BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. KLAMATH COUNTY, Respondent, and JOHN M. SCHOONOVER, Intervenor-Respondent.	LUBA No. 92-223 FINAL OPINION AND ORDER

Appeal from Klamath County.

Jane Ard, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Jerry M. Molatore, Klamath Falls, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Henderson, Molatore & Klein.

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

REMANDED 05/20/93

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner Department of Land Conservation and Development (DLCD) appeals a county order approving a building permit for a nonforest dwelling.

MOTION TO INTERVENE

John M. Schoonover, the applicant below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This is the second time a county decision approving a building permit for a nonforest dwelling on the subject parcel has been appealed to this Board. In our prior decision, we described the relevant facts as follows:

> "An 80 acre parcel (Tract 1214) contains 16 five acre lots. Tract 1214 is designated [and zoned] Forest by the Klamath County Comprehensive Plan and Land Development Code. The challenged decision grants a building permit for one of the 16 five acre lots.
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> "Tract 1214 is subject to a Land Conservation and Development Commission [(LCDC)] enforcement order. See ORS 197.319 to 197.335. Under the terms of that enforcement order, the county is prohibited from issuing building permits or mobile home placement permits for the 16 lots in Tract 1214, unless six criteria stated in the enforcement order are satisfied." DLCD v. Klamath County, 23 Or LUBA 264, 265 (1992) (DLCD I).

In DLCD I, we remanded the county's decision because it failed to demonstrate compliance with an enforcement order criterion requiring that the subject lot be generally

unsuitable for forest use.[1] On remand, the board of county commissioners held additional evidentiary hearings. The county mailed notice of these hearings to petitioner. Record 17, 91-94. On November 5, 1992, the board of commissioners adopted the challenged order approving a building permit for a nonforest dwelling on the subject lot. This appeal followed.

STANDING

Petitioner contends it has standing to appeal the county's decision under ORS 197.830(2), because it filed a notice of intent to appeal and "participated in writing in the proceedings leading to the land use decision in question [Record 117-22, 155-56, 161-63]." Petition for Review 1.

Intervenor-respondent (intervenor) challenges petitioner's standing. Intervenor contends petitioner did not "appear" before the county, as required by ORS 197.830(2), because petitioner failed to participate orally or in writing during the county proceedings on remand. Intervenor concedes petitioner appeared before the county during the proceedings leading to the county decision challenged in DLCD I, and that letters submitted to the county by petitioner during those proceedings are in the

[1]In DLCD I, we did not address petitioner's allegations that other enforcement order criteria were violated by the county's decision. We explained that resolving issues raised concerning the other enforcement order criteria would require further extensions of the statutory deadline for issuing our final opinion and order. DLCD I, 23 Or LUBA at 267 n 1.

local record of the decision challenged in this appeal. However, intervenor argues these letters are in the record only because intervenor asked the county to include the record of the prior proceedings in the record of the proceedings on remand and, therefore, that these letters are in the record does not, of itself, establish that petitioner appeared before the county during the proceedings on remand.

There is no dispute that petitioner was notified of the county proceedings on remand from DLCD I, but did not submit oral or written testimony during those proceedings. Letters submitted to the county by petitioner during the proceedings leading to the decision challenged in DLCD I are in the record that was before the board of commissioners when it made the decision challenged here. However, petitioner does not claim it took any action after DLCD I to request that these letters be made part of the record of the decision challenged here or otherwise place the letters before the board of commissioners on remand. Therefore, we agree with intervenor that petitioner did not appear before the local government during the proceedings on remand. Schatz v. City of Jacksonville, 20 Or LUBA 546, 548 (1991).

However, petitioner did appear before the local government during the proceedings that lead to the first county decision appealed in DLCD I. Therefore, we must decide whether petitioner's earlier appearance before the local government in this matter satisfies the standing

requirement of ORS 197.830(2)(b), a question not previously addressed by this Board or the appellate courts.

As relevant here, ORS 197.830(2) provides:

> "[A] person may petition the board for review of a land use decision * * * if the person:
>
> "* * * * *
>
> "(b) Appeared before the local government * * * orally or in writing."

A statutory requirement that a petitioner have "appeared" below in order to have standing to appeal to LUBA has existed since LUBA was first created in 1979.[2] Oregon Laws 1979, chapter 772, section 4(3)(a), required that a petitioner have "appeared before the local government * * * governing body * * * orally or in writing." In Warren v. Lane County, 297 Or 290, 686 P2d 316 (1984) (Warren), the Oregon Supreme Court decided whether a petitioner's appearance before a planning commission, at an earlier phase of the local proceedings leading to the challenged decision by the governing body, satisfies the requirement of Oregon Laws 1979, chapter 772, section 4(3)(a) for an appearance before the local government "governing body." It discussed the "appearance requirement" as follows:

> "* * * We concur with LUBA's reasoning in Weber

[2]Initially, this requirement applied only to appeals of quasi-judicial land use decisions. However, in 1989, the requirement that a petitioner have "appeared" was made applicable to appeals of legislative land use decisions as well. Or Laws 1989, ch 761, § 12.

> [v. Clackamas County, 3 Or LUBA 237 (1981),[3]] that the legislative history of Oregon Laws 1979, chapter 772 indicates that the legislature made the appearance requirement in order to prevent persons from doing nothing until after a * * * land use decision has been made, and then appealing the decision by showing adverse effect or dissatisfaction with it.[4] The legislature required that in order to appeal, persons must first get involved and offer their views at the local level. * * *
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> "There may be instances where an appearance 'at some stage' of the decision-making process will not meet the [statutory] requirement.[9] However, in a case such as this, where the local governing body bases its land use decision, in whole or in

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[3]In Weber, 3 Or LUBA at 239, we addressed whether the statutory requirement for an appearance before the governing body was satisfied by an appearance before a lower level local decision maker, where the record before the governing body includes the record before the lower level decision maker:

> "To require direct appearance before the governing body to preserve appeal rights could have negative ramifications. It would do little to expedite review of decisions by the governing body and may unduly delay proceedings at that level. If a person has appeared before the hearings officer or planning commission, that appearance will be reflected in the record and the governing body is required to review the record. The person's views will, therefore, have been made known to the governing body. To require the person who has once appeared to appear again and to go through what need only be a mechanical process of restating views already expressed appears to us to be a needless exercise. * * *" (Emphasis in original.)

In a preliminary order concerning petitioners' standing in Warren v. Lane County, 5 Or LUBA 227, 237-38 (1982), we explained that the interpretation of the appearance requirement in Weber was not limited to instances where the record before the governing body includes the entire record made before a lower level decision maker.

[4]The supreme court refers to a former additional requirement for standing, that a petitioner be adversely affected or aggrieved by the challenged decision. This requirement was deleted from the statutes by Or Laws 1989, ch 761, § 12.

> part, on the record obtained in a prior proceeding before a planning commission, hearings officer, or other approval authority, * * * then an appearance on the record before that authority is an appearance before the local governing body. * * *
>
> _____

> "[9]Local procedures vary and it would be imprudent to suggest an inclusive rule. For example, at least three variations of the process by which local governments make land use decisions are possible: (1) The local government reaches a decision based solely on the record of the proceedings below; (2) The local government's decision is made with the benefit of the record created below, plus new evidence received by the body making the decision on review; or (3) The local government decides without any regard to prior hearings or the record, if any, of the proceedings below. We do not decide here whether an appearance at some preliminary stage of this last hypothetical decision making process would satisfy [the statute]." (Emphasis added.) Warren, 297 Or at 297-98.

In 1983, while Warren was before the appellate courts, the statutory reference to "governing body" was deleted, making the wording of then ORS 197.830(3)(b) the same as current ORS 197.830(2)(b). Or Laws 1983, ch 827, § 31(3)(b). This change was consistent with, and effectively constituted legislative endorsement of, this Board's previous rulings in Weber, supra, and Warren, supra, that an appearance during any phase of the local government proceedings concerning a particular matter should be sufficient to grant petitioner standing to appeal the local government's final decision to LUBA.

If the purpose of the statutory appearance requirement

is to ensure that persons appealing local decisions got involved and offered their views at the local level, it is not inconsistent with this purpose to find that a petitioner who has appeared before a local government during the proceedings leading to a first local government decision appealed to this Board, has "appeared before the local government" for the purpose of having standing to appeal a second local government decision concerning the same matter, made after remand. After all, if this Board remanded the local government's first decision based on petitioner's appeal, the issues remaining under consideration on remand are basically those where the Board agreed with petitioner's allegations. If petitioner offered its views to the local government in the initial proceedings, no real purpose would be served by requiring petitioner to repeat those views during the local proceedings on remand.

What remains to be considered is whether the local government proceedings on remand can simply be considered an additional phase of the original proceedings, rather than a new proceeding to which the appearance requirement of ORS 197.830(2)(b) separately applies. The Oregon Supreme Court considered this question, in determining the applicability of "waiver" or "law of the case" principles, in Beck v. City of Tillamook, 313 Or 148, 151, 831 P2d 674 (1992) (Beck):

> "The parties' first disagreement is whether Beck I [Beck v. City of Tillamook, 18 Or LUBA 587 (1990)]

> and Beck II [Beck v. City of Tillamook, 20 Or LUBA 178 (1990)] are two separate cases or, instead, two phases of the same case. Although there were two successive appeals to LUBA, there is but one case. There was one application for one conditional use permit on one piece of property. * * *" (Emphasis added.)

The court went on to describe the city proceedings after LUBA remanded the first city decision in Beck I, as reopening the record of the city proceedings that led to the decision challenged in Beck I. In other words, the supreme court appears to view local government proceedings conducted after a remand by LUBA, at least where there is no new application, as a continuation of the initial local government proceedings.[5]

In this case, we similarly view the proceedings conducted by the county after DLCD I, regarding the same building permit application, as a continuation of the proceedings that led to the decision appealed in DLCD I. Petitioner submitted written testimony to the county at some point during the local proceedings on the subject

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[5]We note this view of local proceedings on remand as a continuation of the original local proceedings is consistent with decisions of this Board stating that in conducting proceedings on remand, unless the local code so requires, a local government generally need not repeat the entire process it followed in making the initial decision. Wentland v. City of Portland, 23 Or LUBA 321, 326-27 (1992); Bartels v. City of Portland, 23 Or LUBA 182, 185-86 (1992); Washington Co. Farm Bureau v. Washington Co., 22 Or LUBA 540 (1992); Lane County School Dist. 71 v. Lane County, 15 Or LUBA 150, 154 (1986); but see Schatz v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 92-221, May 17, 1993) (where procedural requirements of ORS 197.763 were not applicable to initial local proceedings, but become applicable to proceedings on remand, local government must comply with ORS 197.763).

application and, therefore, "appeared before the local government," as required by ORS 197.830(2)(b).

Intervenor's challenge to petitioner's standing is denied.

ASSIGNMENT OF ERROR

> "The County failed to make adequate findings supported by substantial evidence in the whole record that a building permit for Lot 9 on Tract 1214 meets the criteria set out in [LCDC] Enforcement Order No. 89-EO-491 and the Klamath County Land Development Code. In addition, the County incorrectly interpreted the criteria applicable to the decision."

Petitioner challenges the county's decision with regard to compliance with five of the six criteria established by LCDC Enforcement Order 89-EO-491 (enforcement order).

A. Generally Unsuitable Criterion

Under the enforcement order, the county must apply the following criterion in approving a building permit for a nonforest dwelling on the subject parcel:

> "The proposed nonforest use is situated upon a parcel of land generally unsuitable for the production of forest crops and livestock, considering the terrain, adverse soil or land conditions, drainages and flooding, vegetation, location and size of [the] tract. 'Generally unsuitable' means land does not have a timber productivity rating of I through VI * * * unless findings and reasons are provided which thoroughly explain <u>why</u> other factors present make the land generally unsuitable for the production of forest crops and livestock. For example, having only generalized soils mapping shall not be used to find that property containing cubic foot site [class] V [soils] is generally unsuitable for forest use." (Emphasis in original.)

1. Forest Crops

With regard to suitability of the subject parcel for producing forest crops, the county's findings state:

> "The subject parcel contains approximately one acre in the flood plain of the Little Deschutes River. Most of the flood plain is devoid of tree cover. Any merchantable trees along the banks of the river have no commercial value and cannot be harvested. The parcel is flat and rolling and is transected by the Little Deschutes River. Any forestry activity within the floodplain will be severely limited. * * * The subject parcel is low productivity forest land.
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> "* * * * *
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> "It is not economically feasible to manage the property for forest growth, because the growth potential is only 13.4 cubic feet per acre per year in a wild state, or 22 cubic feet per acre per year in a managed state." Record 8.

Petitioner generally contends the above quoted findings are inadequate because they do not explain the rationale for the county's conclusion that the subject parcel is generally unsuitable for the production of forest crops. With regard to the findings concerning one acre of the parcel being in a floodplain, petitioner argues the county has not explained why being in a floodplain will limit forestry activity and contends the record does not contain substantial evidence to support such a conclusion. Moreover, petitioner argues the fact that one acre of the parcel is in a floodplain does not explain why the remainder of the parcel should be considered generally unsuitable. Petitioner also contends the county erred in relying on economic feasibility of managing the

parcel for forest growth, because economic feasibility is not one of the physical characteristics of the subject property that the enforcement order authorizes to be considered under the generally unsuitable criterion.[6]

The challenged decision relies on two bases for concluding the subject parcel is generally unsuitable for production of forest crops. One is that one acre of the parcel is in a floodplain. We agree with petitioner that these findings are inadequate to support a conclusion that the subject parcel is generally unsuitable for producing forest crops. The findings do not explain why being in a floodplain will "severely limit" forestry activity and do not explain why having one acre in the floodplain makes the entire five acre parcel generally unsuitable.

The other basis relied on by the county is that it is "not economically feasible to manage the property for forest growth." Record 8. The enforcement order generally unsuitable criterion states that land with a timber productivity rating of I through VI is presumed not to be generally unsuitable, "unless findings and reasons are

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[6]In addition, petitioner argues the county erred by failing to explain in its findings why the determination in the challenged decision that the subject parcel is capable of producing at most 22 cubic feet per acre per year is lower than the determination in its previous decision that the parcel is capable of producing 50 to 80 cubic feet per acre per year. DLCD I, supra, 23 Or LUBA at 266. However, petitioner cites no legal source for a requirement that a local government explain in its findings inconsistencies with previous decisions, and we are aware of none. See Reeder v. Clackamas County, 20 Or LUBA 238, 242-43 (1990).

provided which thoroughly explain why other factors present make the land generally unsuitable for the production of forest crops * * *."[7] (Emphasis in original.) We understand petitioner, the agency that adopted the enforcement order, to contend that such "other factors" are limited to the physical characteristics of the land listed in the first part of the generally unsuitable standard. We agree this is a reasonable interpretation of the enforcement order generally unsuitable standard.[8]

Thus, what the county must determine is whether the land itself is suitable for the production of forest crops, considering "terrain, adverse soil or land conditions, drainages and flooding, vegetation, location and size of [the] tract." Whether the production of forest crops on the subject parcel, at this particular point in time, is "economically feasible" is, at best, indirect evidence of whether the land itself is suitable for the production of forest crops. See Reed v. Lane County, 19 Or LUBA 276, 284

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[7]The county decision challenged in DLCD I found the subject parcel has a timber productivity rating of Class V. The decision challenged in this appeal does not purport to find that the subject parcel has a rating other than Class I through VI. Rather, the challenged decision relies on "other factors" making the land generally unsuitable for the production of forest crops.

[8]Because we are interpreting a provision in an enforcement order adopted by LCDC, we are not required to defer to the county's interpretation, as we would in reviewing a county's interpretation of its own enactment. See Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, ___ P2d ___ (1992) (LUBA is required to affirm a local government's interpretation of its own land use regulations, unless that interpretation is "clearly wrong").

(1990) (profitability is at best indirect evidence of whether a piece of farm land is suitable for the production of farm crops). Here, the findings on economic feasibility do not support a conclusion that the parcel is generally unsuitable because they do not explain why physical characteristics of the land lead to such a conclusion. They do not explain what characteristics of the land lead to a determination that the parcel is capable of producing only 22 cubic feet per acre per year or why production of 22 cubic feet per acre per year means the land itself is not suitable for the production of forest products.

This subassignment of error is sustained.[9]

2. Livestock

With regard to suitability of the subject parcel for livestock production, the county's findings state:

> "* * * Livestock grazing is not a viable use for the parcel. There is no livestock grazing at this time on the subject property. * * *
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> "The land is unsuitable for [the] production of livestock because the land is not suitable for the growing of grasses necessary to produce livestock." Record 8.

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[9]Sustaining this subassignment of error provides a sufficient basis for remanding the county's decision. However, ORS 197.835(9)(a) requires that we decide all issues when reversing or remanding a decision, to the extent we can do so consistent with the deadline established by statute for issuing our final opinion and order. Therefore, we address two additional subassignments of error concerning compliance with this and one other enforcement order criterion. Resolution of the issues raised in petitioner's remaining subassignments of error concerning still other enforcement order criteria would require further extensions of the statutory deadline for issuing our final opinion and order.

Petitioner contends the findings in the first paragraph quoted above are inadequate because they do not explain the county's rationale for concluding the subject parcel is generally unsuitable for the production of livestock. Petitioner also argues the finding in the second paragraph is not supported by any evidence in the record.

We agree with petitioner that statements that "livestock grazing is not a viable use" of, and "there is no livestock grazing at this time" on, the subject parcel are inadequate to explain why the subject parcel is generally unsuitable for livestock production. In addition, no party cites any evidence in the record that supports the county's finding that the subject parcel "is not suitable for the growing of grasses necessary to produce livestock."

This subassignment of error is sustained.

B. Noninterference Criterion

Under the enforcement order, the county must apply the following criterion in approving a building permit for a nonforest dwelling on the subject parcel:

> "The proposed nonforest use does not interfere seriously with the accepted forestry practices on adjacent lands devoted to forest use; and does not significantly increase the cost of forestry operations on such lands."

Petitioner argues that in order to determine whether the proposed dwelling will seriously interfere with accepted forestry practices, the county must first identify the accepted forestry practices occurring on adjacent lands.

According to petitioner, the findings fail to do this. Petitioner also argues many of the county's findings improperly focus on why adjacent forest practices will not interfere with the proposed dwelling, rather than the converse. Finally, petitioner contends that even if the county properly found no serious interference, the findings would still be inadequate because they do not address whether the presence of a dwelling will require adjacent forest operators to take extra precautions that will significantly increase the cost of their operations.

The findings state that property to the south and west of the subject parcel "has been logged." Record 6. The findings also state that the "logging practices" that have occurred on properties to the north and east of the subject parcel are "logging" and "salvage logging," respectively. Record 5. We agree with petitioner that before the county can determine whether the proposed dwelling will seriously interfere with "the accepted forestry practices on adjacent lands," it must determine what those accepted forestry practices are. We further agree with petitioner that "logging" and "salvage logging' are not adequate descriptions of accepted forestry practices.

This subassignment of error is sustained.

The assignment of error is sustained in part.

The county's decision is remanded.