BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL LARDY and DIANA LARDY, Petitioners, vs. WASHINGTON COUNTY, Respondent, and OREGON DEPARTMENT OF FORESTRY, Intervenor-Respondent.	LUBA No. 92-170 FINAL OPINION AND ORDER

Appeal from Washington County.

David B. Smith, Tigard, filed the petition for review and argued on behalf of petitioners.

David C. Noren, Assistant Washington County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent. With him on the brief was John M. Junkin, Washington County Counsel.

Jane Ard, Assistant Attorney General, Salem, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

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

AFFIRMED 02/23/93

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 a county decision denying their request for special use approval for a forest management dwelling on a 50 acre parcel.

MOTION TO INTERVENE

The Oregon Department of Forestry (ODF) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject 50 acre parcel is located in the county's Exclusive Forest and Conservation (EFC) District, a planning designation adopted to implement Statewide Planning Goal 4 (Forest Lands). We previously affirmed a county decision denying petitioners' application for conditional use approval for a temporary dwelling to be used in conjunction with forest use. Lardy v. Washington County, 20 Or LUBA 450 (1991).

Forty acres of the subject 50 acres were logged in the past. Petitioners submitted a forest management plan that calls for approximately 400 person hours over the next ten years to reforest the subject property. The county found that the proposed dwelling fails to satisfy the Washington County Community Development Code (CDC) 430-37.2.E(1) requirement that the dwelling be shown to be "necessary for" and "accessory to" forest operations. On the basis of this

finding, the county denied the requested approval.

FIRST ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction by violating ORS 197.610 to 197.625 in using standards to determine whether a forest management dwelling is 'necessary [for] and accessory' to forest operations, that had been promulgated by ODF, but had not been adopted by that agency as an administrative rule, and which had not been acknowledged by the Land Conservation and Development Commission."

CDC 342-3.1.F provides that a forest management dwelling is a permitted use in the EFC district, subject to the special use standards set out at CDC 430-37.2.E. CDC 430-37.2.E provides forest management dwellings must be "necessary for and accessory to, forest operations" and explains as follows:

> "For purposes of this section, 'necessary for' and 'accessory to' are defined as:
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> "'Necessary for' means the dwelling will contribute substantially to effective and efficient management of the forest land to be managed by the resident(s) of the dwelling. OAR 660-06-027(1) states this requirement is intended to create a relationship between the approval of a dwelling and the ongoing forest management of the land. It means that the principal purpose for locating a dwelling on forest lands is to enable the resident to conduct efficient and effective forest management. A dwelling is necessary where the occupant must spend an extensive amount of time on forest management. This definition precludes a dwelling which simply enhances forest management. This definition also does not demand that a dwelling be absolutely required for forest management or that the production of trees is physically possible only with a dwelling.

> "'Accessory to' means that the dwelling is incidental and subordinate to the main forest use."

The county concluded petitioners failed to demonstrate the proposed dwelling complies with the "necessary for" and "accessory to" requirements of CDC 430-37.2.E, and explained that conclusion as follows:

> "4. The applicants estimate 400 hour[s] per year of labor is required for forest management of the property over the next ten years. The Johnson memo [Record 119-20] indicates that such estimates are high, and that, over a 60 year rotation, 400 hour[s] per year is sufficient to manage between 81 and 202 acres. The discrepancy is due in part to the time [applicants include] for conversion of the existing Red Alder and brush cover to Douglas Fir. * * * [E]ven if conversion is considered, the applicants have not demonstrated that they must spend an extensive amount of time on forest management, or that the dwelling will contribute substantially to effective and efficient forest management of the forest land. The conversion process is one that could be accomplished over a relatively short period of time, during which the presence of a dwelling might enhance the conversion operation. However, the dwelling is not necessary for the ongoing management of the forest operation. The Board concludes that the applicants have failed to demonstrate that the proposed dwelling is 'necessary for' forest management.
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> "5. The Board [of Commissioners] further finds that, even if additional labor needed for conversion over a 10 year timeframe is considered, the principal day-to-day use of the property would not be for forest management, but for the dwelling itself. Accordingly, the Board [of Commissioners]

> concludes that the proposed dwelling would not be 'accessory to' the forest management use. The Board bases this conclusion in part on the standards used by ODF staff, which indicate that it is not until 500 or more hours per year are required that a dwelling's principal purpose is for forest management. The Board does not consider this standard to be a state-required minimum, but rather a useful guide in determining whether a proposed dwelling is necessary for forest management." (Emphases in original.) Record 11.

Petitioners argue the last two sentences of finding five, quoted above, demonstrate the county denied the requested approval, based on alleged "standards" that have never been promulgated as such by ODF. Petitioners also contend that because these alleged "standards" have never been adopted as part of the CDC or county comprehensive plan, the county may not properly apply them to deny the request.

Respondent and intervenor-respondent (respondents) contend petitioners mischaracterize the county's use of and reliance on the materials submitted by ODF staff. Respondents contend the above quoted findings make clear that the relevant "standards" being applied were the "necessary for" and "accessory to" standards of CDC 430-37.2.E. Respondents contend the findings make it sufficiently clear that the county was simply relying on the material submitted by ODF as expert testimony concerning whether the proposed dwelling meets the "necessary for" and

"accessory to" requirements of CDC 430-37.2.E.

We agree with respondents.

In addition, respondents point out petitioners' challenge is directed only at finding five, which addresses the "accessory to" requirement of CDC 430-37.2.E and petitioners do not challenge finding four, or other findings adopted by the county which explain that the "necessary for" requirement of CDC 430-37.2.E is not met. Respondents argue these unchallenged findings are sufficient to demonstrate the applicants failed to demonstrate compliance with CDC 430-37.2.E, notwithstanding petitioners' challenge to finding five, and we agree.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under these assignments of error, petitioners argue the county's decision denying their request for approval of a forest management dwelling violates Article I, section 18, of the Oregon Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

A. Ripeness

Respondents argue that because petitioners have not sought approval of other uses allowable in the EFC district, or sought a plan designation amendment and an exception to Goal 4 to allow nonresource use of the property, petitioners' "regulatory taking" claim under the Oregon and United States Constitutions is not ripe. Respondent is

correct. Dority v. Clackamas County, 115 Or App 449, ___ P2d ___ (1992), rev den 315 Or 311 (1993); Joyce v. Multnomah County, 114 Or App 244, 835 P2d 127 (1992); Young v. Clackamas County, ___ Or LUBA ___ (LUBA No. 92-168, February 17, 1993); Larson v. Multnomah County, ___ Or LUBA ___ (LUBA No. 92-100, Order on Motion for Evidentiary Hearing, January 27, 1993).

We agree that petitioners need not seek approvals that are futile or not available in order to satisfy the requirement that their state and federal taking claims are ripe. However, on this record, we are unable to agree with petitioners that they have demonstrated that seeking approvals for other allowable uses or a variance, plan amendment or statewide planning goal exception would be futile. See Joyce v. Multnomah County, supra. We briefly address below petitioners' other contentions that their taking claims are ripe.

B. Article I, section 18, of the Oregon Constitution

Petitioners do not appear to dispute that forest use constitutes an economically viable use of the subject property. However, petitioners argue that the county's "action denying the [requested] dwelling inflicts irreversible harm" on petitioners' property right to construct a dwelling. Petitioners contend the county's action, therefore, both violates Article I, section 18, of the Oregon Constitution and is ripe for adjudication.

As an initial point, we find no generally applicable right under Article I, section 18, of the Oregon Constitution to construct a dwelling on one's property.[1] As the Oregon Supreme Court explained in Fifth Avenue Corp. v. Washington Co., 282 Or 591, 609, 581 P2d 50 (1978):

> "* * * 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.' * * *"

The above standard applies to regulatory taking challenges to land use regulations under Article I, section 18, of the Oregon Constitution. Dodd v. Hood River County, 115 Or App 139, 142, 836 P2d 1373, rev allowed 315 Or 271 (1992); Nelson v. Benton County, 115 Or App 453, 457-58, ___ P2d ___ (1992). However, Fifth Avenue also involved applying plan and zoning designations to private property for ultimate

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[1]Petitioners cite the U.S. Supreme Court's decision in Nollan v. California Coastal Commission, 483 U.S. 825, 834, 107 S Ct 3141, 97 L Ed2d 677 (1987), as establishing a general property right to construct a dwelling on one's property. The U.S. Supreme Court's decision in Nollan concerned the Fifth and Fourteenth Amendments to the United States Constitution; and that decision has no direct bearing on the private property rights protected under Article I, section 18, of the Oregon Constitution. Neither does that decision establish a general property right under the Fifth and Fourteenth Amendments of the United States Constitution to construct a dwelling on property. Clearly, planning and zoning designations may prohibit establishment of residential uses where such residential uses would conflict with economically viable uses of such property that are allowed under the planning and zoning designations. For example, it is unlikely that anyone would seriously contend that property designated for a variety of economically viable commercial or industrial uses is unconstitutionally "taken" because residential development is precluded under the applicable commercial or industrial zoning designation. As previously noted, there is no dispute that the subject property is suitable for the forest uses for which it is designated under the county comprehensive plan.

public acquisition and use. In summarizing the test to be applied to inverse condemnation claims under Article I, section 18, of the Oregon Constitution concerning planning and zoning of private property for public use, the court explained no compensation is due for inverse condemnation unless:

> "* * * (1) the property owner is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage. * * *" Fifth Avenue, 282 Or at 614.

Petitioners argue the "inflict virtually irreversible damage" test is not subject to the ripeness requirements that have been applied where property owners argue a land use regulation leaves them without a substantial beneficial use of their property. Petitioners contend the county's decision inflicts such irreversible damage and, therefore, their state taking claim is ripe for adjudication. We reject the argument.

Petitioners' argument assumes a challenge to a local government regulation under the second part of the above quoted Fifth Avenue two-part test is not subject to the ripeness requirement imposed on regulatory taking challenges alleging that a local government regulation leaves landowners without a substantial beneficial use of their property. We need not and do not consider the correctness of that assumption. The more fundamental problem with

petitioners' argument is that the EFC planning designation is not a designation of petitioners' property for present or future public acquisition or use.[2] That designation permits a variety of private economic uses of the subject property, and the designation neither purports to be nor is it a designation of petitioners' property for public use or eventual public acquisition. The above quoted two-part inverse condemnation claim test from Fifth Avenue simply does not apply to such planning regulations. See Young v. Clackamas County, supra.

C. Fifth and Fourteenth Amendments to the United States Constitution

Petitioners' taking claim under the United States Constitution is founded on their contention that the county's denial of their application for a forest management dwelling under the EFC designation constitutes the taking of a public conservation easement for which compensation is due.

We rejected a nearly identical argument that land use regulations protecting and encouraging the use of property for forest use, while stringently limiting the ability to construct residences on such land, constitute the imposition

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[2]Petitioners argue that the county's denial of their request for permission to build a house on their property is a taking of a public conservation easement and, therefore, a taking of their property for public use. We reject that argument in our discussion of petitioners' federal taking claim, infra.

of a pubic conservation easement for which compensation is required. While it is certainly possible to argue that such regulations significantly limit the range of possible economic use of the affected property and to argue that many of the public purposes that underlie such regulations could also be achieved through purchase of a public conservation easement, such arguments do not convert a land use regulation into a public conservation easement. Dodd v. Hood River County, 22 Or LUBA 711, 727, aff'd 115 Or App 139, rev allowed 315 Or 271 (1992); Young v. Clackamas County, supra.

Petitioners cite language in the U.S. Supreme Court's decision in Lucas v. South Carolina Coastal Council, ___ US ___, 112 SCt 2886, 120 L Ed2d 798 (1992) which suggests that land use regulations may constitute the practical equivalent of a public conservation easement.

> "[R]egulations that leave the owner of land without * * * productive options for its use - typically, as here, by requiring land to be left substantially in its natural state - carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." Lucas, 120 L Ed2d at 814.

Petitioners suggest the county's decision to prevent petitioners' desired development of their property is based on the county's desire to preserve the land's forest resource value and is, therefore, the practical equivalent of appropriation of a conservation easement.

The fallacy in petitioners' argument is the lack of any showing that petitioners are left without productive options for the use of their property. They simply have been denied one productive option that they wish to pursue (a single family residence). Moreover, as we explained in Dodd v. Hood River County, supra, it is not sufficient to simply cite a similarity between the public purposes that underlie public conservation easements and land use regulations and, on that basis, contend that what purports to be a land use regulation is really a public conservation easement.

The choice between achieving the public purpose of encouraging forest uses by police power regulation or eminent domain lies with the county, absent some showing that the police power regulation selected by the county is in fact a public conservation easement for which compensation must be paid. While we do not foreclose that such a showing might be possible under some circumstances, petitioners have not done so here. Indeed, as noted earlier, there is no serious dispute that forest use provides a substantial beneficial use of the subject property.

The second and third assignments of error are denied.

The county's decision is affirmed.