BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. COOS COUNTY, Respondent, and LONE ROCK TIMBER COMPANY, Intervenor-Respondent.	LUBA No. 91-193 FINAL OPINION AND ORDER

On remand from the Court of Appeals.

Jerome Lidz, Salem, represented petitioner.

David Ris, Coos Bay, represented respondent.

David B. Smith, Tigard, represented intervenor-respondent.

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

AFFIRMED 12/16/92

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 a county order approving (1) a conditional use permit for a nonforest dwelling on a five acre portion of a 110 acre Forest (F) zoned parcel, and (2) a partition creating a new five acre parcel for the nonforest dwelling.

DECISION

This appeal is on remand after the Court of Appeals' decision on reconsideration in DLCD v. Coos County, 115 Or App 145, ___ P2d ____ (1992) (DLCD v. Coos County II). The dispute in this appeal concerns the county's interpretation of Coos County Zoning Ordinance (CCZO) standard 19(a),[1] which states that to approve a nonforest dwelling on forest land, the county must determine that:

> "Evidence is provided supporting reasons why the proposed use should be sited on forest land; or that the proposed site is on land generally unsuitable for forest uses." (Emphasis supplied.)

In the Court of Appeals' first decision, DLCD v. Coos County, 113 Or App 621, ____ P2d _____ (1992) (DLCD v. Coos County I), the court agreed with this Board that CCZO

[1]CCZO 4.2.700 establishes "review standards and special development conditions" for uses in the county's various zoning districts. CCZO 4.2.300 (Table 4.2b) establishes that a single family nonforest dwelling in the F zone must satisfy CCZO 4.2.700 standard 19(a) (hereafter standard 19(a)). CCZO 4.2.300 (Table 4.2b) also establishes that a partition in the F zone must satisfy CCZO 4.2.700 standard 31. Standard 31(b) itself requires that nonforest parcels comply with standard 19.

standard 19(a) requires a determination that the entire 110 acre parcel, not just the five acre portion on which the dwelling is proposed to be located, is generally unsuitable for forest uses. However, on reconsideration, the Court of Appeals determined that in light of the Supreme Court's decision in Clark v. Jackson County, 313 Or 508, ___ P2d ____ (1992), LUBA must determine whether the county's interpretation of its own code is "clearly contrary" to the code's express words or purpose.[2]

The facts and disputed approval standard in Clark are, in some respects, similar to those at issue in this case. At issue in Clark was a request for a conditional use permit to mine a 40 acre portion of a 400 acre ranch zoned Exclusive Farm Use (EFU). One of Jackson County's approval standards for the authorization of the conditional use permit required findings that the proposed use:

> "Is situated upon generally unsuitable land for the production of farm crops and livestock * * * unless findings conclusively demonstrate that:
>
> "(i) The proposed use will result in a more efficient and effective use of the parcel in view of its value as a natural resource; or
>
> "(ii) No feasible alternative sites in the area exist which shall have less impact on

[2]Clark v. Jackson County, supra, 313 Or at 514, was decided after LDCD v. Coos County I and holds that unless a local government's interpretation of its own code is "clearly * * * contrary to the enacted language," this Board is required to defer to the local government's interpretation of its code.

agricultural land."

Jackson County determined the 40 acre site was generally unsuitable for agricultural use, because it could only support cattle grazing for one week of the year. We disagreed, explaining as follows:

> "The county's findings and the evidence in the record are sufficient to demonstrate that the 40 acres, viewed by themselves, are generally unsuitable for grazing purposes. * * * However, because it is (and historically has been) part of a 400 acre fenced seasonal grazing area and is of some value for grazing as part of that area, the 40 acres are not generally unsuitable for grazing purposes. Even lands with very limited value for agricultural use are not 'generally unsuitable for the production of farm crops and livestock,' within the meaning of ORS 215.213(3) and 215.283(3) and county regulations incorporating the language of those sections, where such lands are part of much larger agricultural operations which make it possible to make use of the limited resource value of the property. * * *" Clark v. Jackson County, 19 Or LUBA 220, 229-30 (1990), rev'd 103 Or App 377 (1990), aff'd 313 Or 508 (1992).

The Supreme Court in Clark determined that we exceeded our permissible scope of review of the challenged county decision. The Court held that Jackson County's interpretation of its own ordinance was not "clearly contrary" to the express words or purpose of its ordinance and, therefore, must be sustained. Concerning the relevance of the meaning attributable to the term "generally unsuitable" in the context of nonfarm dwellings as used in ORS chapter 215, the Court stated:

> "LUBA, in its order denying the mining permit, relied on the similarity between the 'generally unsuitable land' language in LDO 218.060(1)(D) and that in another local ordinance, LDO 218.120 (dealing with nonfarm dwellings) and in statutes regulating location of nonfarm dwellings in EFU zones. LUBA called the language 'nearly identical to standards required by statute to be applied to nonfarm dwellings in EFU zones.' * * * However, this case has nothing to do with permitting or siting nonfarm dwellings in an EFU zone. LDO 218.060(1), which is not about nonfarm dwellings as are those statutes cited by LUBA, is distinguishable from the statutes to which LUBA compared it in several respects. * * *" Clark 313 Or at 515.

The Court went on to point out that the disputed Jackson County ordinance provision contained no analog to ORS 215.213(3)(b), which requires that EFU zoned land not be considered generally unsuitable solely because of its size if it can be put to farm use in conjunction with other land. It also pointed out that the Jackson County ordinance contained an alternative to the generally unsuitable standard for the approval of a conditional use permit, an alternative not available under the statutory nonfarm dwelling generally unsuitable land standard. The Court concluded that these distinctions between the Jackson County ordinance provision and the relevant provisions of ORS chapter 215 establish that the provisions are not similar, notwithstanding the common use of the words "generally unsuitable."

Next, the Court examined the context of the disputed Jackson County "generally unsuitable" standard. The Court

observed that surface mining is explicitly allowed as a conditionally permitted use under the county's acknowledged ordinance and that there is nothing in any of the relevant approval standards which suggests that the generally unsuitable standard should be read as LUBA determined. Concerning the county approval standard that the proposed mining operation be consistent with ORS 215.243, the Court had no difficulty concluding that the allowance of mining operations on EFU zoned land does not offend the statutory policy of ORS 215.243 that agricultural land be preserved in large blocks. The Court concluded by stating:

> "* * * the county's application of the terms of its acknowledged ordinance is permissible, because it is not inconsistent with its language, read in context of the ordinance. We hold that LUBA exceeded its statutory scope of review by imposing on the county, and the county's acknowledged ordinance, an interpretation that LUBA preferred but which was contrary to the county's permissible interpretation." Clark, supra, 313 Or at 518.

Other than the similarity between the words "generally unsuitable" used in ORS chapter 215 and CCZO standard 19(a), there are no other similarities between the two provisions. The land at issue is zoned Forest, not EFU, and the proposed dwelling is a nonforest dwelling, not a nonfarm dwelling. Further, CCZO standard 19(a) offers an alternative to the generally unsuitable standard for approval of a nonforest dwelling, i.e., that "[e]vidence is provided supporting reasons why the proposed use should be sited on forest land." Accordingly, like the Supreme Court explained in

Clark, there is nothing in ORS chapter 215 relating to nonfarm dwellings that dictates a particular result in this case.

The most legally relevant basis for distinguishing Clark from this case is that, here, the proposal includes partitioning the five acre portion of the parcel found to be generally unsuitable for forest uses, from the remainder of the 110 acre parcel that all parties agree is suitable for forest uses.[3] In other words, in this case, a large block of land zoned for forest uses will be divided and a portion of it converted to nonforest residential use. In determining that the generally unsuitable standard of CCZO standard 19(a) should be interpreted in the same manner as the statutory generally unsuitable standard is interpreted in the context of nonfarm dwellings, the Court of Appeals stated in LCDC v. Coos County I, 113 Or App at 625:

> "* * * the policies underlying the words in [both the forest and farm] settin[g] are identical."

However, notwithstanding the above language from the Court of Appeals' initial decision we are not aware of any explicit statutory or other legal requirement that forest land be preserved in large blocks. We do not believe the more general, less explicit policies that may favor preserving forest land in large blocks provide a sufficient

[3]There is no dispute that the proposed five acre parcel is itself generally unsuitable for forest uses.

basis in this case for rejecting the county's interpretation of its ordinance as requiring only that it find the site proposed for a nonforest dwelling to be "generally unsuitable" land.

CCZO Standard 19(a) requires that the "proposed site [of a nonforest dwelling] is on land generally unsuitable for forest uses." It is among a series of standards applicable to approval of nonforest dwellings. Nonforest dwellings are explicitly allowed by the county's acknowledged land use regulations as a conditional use in the F zone.[4] Finally, there is a separate "generally unsuitable" standard in the CCZO, identical to that found in ORS chapter 215, applicable to requests for approval of nonfarm dwellings in the county's exclusive farm use zones. Under these circumstances, CCZO standard 19(a) could be interpreted to mean either that only the proposed five acre nonforest dwelling site itself must be generally unsuitable for forest uses, or that the entire 110 acre parcel must be generally unsuitable for forest uses. We determined in our first decision in this appeal (DLCD v. Coos County, ___ Or

[4]Petitioner argues that we should interpret the Land Conservation and Development Commission's [LCDC's] acknowledgment order for Coos County to establish that the disputed "generally unsuitable" standard was meant to be applied in the same manner as that standard is applied in the context of nonfarm dwellings on EFU zoned land. However, it is the county's, not LCDC's, interpretation of the county ordinance that controls. We understand Clark to require that we determine whether the disputed county interpretation of its ordinance is "clearly contrary" to the ordinance's express words, apparent purpose or context.

LUBA _____ (LUBA No. 91-193, March 9, 1992)), that the latter interpretation was correct. However, the former interpretation is adopted by the county and is not clearly contrary to the express words or context of CCZO standard 19(a) and, therefore, we defer to it.

The county's decision is affirmed.