BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALVIN ALEXANDERSON,	)	
	)	
Petitioner,	)	LUBA No. 93-115
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	

Appeal from Clackamas County.

Alvin Alexanderson, West Linn, filed the petition for review and argued on his own behalf.

Michael E. Judd, Chief Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 11/16/93

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 denying his application to divide a 17.35 acre parcel.

FACTS

The subject parcel is zoned Transitional Timber (T-20), and is developed with two dwellings. The proposal is to create an approximately 2 acre parcel around an existing, older dwelling near Schaeffer Road, leaving an approximately 15 acre parcel for an existing, newer dwelling located toward the rear of the property.

The planning director denied the application and petitioner appealed. The hearings officer affirmed the decision of the planning director, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The hearing officer found the parcel suitable for pasture by improperly considering the entire 17 acres for suitability, rather than the two acres and existing buildings for which partition was sought."

SECOND ASSIGNMENT OF ERROR

> "The hearing officer erred in concluding that use as a pasture rendered the property suitable for 'farm production.' Use for livestock is only material for farmland divisions and is not part of the ordinance criteria for forest zones."

Because the challenged decision is one denying petitioner's application, we need only determine there is one sustainable basis for denial to affirm the county's decision. Garre v. Clackamas County, 18 Or LUBA 877, aff'd

102 Or App 123 (1990).

Petitioner argues the county improperly interpreted and applied Clackamas County Zoning and Development Ordinance (ZDO) 403.05(A)(4), which requires that a nonforest dwelling be "situated upon generally unsuitable land for the production of farm or forest products * * *." Petitioner contends that, as a matter of law, the county is required to determine ZDO 403.05(A)(4) is satisfied if the 2 acre parcel to be partitioned from the balance of the property is generally unsuitable. See DLCD v. Coos County, 115 Or App 145, 838 P2d 1080 (1992) (LUBA must defer to county's interpretation of a generally unsuitable standard in the local code applicable to forest land, if interpretation is not clearly wrong); see also DLCD v. Coos County, 24 Or LUBA 349 (1992) (where nothing explicitly requires that forest land be preserved in large blocks, a county is free to interpret its own generally unsuitable standard, applicable to nonforest dwellings, to require only that the portion of the property upon which a nonforest dwelling is proposed to be located be generally unsuitable for farm or forest use).

Petitioner also argues the county previously interpreted its generally unsuitable standard in a manner different than that applied in this appeal, and that we should require the county to be consistent.

The challenged decision states the following

interpretation of ZDO 403.05(A)(4):

> "The Hearings Officer wishes to note that in reaching the conclusion that this property is suitable for the production of farm products, the entire parcel has been considered. The applicant has pointed out that recent case law permits the County to interpret the language of this approval criterion so that only the portion of the property sought to be partitioned is considered, and has argued the proposed 2 acre parcel should be considered unsuitable because of the existing development and its proximity to Schaeffer Road and the many non-resource dwellings located along Schaeffer Road. Clackamas County has for at least the past two years interpreted this approval criterion to require that the entire parcel be generally unsuitable for the production of farm or forest products, consistent with its interpretation of substantially identical language in its exclusive farm use zoning districts. There is no reason shown sufficient to demonstrate that the requested interpretation is more appropriate." Record 15.

We are required to defer to the county's interpretation of its own enactment, unless its interpretation is contrary to the express words, policy or context in which it is found. Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). In other words, we must affirm the county's interpretation unless it is clearly wrong. West v. Clackamas County, 116 Or App 89, 94, 840 P2d 1354 (1992).

The county's interpretation of ZDO 403.05(A)(4) is neither contrary to the express, words, policy or context of that provision, nor clearly wrong. Further, the county's interpretation of ZDO 403.05(A)(4) is an interpretation that both we and the court of appeals sustained under our

pre-Clark scope of review. See DLCD v. Coos County, 23 Or LUBA 13, aff'd 113 Or App 621, 833 P2d 1318, reconsidered and withdrawn 115 Or App 145 (1992). The fact that after Clark, we were required to defer to a contrary Coos County interpretation of its generally unsuitable standard applicable to nonforest dwellings, does not mean that Coos County would be required to adopt the contrary interpretation it did adopt. Neither does it establish any particular rule applicable to Clackamas County.

Concerning petitioner's assertion that the challenged interpretation is at variance with previous county interpretations of the same or similar ZDO standards, the county points out that most of those previous interpretations predate the supreme court's decision in Smith v. Clackamas County, 313 Or 519, 836 P2d 716 (1992). The Smith decision affirmed the county's current interpretation of its generally unsuitable standard. Further, to the extent the county has interpreted ZDO 403.05(A)(4) in prior cases differently than it interpreted that provision here, we are not persuaded that such differing interpretations rise to the level of arbitrary decision making that could provide a basis for reversal or remand of the county's decision. See Friends of Bryant Woods Park v. Lake Oswego, _____ Or LUBA ____ (LUBA No. 93-108, November 10, 1993), slip op 8.

One further point merits comment. Petitioner's

evidentiary challenge to the county's determination that ZDO 403.05(A)(4) is not satisfied rests on the premise that evidence of suitability for livestock production does not establish suitability for the production of farm "products." Petitioner is wrong. Evidence that the subject parcel is suitable for grazing of livestock is evidence of suitability for the production of farm products. The county's determination of the proposal's noncompliance with ZDO 403.05(A)(4) is supported by substantial evidence in the whole record.

The first and second assignments of error are denied.[1]

The county's decision is affirmed.

[1]Petitioner includes an undeveloped constitutional claim under these assignments of error, and we do not develop that claim for him. Kegg v. Clackamas County, 15 Or LUBA 239, 247 n 10 (1987).