* \* \*.

16 "\* \* \* \* \*

17 "[The assistant fire chief] also pointed out that  
18 due to the distance from where the fire fighting  
19 equipment is stationed and the limited manpower  
20 available, a fast response to this area is going  
21 to be very difficult.

22 "\* \* \* He stated that the County road is not too  
23 steep, but he said the private road is steeper  
24 than what he would put a fire truck on.

25 "[Concerning] turnouts to accommodate large  
26 equipment[, the assistant fire chief] replied that  
27 the road is in good condition up to a point where  
28 the unlocked gate is, but deteriorates after that.  
29 [He] indicated he believes that gate is at the  
30 point where [intervenor's] property begins. In  
31 response to another question [he] indicated he  
32 does not feel there is adequate turn around room  
33 on the private road. He did not check the  
34 driveway into the site, so does not know if the  
35 circular driveway would be adequate.

36 "\* \* \* [The assistant fire chief] said it is true  
37 that if a property pays taxes to a fire district;  
38 the fire district must provide protection.

1           However, the firemen and equipment will not be  
2           able to respond in a manner consistent with other  
3           parts of the district because the equipment is  
4           kept in proximity to the other areas where the  
5           majority of development is.

6           "\* \* \* \* \*"   Record 51-52.

7           We agree with petitioner that the county's findings of  
8           compliance with WCZO 5.020(C) are inadequate to satisfy that  
9           standard.    The county's findings fail to identify the  
10          existing level of service provided by the fire district to  
11          the area, and to determine whether the proposal will either  
12          exceed the ability of the fire district to provide that  
13          level of service to the proposed dwelling or significantly  
14          burden the fire district to provide those existing service  
15          levels.

16          The fourth assignment of error is sustained.

17          The county's decision is remanded.