

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

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

DEPARTMENT OF LAND CONSERVATION)
and DEVELOPMENT,)
Petitioner,)
vs.)
CURRY COUNTY,)
Respondent.)

LUBA No. 92-134
FINAL OPINION
AND ORDER

Appeal from Curry County.

Jane Ard, Salem, filed the petition for review on behalf of petitioner. With her on the brief were Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

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

REMANDED 10/27/92

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving a
4 partition of an 18.06 acre parcel into a 16 acre forest
5 parcel and a 2.06 acre nonforest parcel.¹

6 **FACTS**

7 The subject property is zoned Forestry Grazing (FG), a
8 zoning district adopted to implement Statewide Planning
9 Goals 3 (Agricultural Lands) and 4 (Forest Lands). Curry
10 County Zoning Ordinance (CCZO) 3.050. A land division
11 creating the parent 18.06 acre parcel for forest use was
12 approved by the county in 1988. Lands to the north, west
13 and east of the 18.06 acre parcel are in forest use and
14 zoned FG or Timber. Properties to the south, across
15 Winchuck Road from the subject property, are located within
16 the Winchuck Rural Exception Area and are zoned for rural
17 residential use.

18 **FIRST ASSIGNMENT OF ERROR**

19 Under the first assignment of error, petitioner alleges
20 the challenged decision fails to demonstrate compliance with
21 CCZO requirements for creation of new forest and nonforest
22 parcels in the FG zone.

¹An existing forest related dwelling is located on the 16 acre parcel. Although the decision is somewhat unclear on the point, like petitioner, we assume the challenged decision includes approval for a nonforest dwelling on the 2.06 acre parcel.

1 **A. The 2.06 Acre Nonforest Parcel**

2 CCZO 3.056(C) imposes the following relevant
3 requirements for creation of new nonforest parcels in the FG
4 zone:

5 "1. If the proposed parcel is intended for a
6 nonfarm or nonforest use, it shall only be as
7 large as necessary to accommodate the use,
8 and any buffer area needed to ensure
9 compatibility with adjacent farm or forest
10 uses; and shall be situated on generally
11 unsuitable land for farm or forest use
12 considering the terrain, adverse soil or land
13 conditions, drainage and flooding, location
14 and size of parcel; and

15 "2. The following criteria are applied to the
16 creation of all nonfarm and nonforest
17 parcels:

18 "* * * * *

19 "c) the proposed division of land shall not
20 materially alter the stability of the
21 overall land use pattern of the area;
22 and

23 "* * * * *

24 "e) the proposed division of land shall not
25 have a significant adverse impact on
26 timber production, grazing land,
27 agriculture, watershed, fish and
28 wildlife habitat, soil and slope
29 stability, air or water quality, or
30 outdoor recreation activity; and

31 "f) the proposed division of land shall
32 comply with the purposes and intent of
33 the agriculture and forest policies of
34 the Curry County Comprehensive Plan."

1 **1. No Larger Than Necessary to Accommodate Use**
2 **(CCZO 3.056(C)(1))**

3 In response to the requirement of CCZO 3.056(C)(1) that
4 the proposed nonforest parcel be no larger than "necessary
5 to accommodate the use," the county found the proposed 2.06
6 acre parcel is "an ideal size for a small roadside parcel."
7 Record 8.

8 We agree with petitioner that the finding is not
9 responsive to the criterion. The 2.06 acre parcel may well
10 be ideally suited for development as a roadside residential
11 parcel. However, that does not mean the 2.06 acre parcel is
12 no larger than required for the proposed nonforest use.

13 This subassignment of error is sustained.

14 **2. Generally Unsuitable Land (CCZO 3.056(C)(1))**

15 As noted above, the FG zone is an exclusive farm use
16 (EFU) zone intended to implement both Goals 3 and 4. Under
17 the statutory EFU zoning provisions applicable to approval
18 of nonfarm dwellings, such dwellings must be located on land
19 generally unsuitable for farm use. See ORS 215.213(3)(b);
20 215.263(4); 215.283(3)(d); OAR 660-05-040. Therefore, the
21 generally unsuitable land standard in CCZO 3.056(C)(1) must
22 be construed and applied in a manner that is consistent with
23 the construction and application of that standard in the EFU
24 zoning statutory provisions. Compare DLCD v. Coos County,
25 113 Or App 621, ___ P2d ___, modified 115 Or App 145 (1992).
26 As relevant to this appeal, the generally unsuitable land
27 standard of CCZO 3.056(C)(1) must be applied to the 18.06

1 acre parent parcel. Smith v. Clackamas County, 313 Or 519,
2 ___ P2d ___ (1992).

3 Petitioner first points out the 18.06 acre parent
4 parcel, which includes the subject 2.06 acre nonfarm parcel,
5 was created as a forest parcel and presumably is suitable
6 for forest use. Petitioner contends the challenged decision
7 improperly focuses on the 2.06 acre parcel in applying the
8 generally unsuitable land standard; and, for that reason,
9 the county failed to adequately demonstrate compliance with
10 CCZO 3.056(C)(1).

11 Petitioner is correct, and this subassignment of error
12 is sustained.

13 **3. Stability of the Overall Land Use Pattern of**
14 **the Area (CCZO 3.056(C)(2)(c))**

15 In applying the requirement of CCZO 3.056(C)(2)(c) that
16 the creation of a nonforest parcel may not materially alter
17 the stability of the overall land use pattern of the area,
18 petitioner contends the county failed to adequately identify
19 the relevant area. See Sweeten v. Clackamas County, 17 Or
20 LUBA 1234, 1245-46 (1989). Moreover, petitioner contends
21 the county focused exclusively, and improperly, on the
22 Winchuck rural residential area to the south and failed to
23 address potential land use stability impacts on the lands in
24 forest use to the west, east and north of the subject
25 property.

26 Petitioner is correct, and this subassignment of error
27 is sustained.

1 **4. Impact on Timber Production, Grazing Land,**
2 **Agriculture, Watershed, Fish and Wildlife**
3 **Habitat, Soil and Slope Stability, Air or**
4 **Water Quality, or Outdoor Recreation Activity**
5 **(CCZO 3.056(C)(2)(e))**

6 Petitioner speculates that the following finding was
7 adopted to address the requirement of CCZO 3.056(C)(2)(e)
8 that the proposed division of land shall not have a
9 significant adverse impact the natural resource values
10 listed in that standard:

11 "Because the subject property is located within an
12 'Impacted' Big Game Habitat Area, it is not
13 subject to the dwelling guidelines suggested by
14 the Oregon Department of Fish and Wildlife."
15 Record 9.

16 Petitioner argues the above quoted finding is simply not
17 responsive to the criterion.

18 Petitioner is correct, and we are unable to locate
19 other findings addressing CCZO 3.056(C)(2)(e). This
20 subassignment of error is sustained.

21 **5. Plan Agriculture and Forest Policies**
22 **(CCZO 3.056(C)(2)(f))**

23 Petitioner contends the challenged decision addresses
24 only two of the ten Curry County Comprehensive Plan Forest
25 Policies and fails to address any of the plan Agriculture
26 Policies. Petitioner contends the county must either
27 demonstrate compliance with all of these plan policies or
28 explain why the policies are not relevant.

29 Petitioner is correct, and this subassignment of error
30 is sustained.

1 **B. The 16 Acre Forest Parcel**

2 CCZO 3.056(B) imposes the following criteria for
3 approval of a forest parcel in the FG zone:

4 "1. Any proposed division of land for forest use
5 must create parcels which are large enough to
6 permit efficient management for the
7 production of wood fiber or other forest
8 uses.

9 "2. If the proposed forest use is the production
10 of trees the parcel size shall be consistent
11 with the size of other parcels being managed
12 for the same purpose in the area. Parcels
13 shall be large enough to ensure the long term
14 management of the parcel for timber
15 production or other forest uses. In
16 addition, a management plan for the proposed
17 forest use shall be provided * * *. The
18 decision making body shall evaluate the
19 resource management plan to determine if the
20 proposed parcel meets the criteria in (1)
21 above."

22 The county adopted the following findings to address
23 the above requirements:

24 "9. The applicants have complied with the
25 requirement for submitting a management plan.

26 "10. Because the management plan calls for
27 intensive use of the forest parcel through
28 the use of greenhouses and intensive forestry
29 practices, the forest parcel will be large
30 enough to permit efficient management."
31 Record 9.

32 Petitioner argues the above findings are inadequate to
33 explain why the 16 acre parcel will be large enough to
34 permit efficient management for the production of wood fiber
35 or other forest uses. Petitioner also points out the
36 previously approved forest management plan was for the 18

1 acre parent parcel. Petitioner argues the above findings do
2 not even attempt to address whether the 16 acre parcel is
3 "consistent with the size of other parcels being managed for
4 the same purpose in the area," as required by CCZO
5 3.056(B)(2).

6 Petitioner is correct, and this subassignment of error
7 is sustained.

8 **SECOND ASSIGNMENT OF ERROR**

9 The CCZO 3.054(16) standards governing approval of
10 nonforest dwellings in the FG zone essentially replicate the
11 standards of CCZO 3.056(C)(1) and (2) discussed above.
12 Petitioner points out the county did not adopt findings
13 separately addressing the requirements of CCZO 3.056(C)(1)
14 and (2) and 3.054(16). Petitioner contends that for the
15 same reasons the county's findings are inadequate to
16 demonstrate compliance with CCZO 3.056(C)(1) and (2), they
17 are inadequate to demonstrate compliance with 3.054(16). We
18 agree with petitioner.

19 The second assignment of error is sustained.

20 The county's decision is remanded.