

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

1  
2  
3  
4 MARK FURLER, )  
5 )  
6           Petitioner, )  
7 )  
8       vs. )  
9 )  
10 CURRY COUNTY, )  
11 )  
12           Respondent, )  
13 )  
14       and )  
15 )  
16 IRA CREE, WILLIAM CREE, and CREE )  
17 INVESTMENTS, )  
18 )  
19           Intervenors-Respondent. )

LUBA No. 95-061  
  
FINAL OPINION  
AND ORDER

20  
21  
22       Appeal from Curry County.

23  
24       Neil S. Kagan, Gresham, filed the petition for review  
25 on behalf of petitioner. Mark Furler argued on his own  
26 behalf.

27  
28       No appearance by respondent.

29  
30       Michael E. Farthing, Eugene, filed the response brief  
31 and argued on behalf of intervenors-respondent. With him on  
32 the brief was Gleaves Swearingen Larsen Potter Scott &  
33 Smith.

34  
35       LIVINGSTON, Chief Referee; GUSTAFSON, Referee,  
36 participated in the decision.

37  
38                   REMANDED                                   03/07/96

39  
40       You are entitled to judicial review of this Order.  
41 Judicial review is governed by the provisions of ORS  
42 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county board of  
4 commissioners approving a conditional use permit for a  
5 resource-related dwelling (forest dwelling) on a 40-acre  
6 tract in the county's Timber zone.<sup>1</sup>

7 **MOTION TO INTERVENE**

8 Ira Cree, William Cree and Cree Investments  
9 (intervenors) move to intervene in this proceeding on the  
10 side of respondent. There is no opposition to the motion,  
11 and it is allowed.

12 **MOTION TO FILE REPLY BRIEF**

13 Petitioner moves to file a reply brief, which  
14 accompanies the motion. A reply brief may be allowed if it  
15 addresses new matters raised in a respondent's brief.  
16 OAR 661-10-039. Since petitioner's reply brief does little  
17 more than reargue the issues presented in the petition for  
18 review, the motion is denied.

19 **FACTS**

20 This is the second appeal of a decision approving a  
21 forest dwelling on the subject property. In Furler v. Curry  
22 County, 27 Or LUBA 497 (1994) (Furler I), we stated:

23 "The subject property is a 40-acre parcel  
24 designated for use by the Curry County

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<sup>1</sup>The Curry County Zoning Ordinance (CCZO) 3.042(8) lists forest dwellings as a conditional use.

1 Comprehensive Plan (plan) and zoned Timber. \* \* \*  
2 U.S. Forest Service land adjoins the subject  
3 property to the east. Privately owned Timber-  
4 zoned properties adjoin the subject property to  
5 the north, west and south. The property is  
6 located approximately six miles southeast of the  
7 urban growth boundary (UGB) of the City of Gold  
8 Beach." Furler I, 27 Or LUBA at 498-99.<sup>2</sup>

9 Portions of the property were logged between thirty and  
10 forty years ago. The harvested areas were not replanted and  
11 were left to seed themselves naturally. Although there are  
12 no identified water sources on the property itself, there  
13 are developed springs on adjacent properties from which  
14 intervenors intend to obtain water in the short term. In  
15 the long term, intervenors intend to drill a well near the  
16 center of the property as the water source for the proposed  
17 dwelling.

18 Our Furler I remand order required that the county  
19 reopen the evidentiary record. 27 Or LUBA at 501 n4. After  
20 a hearing on January 10, 1995, at which additional evidence  
21 and public testimony were presented, the board of county  
22 commissioners again approved the application. This appeal  
23 followed.

24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioner contends the county has not made adequate

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<sup>2</sup>There are now four LUBA opinions entitled Furler v. Curry County which discuss forest dwellings. This opinion and Furler I address the subject property. Furler v. Curry County, 27 Or LUBA 497 (1994) and Furler v. Curry County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 95-060, March 1, 1996) address an adjacent property.

1 findings supported by substantial evidence with respect to  
2 plan Section 5.12(F), Policy 6 (Policy 6), which provides:

3 "Curry County will cooperate with the Department  
4 of Water Resources [DWR] and Department of Fish  
5 and Wildlife [ODFW] to obtain more information  
6 about groundwater and surface water availability  
7 and to conserve water resources for consumptive  
8 and nonconsumptive uses to the benefit of the  
9 people of the county."

10 The challenged decision interprets Policy 6 as  
11 requiring the county to

12 "cooperate with the [DWR] and [ODFW] 1) to obtain  
13 more information about groundwater and surface  
14 water availability', and 2) 'conserve water  
15 resources for consumptive and nonconsumptive  
16 uses.'"<sup>3</sup> Record 11.

17 The challenged decision contains six findings of fact  
18 addressing Policy 6. Findings 2 and 3 state:

19 "2. The County cooperated with [DWR] and [ODFW]  
20 by providing both agencies with notice of the  
21 request and the opportunity to participate in  
22 the application.

23 "3. The County cooperated with both agencies in  
24 making the information pertaining to the  
25 surface water supply located on the adjacent  
26 \* \* \* property available." Record B5.<sup>4</sup>

27 **A. "Cooperate to Obtain Information"**

28 Petitioner contends initially that Policy 6, as

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<sup>3</sup>This interpretation of Policy 6 is permitted by our remand order in Furler v. Curry County, 27 Or LUBA 546, 551 (1994).

<sup>4</sup>References to the record in Furler I are to "A \_\_\_\_." References to the record on remand are to "B \_\_\_\_." References to the supplemental record on remand are to "SR \_\_\_\_."

1 interpreted by the county governing body, contemplates that  
2 the county will obtain information from DWR and ODFW, not  
3 furnish information to these agencies. We agree. However,  
4 although findings 2 and 3 are worded to suggest that  
5 information was provided by the county to the agencies,  
6 rather than the other way around, the effect of inviting  
7 participation is to solicit information. Indeed, ODFW  
8 responded by providing comments. Record 116, 131, 132, 170.  
9 Although the county may have erred in its wording of  
10 findings 2 and 3, the error is harmless.

11 **B. "Cooperate to Conserve Water"**

12 Petitioner contends that the county failed to cooperate  
13 with ODFW in achieving the second objective of Policy 6,  
14 conserving water, since it ignored all of ODFW's  
15 recommendations. See Record A116. Neither the plan nor the  
16 challenged decision defines "cooperate." We do not  
17 interpret "cooperate" to require a local government making a  
18 land use decision to adopt the views of an affected agency,  
19 but instead to require that the county consider and  
20 accommodate an affected agency's needs and expressed  
21 concerns as much as possible. This means at a minimum that  
22 the county must address in its findings any issues raised by  
23 the agency.

24 The county failed to cooperate with ODFW, not because  
25 the challenged decision does not adopt ODFW's  
26 recommendations, but because it contains no findings that

1 address the issues raised in ODFW's letter. The county's  
2 failure to include such findings also violates the general  
3 rule that when a relevant issue is raised in the local  
4 proceedings, it must be addressed in findings. See City of  
5 Wood Village v. Portland Metro Area LGBC, 48 Or App 79, 97,  
6 616 P2d 528 (1980); Norvell v. Portland Metro Area LGBC, 43  
7 Or App 849, 853, 604 P2d 896 (1979); Eckis v. Linn County,  
8 19 Or LUBA 15, 29 (1990).

9 The first assignment of error is sustained in part.

10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioner challenges the county's application of CCZO  
12 3.042(8)(c) and (d). CCZO 3.042(8) provides, in relevant  
13 part:

14 "A single-family dwelling or mobile home required  
15 for [or] accessory to a forest use may be  
16 established under the following conditions:

17 "\* \* \* \* \*

18 "c) domestic water supplies for development on  
19 forest parcels must emanate from surface or  
20 subsurface water sources contained within the  
21 boundary of the subject property; or if the  
22 domestic water supply is obtained from a  
23 source on other lands, then there shall be a  
24 documented approval for such use from all  
25 other affected parties, with the condition  
26 that such use will not affect the owners' (of  
27 that water source) right to utilize forest  
28 management practices; and

29 "d) A single-family dwelling proposed to be in  
30 conjunction with forest use may be allowed if  
31 it can be shown that a dwelling is required  
32 for [or] accessory to a forest use based upon  
33 the information provided in a resource

1 management plan as defined in the [plan]  
2 Section 4.5.2." (Emphasis added.)

3 **A. CCZO 3.042(8)(c)**

4 The challenged decision makes the following finding  
5 addressing CCZO 3.042(8)(c):<sup>5</sup>

6 "6. CCZO 3.042(8)(c) expressly requires that the  
7 source of domestic water, not the entire  
8 supply, be contained either within the  
9 boundary of the subject property or; on other  
10 lands. If the source is on 'other lands'  
11 then there shall be documented approval for  
12 such use by the affected property owner(s)  
13 (parties). A signed letter of authorization  
14 from said owner(s) will be accepted as  
15 documented approval.

16 "Petitioner appears to argue that  
17 [intervenors] must provide documentation that  
18 all parties potentially affected by the water  
19 use (wherever they may be) will not be  
20 affected in their right to use water for  
21 forest management. \* \* \* The Board expressly  
22 rejects this interpretation. Under Clark v.  
23 Jackson County, [313 Or 508, 514-15, 836 P2d  
24 710 (1992)], the Board interprets the second  
25 clause of CCZO Section 3.042(8)(c) to mean  
26 that if the domestic water supply is obtained  
27 from other lands, permission to use that  
28 water shall be documented by the owner and  
29 the documented permission shall have a  
30 condition that the use will not affect the  
31 owners' (of the water source) right to  
32 utilize forest management practices." Record  
33 B11-12. (Emphasis in original.)

34 Petitioner contends this interpretation is contrary to  
35 the express words, purpose or policy of CCZO 3.042(8)(c) and

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<sup>5</sup>Since the water supply will not emanate from intervenor's own property, only the language emphasized above applies.

1 must be reversed. We agree. CCZO 3.042(8)(c) requires a  
2 documented approval for an accessory use, such as a forest  
3 dwelling, not just from the owner(s) of the land which is  
4 the proposed source of the domestic water supply, but from  
5 "all other affected parties." (Emphasis added.) The county  
6 cannot eliminate this express requirement through  
7 interpretation.

8 Petitioner describes the Bureau of Land Management  
9 (BLM) as an "affected party," because the water emanating  
10 from the proposed source flows onto its land. Intervenors  
11 argue petitioner has not established that the use of the  
12 proposed source will have a discernible impact on BLM land.  
13 Intervenors argue further that

14 "using Petitioner's logic, water from a well that  
15 might flow into a creek system that eventually  
16 flows through BLM land into other areas and  
17 through other people's lands would create an  
18 endless number of 'affected parties.'"   
19 Intervenors' Brief 9.

20 We disagree. "Affected parties" must be interpreted  
21 reasonably, to avoid an absurd result. If, under a  
22 reasonable interpretation of the standard, the county finds  
23 that the evidence in the record shows that the BLM is not an  
24 "affected party," it need not require documented approval  
25 from the BLM.

26 Finally, petitioner contends that the county's finding  
27 that intervenors will obtain domestic water from the  
28 neighbor's property is not supported by substantial



1 evidence, because while the neighbor has applied for a  
2 domestic water right, the application was only for a single  
3 household and has not been permanently granted by the DWR.<sup>6</sup>  
4 Record B72, 115. The challenged decision finds that the  
5 domestic water source on the neighbor's property "would be  
6 capable of supporting 9.6 three bedroom dwellings; that the  
7 neighbor has applied for a domestic water right; and that  
8 the water source is already developed." Record B6. These  
9 findings have no import unless the appropriate agency has  
10 granted intervenors the right to use water from the  
11 neighbor's property. We agree with petitioner that implicit  
12 in CCZO 3.042(8)(c) is a requirement that before a  
13 conditional use permit for a forest dwelling is granted, the  
14 applicant must show that the water from the neighbor's  
15 property or from the applicant's own property can be legally  
16 provided through the appropriate grant of water rights.<sup>7</sup>

17 This subassignment of error is sustained.

18 **B. CCZO 3.042(8)(d)**

19 Petitioner contests the adequacy of the county's  
20 findings under CCZO 3.042(8)(d) and contends the findings  
21 are not supported by substantial evidence in the whole  
22 record. When intervenors' forest dwelling application was

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<sup>6</sup>Our review of this contention is hampered by intervenors' failure to respond to it.

<sup>7</sup>That requirement may be satisfied through the imposition of a condition.

1 submitted to the county, Statewide Planning Goal 4 (Forest  
2 Lands) and OAR 660-06-025(1)(d) and 660-06-027(2) (part of  
3 the Goal 4 rule) required that a forest management dwelling  
4 on designated forest lands be "necessary for and accessory  
5 to forest operations." The challenged decision interprets  
6 the term "required for," as used in CCZO 3.042(8)(d), to be  
7 consistent with the "necessary for" language contained in  
8 Goal 4. Record B12. There is no dispute that the "required  
9 for and accessory to a forest use" requirement in CCZO  
10 3.042(8)(d) implements the "necessary for and accessory to  
11 forest operations" requirement of Goal 4 and the Goal 4  
12 rule.<sup>8</sup> We therefore determine whether the county's  
13 application of CCZO 3.042(8)(d) is reasonable and correct.<sup>9</sup>

14 **A. The "Necessary" Standard**

15 As we explained in Furler v. Curry County, \_\_\_ Or LUBA  
16 \_\_\_ (LUBA No. 95-060, March 1, 1996), slip op 8, the  
17 "necessary" standard is a demanding one. See 1000 Friends  
18 of Oregon v. LCDC (Lane County), 305 Or 384, 396, 752 P2d  
19 271 (1988); 1000 Friends of Oregon v. LCDC (Lane County), 83  
20 Or App 278, 282-83, 731 P2d 457 (1987), on reconsideration,  
21 85 Or App 619, 737 P2d 975, aff'd 305 Or 384 (1988); DLCD v.

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<sup>8</sup>To maintain consistent terminology, we refer to the county's "required" standard as the "necessary" standard.

<sup>9</sup>Under ORS 197.829(1)(d), we are not required to defer to a local government's interpretation of its plan or regulations if that interpretation is contrary to a state statute, statewide planning goals or administrative rule which the regulations implement.

1 Coos County, 25 Or LUBA 158 (1993); Barnett v. Clatsop  
2 County, 23 Or LUBA 595 (1992); Dodd v. Hood River County, 22  
3 Or LUBA 711, 719, aff'd 115 Or App 139 (1992), aff'd 317 Or  
4 172 (1993). As the Court of Appeals stated in LCDC (Lane  
5 County), supra, "[t]he purpose of the dwelling must be to  
6 make possible the production of trees which it would not  
7 otherwise be physically possible to produce." 83 Or App at  
8 283.

9 The challenged decision incorporates by reference the  
10 findings in Furler I. Record B10. Finding 21 states:

11 "[E]ffective and efficient management of this land  
12 will require the continual presence of the  
13 owner/operator to carry out the activities in the  
14 plan. Continual presence of the owner/operator  
15 requires a dwelling on the property." Record A16.

16 The challenged decision explains:

17 "Proper implementation of the management plan will  
18 require the continual presence of the  
19 owner/operator to provide maximum opportunity to  
20 perform needed activities in a timely and  
21 efficient manner. There are periods requiring  
22 consecutive daily activities followed by periods  
23 of monitoring and general maintenance.  
24 Fluctuations in weather severity on a weekly and  
25 seasonal basis will impact the scope of required  
26 management activities and implementation timing.  
27 There is no method of predicting when these  
28 'windows of opportunity.' may be open, therefore  
29 it is important to be ready and available to  
30 conduct management activities as conditions  
31 allow." Record B8.

32 Intervenors argue:

33 "[T]he management plan calls for a higher level of  
34 investment in time, materials and energy than  
35 would be required for a higher yield site in order

1 to maximize [the] productivity potential. [Record  
2 B8]. The Commissioners found that this increased  
3 expenditure of time, materials, and energy would  
4 be more likely to be accomplished if an onsite  
5 dwelling were allowed. [Record B13]. The onsite  
6 dwelling would allow the resident owner to take  
7 advantage of management opportunities that might  
8 occur on a random basis due to weather and the  
9 availability of the owner operator. [Record B13-  
10 14]. The more often the owner operator is present  
11 at the site when these opportunities arise, the  
12 more likely it is that these more intensive  
13 management efforts will occur." Intervenor's  
14 Brief 10-11.

15 Underlying this argument, which accurately reflects the  
16 county's findings, is the assumption that someone residing  
17 on the property might, and probably would, find it more  
18 convenient to step outside, weather permitting, to spend a  
19 few hours engaging in forest management than someone  
20 residing in Gold Beach, six miles away. Even if true, this  
21 falls far short of the requirement, as interpreted by both  
22 the Oregon Supreme Court and the Court of Appeals in LCDC  
23 (Lane County), supra, and by LUBA in Dodd, supra, and  
24 Barnett, supra, that the dwelling be "necessary."

25 Moreover, the record does not show that intervenors Ira  
26 or William Cree or a resident manager will or even intend to  
27 occupy the proposed forest dwelling continually.<sup>10</sup> Unless

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<sup>10</sup>Intervenors' attorney acknowledged at oral argument that the proposed dwelling is a vacation home for one or more of intervenors, who reside in California. See also Record A30, 111, 108. Intervenor apparently view the alternative to management from an on-site dwelling to be management from a motel room in Gold Beach. See Record B23. However, there is evidence that during the period in which the local proceedings were

1 this showing is made, the county cannot justify permitting  
2 the dwelling on the ground that continual residency is  
3 necessary to implement the forest management plan.

4 **B. The "Accessory" Standard**

5 Relying on the definition of "accessory" found in CCZO  
6 1.030(1), the county finds

7 "[t]he proposed dwelling is subordinate to,  
8 incidental to, and accessory to the principal  
9 forest management use of the property because it  
10 will serve as the base of operation for said  
11 [forest management] plan, will occupy a  
12 proportionately smaller area than the main use and  
13 be directly affiliated with the principal forest  
14 use." Record B12.<sup>11</sup>

15 The finding that the proposed dwelling will serve as  
16 the base of operation for the proposed forest management  
17 plan is contradicted by evidence that it will not be  
18 continually occupied. That the dwelling will occupy a  
19 proportionately smaller area than the forest use does not  
20 independently justify approval. See Furler, supra, 27 Or  
21 LUBA at 559.

22 This subassignment of error is sustained.

23 The second assignment of error is sustained.

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conducted, one dwelling adjoining the subject property was for sale and another was available as a rental. Record B95, SR 16.

<sup>11</sup>CCZO 1.030(1) states:

"Accessory structure or use. A use or structure incidental and subordinate to the main use of the property and located on the same parcel, tract or lot as the main use."

This definition is consistent with Goal 4 and the Goal 4 rule.

1           The county's decision is remanded.