BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK FURLER, Petitioner, vs. CURRY COUNTY, Respondent, and FRANK E. MAURICE, Intervenor-Respondent.	LUBA No. 94-058 FINAL OPINION AND ORDER

Appeal from Curry County.

Neil S. Kagan, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

Michael J. Babbitt, Salem, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 07/22/94

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 appeals a county decision approving a dwelling in conjunction with forest use (forest dwelling).

MOTION TO INTERVENE

Frank E. Maurice, 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.

MOTION TO STRIKE

Intervenor moves to strike the affidavit by petitioner appended to the petition for review. Petition for Review App-15 to App-16. This affidavit is attached to the petition for review in support of petitioner's allegations of standing. Petition for Review 1. However, intervenor does not contest petitioner's standing and, therefore, we do not consider the affidavit.

FACTS

The subject property is a vacant 40-acre parcel designated for forest use by the Curry County Comprehensive Plan (plan) and zoned Timber. The property is within a designated sensitive big game habitat area. Portions of the property were logged in the late 1950's or early 1960's, and again in 1978. Some areas of the property were replanted with Douglas fir about 15 years ago, but much of the parcel was left to reseed itself naturally. Access to the property is provided by Saunders Creek Road and Signal Buttes Trail,

one-lane gravel and dirt roads.

U.S. Forest Service land adjoins the subject property to the east. U.S. Bureau of Land Management land adjoins the property to the north. Privately owned Timber-zoned properties adjoin the subject property to the west and south.[1] The subject property is located approximately five miles east of the urban growth boundary (UGB) of the City of Gold Beach.

Intervenor submitted a forest dwelling application to the county planning department on September 28, 1992. Record 38. Intervenor's forest management plan proposes that a 12 acre area and a 10 acre area of the subject property be replanted with, and managed for, Douglas fir. Under the forest management plan, a 16 acre portion of the property that is very rocky and has poor moisture content will be left in its natural state for wildlife habitat. A two acre area that is mostly meadow is proposed to be used for the dwelling site (1/2 acre) and wildlife habitat (1 1/2 acre).

The county planning commission approved intervenor's application. The board of county commissioners conducted a de novo review of the application and, after a public hearing, issued an order approving the application on

[1]The 40-acre parcel adjoining the subject property to the south is the property at issue in Furler v. Curry County, ___ Or LUBA ___ (LUBA No. 94-059, July 11, 1994) (Furler I), in which we remanded a county decision approving a forest dwelling on that property.

March 21, 1994. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Curry County Comprehensive Plan (Plan) Section 4.6, Policy 5 (Policy 5) provides:

> "Residential uses adjacent to forest lands will be subject to provision of adequate setbacks and disclosure procedures to alert adjacent forest land owners of proposed development and provisions for adequate fire preventative measures."

With regard to the above policy, the challenged decision states:

> "* * * Policy 5 is a specific decision criterion. The applicant is proposing to site the forest related dwelling near the center of the subject property and slightly to the westerly side which will locate it away from the federal forest land and closer to other forest related dwellings in the area.
>
> "The county has notified adjacent forest land owners of the proposed dwelling and the adjacent property owner to the northwest has appealed the Planning Commission approval of the dwelling.
>
> "The applicant has indicated that [he] intend[s] to provide firebreaks and other fire preventative measures." Record 9.

With regard to the requirements of Policy 5 for provision of "adequate setbacks" and "adequate fire prevention measures," petitioner argues the decision simply recites what the applicant proposes or intends. Petitioner argues that a finding of fact must state what the county believes to be true, not merely recite what the applicant said. DLCD v. Coos County, 25 Or LUBA 158, 163 (1993).

Petitioner further argues the above quoted statements are inadequate to demonstrate compliance with Policy 5 because they do not establish what setbacks and fire preventive measures are required by Policy 5 in this instance or explain why what is proposed is adequate. We agree with petitioner.

With regard to the requirement of Policy 5 for "disclosure procedures to alert adjacent forest land owners of proposed development," petitioner does not dispute that the county provided owners of adjacent forest land with notice of the hearing on intervenor's proposal to develop a forest dwelling on the subject property. However, petitioner contends the notice of hearing provided to adjacent property owners was inadequate, and failed to satisfy Policy 5, because it did not identify applicable approval criteria in the plan, as required by ORS 197.763(3)(b), and failed to explain the requirements for submission of testimony and the procedure for conduct of the hearing, as required by ORS 197.763(3)(j).

ORS 197.763 establishes requirements for quasi-judicial land use hearings that are directly applicable to the county proceedings on the subject application. We agree with petitioner that the record does not demonstrate the county complied with the notice requirements of ORS 197.763(3)(b) and (j). We have previously explained that a local government's failure to comply with the notice of hearing

requirements of ORS 197.763(3) has two consequences. First, under ORS 197.835(2)(a), it allows this Board to consider issues that were not raised below.[2] Second, it is a procedural error which, under ORS 197.835(7)(a)(B), may provide a basis for reversal or remand of the challenged decision, but only if such error prejudices petitioner's substantial rights. Mazeski v. Wasco County, 26 Or LUBA 226, 235 (1993); Caine v. Tillamook County, 22 Or LUBA 687, 692-93 (1992).

Intervenor argues the record shows that petitioner was well aware of the applicable criteria in the plan and participated effectively in the hearing below. We agree with intervenor that petitioner does not demonstrate the county's failure to comply with ORS 197.763(3) prejudiced his substantial right to present his case below. Therefore, even if the "disclosure procedures" requirement of Policy 5 were interpreted to incorporate the notice of hearing requirements of ORS 197.763(3), petitioner's arguments here would provide no basis for reversal or remand of the challenged decision.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Plan Section 5.12F, Policy 6 (Policy 6) provides:

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[2]However, no party contends the issues raised in the petition for review were not raised below. Therefore, there are no waiver issues presented in this case.

> "Curry County will cooperate with the Department of Water Resources and Department of Fish and Wildlife to obtain more information about groundwater and surface water availability and to conserve water resources for consumptive and nonconsumptive uses to the benefit of the people of the county."

The decision includes the following statement regarding interpretation of plan policies in general:

> "[G]eneral plan policies do not mandate a particular course of conduct with respect to a particular development, so long as that development meets specific comprehensive plan and zoning provisions that do control individual developments * * *." Record 9.

In addition, the decision addresses Policy 6 as follows:

> "* * * Policy 6 does contain a specific policy which requires the County <u>to cooperate with the Department of Water Resources and Department of Fish and Wildlife regarding water information and to conserve water resources</u>.
>
> "Curry County has cooperated with the Department of Water Resources and Oregon Department of Fish and Wildlife by providing these agencies with notice of this application and by considering their comment[s] in making the decision on this land use matter." (Emphasis added.) Record 10.

Petitioner contends the decision recognizes Policy 6 as a specific policy applicable to individual developments. In addition, petitioner argues the emphasized portion of the findings quoted above indicates the county interprets Policy 6 to impose two separate requirements -- (1) to cooperate with the Water Resources Department (WRD) and Oregon Department of Fish and Wildlife (ODFW) regarding water information, and (2) to conserve water. Petitioner

does not challenge the county's determination that it cooperated with the WRD and ODFW, but contends the challenged decision fails to address the independent requirement of Policy 6 to conserve water.

Intervenor argues that Policy 6 does not establish an independent approval standard "to conserve water." According to intervenor, Policy 6 requires the county to cooperate with the WRD and ODFW (1) "to obtain more information about groundwater and surface water availability," and (2) "to conserve water resources for consumptive and nonconsumptive uses." Intervenor contends the county's finding adequately indicates that it cooperated with the WRD and ODFW with regard to the subject application.

This Board is required to defer to the county's interpretation of its plan, unless that interpretation is contrary to the express words, policy or context of the plan.[3] ORS 197.829; Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must defer to the county's interpretation of Policy 6, unless that interpretation is "clearly wrong." Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d

[3]There is no contention here that the county's interpretation of Policy 6 is contrary to a state statute, statewide planning goal or administrative rule which the policy implements. See ORS 197.829(4).

1354 (1992). Additionally, under Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on reconsideration 125 Or App 119 (1993), rev allowed 318 Or 478 (1994), and Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992), we are required to review the county interpretation of Policy 6 expressed in the challenged decision, and may not interpret Policy 6 ourselves in the first instance.

Here, we cannot determine from the challenged decision whether the county interprets Policy 6 to have the meaning advocated by petitioner or that advocated by intervenor, neither of which would be "clearly wrong." Therefore, we must remand the decision for the county to clarify its interpretation of Policy 6. If the county's interpretation of Policy 6 is that advocated by petitioner, the county must also include in its decision findings, supported by substantial evidence, demonstrating the proposal conserves water.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

A. CCZO 3.042(8)(b)

Curry County Zoning Ordinance (CCZO) 3.042(8)(b) establishes the following approval standard for the proposed forest dwelling:

> "It must comply with the suggested dwelling unit density guidelines for 'sensitive' and 'peripheral' big game habitat defined by the [ODFW] as big game habitat on the comprehensive plan inventory maps[.]"

There is no dispute the subject property is within an identified sensitive big game habitat area. The parties also agree that CCZO 3.042(8)(b) refers to the following provision of the January 13, 1981 ODFW Wildlife Protection Plan for Curry County (ODFW plan):

> "In nonexclusive [plan and zoning] classifications, development should be low density, allowing for normal agricultural and forest uses. Residential densities should generally not exceed 1:80 acres on major deer and elk ranges where lands are sparsely developed and recreational opportunities are maximal. * * * It should be emphasized that [ODFW's] recommendations relate to overall residential density and not minimum lot size." Record 171.

The decision interprets the above provision of the ODFW plan to allow the inclusion of publicly owned land in the calculation of residential density:

> "The * * * proposed dwelling will meet this guideline because there are large tracts of federal forest land adjacent to the subject property which do not have dwellings so that the average dwelling density in the square mile area centered on the subject parcel is effectively much less than one dwelling per eighty acres." Record 12.

Petitioner contends this interpretation is contrary to the purpose of the ODFW plan in defining suggested dwelling density guidelines for sensitive big game habitat and will allow the conversion of sensitive big game habitat to less valuable peripheral or impacted habitat. Petitioner's argument is supported by statements in a letter to petitioner from the ODFW South Coast District Wildlife

Biologist. Record 160.

We considered this identical issue in Furler I, slip op at 12, and determined the language of the ODFW plan itself provides no basis for concluding the county erred by including public land in its residential density calculation. The only difference here is that the record includes the opinion of an ODFW staff person that the ODFW plan should not be interpreted to allow inclusion of public land in the residential density calculation. However, as far as we can determine, the ODFW plan has never been adopted by ODFW itself as an administrative rule or in any other manner.[4] It is applicable here only because its dwelling unit density guidelines are incorporated into CCZO 3.042(8)(b), a county enactment. We do not see that under ORS 197.829 we are required or allowed to give any deference to the interpretation expressed by the ODFW staff member. We therefore adhere to our conclusion in Furler I that the county did not err by including public land in its residential density calculation.

This subassignment of error is denied.

B. CCZO 3.042(8)(c)

As relevant here, CCZO 3.042(8)(c) imposes the following standard on the subject application:

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[4]The ODFW plan is subtitled "A Report by [ODFW] to the Curry County Planning Department." Record 163.

> "Domestic water supplies for development on forest parcels must emanate from surface or subsurface water sources contained within the boundary of the subject property * * *."

The decision addresses this requirement as follows:

> "A 36[-inch] concrete tile well that is 8.3 feet deep has been placed in the marshy area of a spring located near the stream on the subject property. The applicant has applied for water rights to appropriate 0.01 cubic feet [per second of] surface water for domestic use.
>
> "The spring has a flow rate of 3 gallons per minute based on a flow test done * * * on September 17, 1992." Record 8.
>
> "Domestic water sources will emanate from subsurface [sic] water sources contained within the boundary of the subject property. * * *" Record 12.

Petitioner argues:

> "[CCZO] 3.042(8)(c) is more than just a requirement that sources of domestic water exist within the property. It is a requirement that the entire supply of domestic water necessary for development come from the property itself. To the extent the county interpreted [CCZO 3.042(8)(c)] only to require that sources of domestic water exist within the property, the county's decision is inconsistent with the express language of the [CCZO], is clearly wrong, and improperly construes the applicable law." (Emphases added.) Petition for Review 12.

Contrary to petitioner's argument, CCZO 3.042(8)(c) expressly requires that the sources of domestic water supplies, not the entire supply of domestic water, must be contained within the boundary of the subject property. The county found CCZO 3.042(8)(c) is satisfied because the

spring that will be used as the source of intervenor's domestic water is located on the subject property. The interpretation of CCZO 3.042(8)(c) expressed in the challenged decision is well within the discretion afforded the county by ORS 197.829 and Clark v. Jackson County, supra.

This subassignment of error is denied.

C. CCZO 3.042(8)(d)

CCZO 3.042(8)(d) imposes the following standard on the subject application:

> "A single-family dwelling proposed to be in conjunction with forest use may be allowed if it can be shown that a dwelling is required for and accessory to a forest use based upon the information provided in a resource management plan as defined in [comprehensive plan] Section 4.5.2."

In September, 1992, when intervenor's forest dwelling application was submitted to the county,[5] Statewide Planning Goal 4 (Forest Lands) and OAR 660-06-025(1)(d) and 660-06-027(2) (part of the administrative rules implementing Goal 4) required that a forest management dwelling on designated forest lands be "necessary for and accessory to forest operations." There is no dispute that the subject property is designated and zoned for forest use by the acknowledged county plan and land use regulations. There is

[5]ORS 215.428(3) requires that approval or denial of a permit application be based on the standards and criteria in effect when the application was first submitted to the county.

also no dispute that the "required for and accessory to a forest use" requirement of CCZO 3.042(8)(d) implements the "necessary for and accessory to forest operations" requirement of Goal 4 and the Goal 4 rule.[6]

Under ORS 197.829(4), we cannot affirm the county's interpretation of its land use regulation, in this case CCZO 3.042(8)(d), if that interpretation "[i]s contrary to a state statute, land use goal or rule that the * * * land use regulation implements." We therefore briefly describe the established interpretation of the Goal 4 "necessary for and accessory to" requirement, before addressing petitioner's contentions that the challenged decision misinterprets and misapplies the equivalent requirement of CCZO 3.042(8)(d).

In Barnett v. Clatsop County, 23 Or LUBA 595, 597 (1992), we explained the "necessary for and accessory to" standard as follows:

> "[T]he 'necessary for and accessory to' forest use test for approval of forest dwellings is a significant limitation on the approval of permits for construction of single family dwellings on lands planned and zoned for forest use. Dodd v. Hood River County, 22 Or LUBA 711, 717-18[, aff'd

[6]The decision itself states the county "has interpreted the 'required for' language in [CCZO 3.042(8)(d)] to mean 'necessary.'" Record 13. The decision also states the county interprets "necessary" as that term was interpreted in DLCD v. Coos County, 25 Or LUBA 158 (1993). However, in DLCD v. Coos County, 25 Or LUBA at 161, we explained we did not resolve the dispute between the parties regarding the interpretation of the county code's "necessary for and accessory to" standard, because the findings in the challenged decision and the evidence in the record were adequate to support a determination of compliance with the stricter interpretation of "necessary" advocated by the petitioner in that case.

> 115 Or App 139 (1992), aff'd 317 Or 172 (1993)]. Further, * * * the necessary for and accessory to test is not satisfied simply because a proposed forest dwelling is convenient to the continuation of the forest use of a parcel, Tipperman v. Union County, 22 Or LUBA 775, 777-79 (1992), or because the proposed dwelling will enhance the cost effectiveness of forest operations on a forest parcel. DLCD v. Yamhill County, 22 Or LUBA 466, 471 (1991)."

We concluded the county decision challenged in Barnett, supra, failed to establish the proposed dwelling was necessary for and accessory to forest use of the subject parcel, for the following reasons:

> "* * * The challenged decision fails to establish a link between the proposed forest management activities and the need for an on-site dwelling. * * * The findings also fail to explain whether other dwellings in the area are available to provide housing for people to perform [required activities on] the subject property. * * * In sum, the findings fail to explain why living on-site is required for performance of the identified forest management duties. The findings are inadequate to establish that the proposed dwelling is 'necessary,' within the meaning of [the applicable local code provision]. * * *" Barnett, supra, 23 Or LUBA at 597-98.

1. Necessary For Forest Use

The decision addresses the "necessary for" forest use requirement of CCZO 3.042(8)(d) (necessary standard) as follows:

> "The [forest management] plan describes the time involved and the cost of the [forest] management activities involved in the plan. The [forest management] plan provides an estimate of the total hours that would be involved in the management of the land * * * for the duration of the plan [--]

> about 5000 hours. The applicant projects a sixty year cycle to produce about 1100 board feet per acre of timber. The implementation of this forest management plan would result in about seven (7) hours per month being spent on the forest management activities described over the sixty year timber growing cycle. However, the initial hourly requirement will far exceed 7 hours.
>
> "Another part of the [forest management] plan describes the number of hours per week that the resident[s] will apply to various forest management activities. These are described as involving two persons and are noted as only taking place during the 'prime working season.' These hours total 105 hours for two persons which equals 52.5 hours per week [per] person.
>
> "[I]nitial high-intensity work needs to be done on this 40-acre parcel to ensure health and growth of the flora cover, the future marketability of its timber stock, and preservation of the landcover. The property is quite remote, which would make any sustained work with the timber potential very difficult for the applicant unless there is a dwelling permitting him to attend the many activities involved in developing a marketable timber crop." (Emphasis added.) Record 14-15.

Petitioner contends the above quoted findings fail to establish that the proposed forest dwelling is essential to successful forest management of the property, rather than merely being convenient or cost effective for forest management. Petitioner argues the findings do not explain why carrying out the necessary forest management operations requires the presence of an on-site dwelling.[7] Petitioner

[7]Petitioner also contends the county's findings regarding the number of person hours required for forest management operations on the subject property are not supported by substantial evidence in the record. Because we conclude the county's findings are inadequate for other reasons, as

further argues the only reason given for the county's determination that it would be "very difficult" for intervenor to conduct forest management operations on the property without residing in an on-site dwelling, is that the property is "quite remote." According to petitioner, that conclusion is supported only by intervenor's assertion that the property is "quite remote." Record 51. Petitioner cites evidence in the record that the subject property is located five miles from the Gold Beach UGB, and is within a 35 minute commuting distance from that city. Record 38, 111.

The only explanation given by the challenged decision for why the proposed forest management operations on the subject property require the presence of an on-site dwelling, is that it would be "very difficult" for intervenor to carry out the proposed operations without an on-site dwelling because the property is "quite remote."[8]

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explained in the text, infra, we do not address petitioner's evidentiary challenge to these findings.

[8]This case is distinguishable from DLCD v. Coos County, supra, because in that case, the county decision included findings explaining why carrying out the proposed forest management activities required an on-site dwelling, and the adequacy of those findings was not challenged. DLCD v. Coos County, 25 Or LUBA at 166. The challenge made in DLCD v. Coos County was to the evidentiary support for the county's determination that it was necessary to have an on-site dwelling to carry out the proposed forest management activities. With regard to that evidentiary challenge, we found the record included a forest management plan, prepared by a professional forestry consulting firm, "contain[ing] a detailed explanation of why implementation of the plan requires 'the continual presence of an on-site operator,'" and undisputed expert testimony that it was impracticable for the forest management plan to be implemented unless the operator resided on the property. Id. at 165.

Record 14. Other than the conclusory statement to this effect by intervenor, the only evidence in the record to which we are cited shows that the property is within five miles or 35 minutes of the City of Gold Beach. We agree with petitioner that, based on this evidence, a reasonable person could not conclude that the property is so "remote" that an on-site dwelling is necessary to conduct forest management operations on the property. Consequently, the county's findings are inadequate to demonstrate compliance with the "necessary for forest use" requirement of CCZO 3.042(8)(d).

This subassignment of error is sustained.

2. Accessory To Forest Use

The decision addresses the "accessory to" forest use requirement of CCZO 3.042(8)(d) (accessory standard) as follows:

> "The * * * proposed use of the [forest] dwelling would be accessory, that is secondary to the main forest use -- management for timber and wildlife. The dwelling would occupy a small portion of the 40 acres, and the value of the dwelling would likely be insignificant as compared to the value of timber on the subject 40 acre tract." Record 15.

Petitioner contends the second reason given in support of the county's determination of compliance with the accessory standard, that the value of the proposed dwelling will be insignificant compared to the value of the timber on the subject property, is not supported by substantial

evidence in the record. No party cites any evidence in the record supporting the challenged finding. Therefore, we agree with petitioner that the finding is not supported by substantial evidence, and the county cannot base its determination on this finding.

Petitioner next contends the first reason given in support of the county's determination of compliance with the accessory standard, that the proposed dwelling would occupy a small portion of the subject 40-acre parcel, is irrelevant to that standard. Petitioner argues a dwelling cannot be secondary to a forest use merely because the dwelling occupies less space than the forest use.

The finding that the proposed forest dwelling will occupy only a small portion of the subject property is relevant to a determination of compliance with the accessory standard. However, we agree with petitioner that this finding, by itself, is not sufficient to support a determination of compliance with the accessory standard.

This subassignment of error is sustained.

The third assignment of error is sustained, in part.

The county's decision is remanded.