BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM L. EDDINGS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 98-190
COLUMBIA COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
JIM LEPIN and CHARLIE LEPIN, RAY JOHNSON and GLORIA JOHNSON, CLAIR DeBAST and MERTIE DeBAST and JUDY LEPIN,	)	
	)	
Intervenors-Respondent.	)	

Appeal from Columbia County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

John M. Junkin, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Bullivant, Houser, Bailey.

HOLSTUN, Board Chair.

REMANDED 04/16/99

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

Petitioner appeals the county's denial of a conditional use "forest-template" dwelling.

MOTION TO INTERVENE

Jim Lepin, Charlie Lepin, Ray Johnson, Gloria Johnson, Clair DeBast, Mertie DeBast, and Judy Lepin (intervenors), jointly move to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

MOTION TO ALLOW REPLY BRIEF

Petitioner moves for permission to file a reply brief pursuant to OAR 661-010-0039. Petitioner's motion explains that the intervenors' response brief alleges that the findings petitioner challenges in the decision are not the findings that the county board of commissioners (commissioners) actually adopted and incorporated into the final decision. Petitioner argues, and we agree, that the response brief raises a "new matter" within the meaning of OAR 661-010-0039.

Petitioner's motion for permission to file a reply brief is allowed.

FACTS

The subject property is a vacant 20-acre parcel zoned Primary Forest-76-acre minimum (PF-76). The subject property is capable of producing 3,660 cubic feet of wood fiber per year, which is less than the 5,000 cubic feet of wood fiber per year per tract needed to qualify the parcel as "high-value timberland." The area surrounding the subject property is a mix of rural residential and commercial forestry uses.

Petitioner applied to the county for a single-family residence under the "forest-template" dwelling provisions of OAR 660-006-0027. Under the county's code, a forest template dwelling is a "nonresource-related single-family residential structure" that is subject to the conditional use provisions in Columbia County Zoning Ordinance (CCZO) 503.9. The county planning commission conducted a public hearing on June 1, 1998, and voted to deny

petitioner's application, adopting the findings and conclusions of a staff report dated May 20, 1998. The May 20, 1998 staff report recommended denial on the basis of findings 2, 15, and 18, which are findings of noncompliance with CCZO 504.1 and 1503.5(E).

Petitioner appealed to the commissioners. A new staff report, dated July 15, 1998, was prepared for the commissioners. On September 30, 1998, the commissioners held a de novo hearing, and voted to deny the appeal and petitioner's application. The commissioner's final written order expressly refers to and incorporates the May 20, 1998 staff report, and adopts findings 1 through 27 in that staff report.

This appeal followed.

SCOPE OF REVIEW

In challenging the county's denial of his application, petitioner assumes a difficult task. Because petitioner bears the burden before the county of demonstrating compliance with each applicable approval criterion, LUBA must affirm the decision unless petitioner demonstrates error with respect to each approval criterion with which the county finds noncompliance. In other words, to prevail before LUBA, the county need only show that its decision adopts findings that are adequate to demonstrate noncompliance with one applicable criterion, and that those findings are supported by substantial evidence. Boehm v. City of Shady Cove, 31 Or LUBA 85, 87 (1996); Salem-Keizer School Dist. 24-J v. City of Salem, 27 Or LUBA 351, 357 (1994); Reeder v. Clackamas County, 23 Or LUBA 583, 591 (1992).

LUBA has suggested that findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with applicable criteria. Salem-Keizer School Dist. 24-J, 27 Or LUBA at 371 (quoting Commonwealth Properties v. Washington County, 35 Or App 387, 400, 582 P2d 1384 (1978)). However, findings of noncompliance must be adequate to explain the local government's conclusion that applicable criteria are not met, and must suffice to inform the applicant either what steps

are necessary to obtain approval or that it is unlikely that the application will be approved. Salem-Keizer School Dist 24-J, 27 Or LUBA at 371.

Where the petitioner challenges a county's denial of land use approval on evidentiary grounds, it is not sufficient for the petitioner to demonstrate that substantial evidence in the record would also support a finding of compliance with applicable criteria. In bringing an evidentiary challenge to a county's denial, the petitioner must show that the evidence in the record demonstrates that the proposed use complies with applicable criteria as a matter of law. Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d 1241 (1979); Horizon Construction Inc. v. City of Newberg, 28 Or LUBA 632, 641-42 (1995). In short, petitioner must establish that the evidence is such that a reasonable trier of fact could only conclude that the proposal complies with applicable criteria. Horizon Construction, 28 Or LUBA at 641. With this understanding of our scope of review, we turn to the parties' arguments.

PRELIMINARY MATTER

As a preliminary matter, intervenors argue that the county's decision can be affirmed without addressing the merits of petitioner's two assignments of error, which are directed at findings 2, 15, and 18 regarding compliance with CCZO 504.1 and 1503.5(E). Intervenors argue that regardless of the merits of petitioner's arguments concerning those findings, petitioner failed to challenge two other findings of noncompliance with separate approval criteria. Intervenors contend that the staff report that the county adopted in the challenged decision was not the May 20, 1998 staff report, but rather the July 15, 1998 staff report. Intervenors explain that although the two staff reports are similar there is an important difference. In addition to recommending denial based on findings 2, 15, and 18, the July 15, 1998 staff report also recommends denial based on findings 8 and 17. According to intervenor, findings 8 and 17 in the July 15, 1998 staff report are findings of noncompliance with CCZO 505.1 and 1503.5(D). Petitioner's failure to challenge each of the county's bases

for denial, intervenors argue, requires that the Board affirm the decision. Garre v. Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or App 123, 792 P2d 117 (1990).

Petitioner replies that challenged decision incorporated the May 20, 1998 staff report by reference and adopted the findings in that staff report, not the July 15, 1998 staff report. We agree. The challenged decision clearly adopts the findings in the May 20, 1998 staff report as the basis for denial. Accordingly, we reject intervenors' argument that the county denied the application based on findings of noncompliance with CCZO 505.1 and 1503.5(D),

FIRST ASSIGNMENT OF ERROR

The county denied petitioner's application based, in part, on findings 2 and 15, which are findings that the proposed forest-template dwelling does not comply with CCZO 504.1. That provision requires a finding with respect to any conditional use in the PF-76 zone that "[t]he use is consistent with forest and farm uses and with the intent and purposes set forth in the Oregon Forest Practices Act [FPA]." Petitioner argues that the county's finding regarding CCZO 504.1 misconstrues that provision, is inadequate, and is not supported by substantial evidence.

In addressing CCZO 504.1, the challenged decision first quotes a passage from ORS 527.630, part of the FPA:

> "* * *[I]t is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forest land for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water and fish and wildlife resources that assures the continuous benefits of those resources for future generations of Oregonians." Record 19.

The challenged decision then finds:

> "The proposed use of the property is for a single-family dwelling. The parcel is able to grow merchantable timber and is not too small (20 acres) to be considered a viable economic unit. This criterion is not met." Record 19.

A. Finding of noncompliance with CCZO 504.l

Petitioner contends that the above-quoted finding is inadequate because it fails to explain why the proposed dwelling does not comply with CCZO 504.1. In particular, the finding does not explain why the proposed use is inconsistent with forest uses as defined by the county's code, or why it is inconsistent with the intent and purposes of the FPA. Further, petitioner argues, the finding fails to explain how the ability to grow merchantable timber, the size of the parcel, and whether it is a viable economic unit relates to the requirements of CCZO 504.1.

Petitioner speculates that implicit in the above-quoted finding is an interpretation of CCZO 504.1 to the effect nonresource dwellings on forest land are prohibited per se where the land is capable, due to its size and soils, of growing merchantable timber on a commercially viable scale. If so, petitioner argues, that interpretation is either so poorly articulated as to be inadequate for review, or is inconsistent with the text, purpose and policy underlying CCZO 504.1 and thus is reversible under the deferential standard described in ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).

Intervenors concede that the county's finding of noncompliance with CCZO 504.1 is conclusory, but argue that its lack of explanation is a product of the paucity of evidence petitioner submitted to demonstrate compliance with CCZO 504.1. Intervenors argue that the entirety of petitioner's evidence regarding CCZO 504.1 consists of conclusory statements that "[t]he use is consistent with Forest and Farm uses in that a dwelling is allowed with a conditional use, and does not interfere with Forest Practice." Record 142. Further, intervenors contend that, to the extent the challenged decision interprets CCZO 504.1 along the lines suggested by petitioner, that interpretation is consistent with the text of CCZO 504.1 and the forest-template dwelling provisions at ORS 215.750 and OAR 660-006-0027, which allow counties to apply more restrictive standards than provided in the forest-template dwellings provisions. Miller v. Multnomah County, 153 Or App 30, 39, 956 P2d 209 (1998).

We agree with petitioner that the county's finding of noncompliance with CCZO 504.1 is inadequate and that, to the extent it contains an interpretation of that provision, the county's interpretation is inadequate for review. The county's finding is so conclusory that it is insufficient to inform petitioner either what steps are necessary to obtain approval or that it is unlikely that the application can be approved. Salem-Keizer School Dist. 24-J, 27 Or LUBA at 371. It is not clear why the county believes the proposed use is inconsistent with forest uses or the intent and purposes of the FPA.

The county's finding of noncompliance with CCZO 504.1 may, as petitioner suggests, contain an implied interpretation to the effect that nonresource dwellings are categorically prohibited on forest land that is capable of commercial forestry uses. If so, that interpretation is inadequate for review. LUBA must affirm a governing body's interpretation of local provisions, including an implicit interpretation, where that interpretation is consistent with the text, purpose and underlying policy of those provisions and not clearly wrong. ORS 197.829(1); Alliance for Responsible Land Use v. Deschutes Cty., 149 Or App 259, 942 P2d 836 (1997), rev dismissed 327 Or 555 (1998). However, even an implicit interpretation must be adequate for review. Id. at 266 (quoting Weeks v. City of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992). An implicit interpretation is adequate for review where the local government's unambiguous understanding of the meaning of local legislation is inherent and discernible in the manner it applies that legislation. Alliance for Responsible Land Use; see also Bradbury v. City of Bandon, 33 Or LUBA 664, 668 (1997) (a putative implied interpretation is not adequate for review where LUBA cannot tell which of several conceivable interpretations the governing body might have intended); Moore v. Clackamas County, 26 Or LUBA 40, 44 (1993) (same).

The county's conclusory finding of noncompliance with CCZO 504.1 does not unambiguously state its understanding of the meaning of that provision. The commissioners may, indeed, have intended the categorical interpretation that petitioner attributes to them;

however, the county's finding of noncompliance with CCZO 504.1 is also consistent with less categorical interpretations. For example, the challenged finding quotes the FPA but not the forest uses at CCZO 100.27, which allows the inference that the county thought the proposed use is inconsistent with the FPA yet consistent with the forest uses listed in CCZO 100.27. On the other hand, the challenged finding might indicate a belief that the proposed use is consistent with some of the listed uses in CCZO 100.27, but not others. It is not clear whether, under CCZO 504.1, a use is consistent with forest uses if it is consistent with at least one of the seven forest uses listed at CCZO 100.27, or whether it must be consistent with all of them. The brevity of the challenged finding, combined with the nonspecific terms of CCZO 504.1, make it difficult to determine with any certainty what the county understands CCZO 504.1 to mean. Accordingly, to the extent the challenged finding contains an implicit interpretation of CCZO 504.1, that interpretation is inadequate for our review.

Petitioner does not ask us to interpret CCZO 504.1 in the first instance, pursuant to ORS 197.829(2).[1] Even if petitioner had invoked our authority under that provision, we would decline to exercise it. The requirement provided in CCZO 504.1, that the proposed use be consistent with forest uses and the intent and purposes of the FPA, is so general and nonspecific that it is susceptible to a number of interpretations and applications in the present factual context. Consequently, remand is appropriate for the county to clarify the meaning of CCZO 504.1.

The first subassignment of error is sustained.

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[1]ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

B. Substantial Evidence

Petitioner also challenges the county's findings that the subject parcel is capable of growing "merchantable timber" and can be considered a "viable economic unit," as lacking any basis in the record. According to petitioner, the county's findings are in apparent conflict with evidence that the subject property does not qualify as "high-value timberland."[2] Petitioner submits that there is no substantial evidence in the record to support the county's ultimate conclusion that the proposed use does not comply with CCZO 504.1

Intervenors respond by pointing to testimony in the record that the subject property is capable of producing a before-tax profit of $150,000 to $200,000 from harvesting mature timber. Record 33. Intervenors submit that this unrebutted evidence is substantial evidence supporting the county's findings that the subject property is capable of growing merchantable timber and can be considered a viable economic unit.

Petitioner's evidentiary challenge is predicated on a misunderstanding of our scope of review. As described above, in challenging a finding of noncompliance on evidentiary grounds, petitioner faces the difficult if not insuperable burden of proving that the proposed use complies with CCZO 504.1 as a matter of law. Petitioner has not directed our attention to evidence that meets that high standard under any conceivable interpretation of CCZO 504.1, even without considering the contrary evidence cited by intervenors. Nonetheless, our conclusion above that remand is necessary in order for the county to adopt findings that clarify its understanding of CCZO 504.1 makes it unnecessary for us to resolve petitioner's evidentiary challenge. DLCD v. Columbia County, 16 Or LUBA 467, 471 (1988).

The second subassignment of error is denied.

The first assignment of error is sustained, in part.

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[2]Petitioner does not explain the source or significance of the "high-value timberland" designation.

SECOND ASSIGNMENT OF ERROR

The county also denied petitioner's application based, in part, on a finding that the proposed forest-template dwelling did not comply with CCZO 1503.5(E), which requires the applicant to establish that "[t]he proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying district." Petitioner argues that the county's finding regarding CCZO 1503.5(E) misinterprets that provision, is inadequate, and is not supported by substantial evidence.

The county made the following finding regarding CCZO 1503.5(E):

> "The surrounding area is in residential and timber production. The proposed residence may alter the character of the area, as it will introduce a single-family dwelling into an area which is relatively undeveloped. The nearest other house will be over 1000 [feet] north of the proposed homesite; the next nearest house is about 1800 [feet] to the southwest. To the east, in the Rainer watershed, the adjacent parcel is 520 acres; to the south is a 60-acre parcel; to the west is a 32-acre parcel; to the north is a 20-acre parcel." Record 24.

Petitioner argues, first, that the county's finding is not responsive to the requirements of CCZO 1503.5(E) and is inadequate because it fails to establish the character of the surrounding area, and fails to discuss the uses on surrounding properties, what uses are allowed in the underlying zone, and how the proposed use will substantially limit, impair or preclude those uses.

We find it unnecessary to address all of the points raised by petitioner under this assignment of error, because we agree that the above-quoted finding is fundamentally flawed. It is not even clear to us from that finding whether the county found that the proposal violates CCZO 1503.5(E). The county may have intended the portion of the finding that states "[t]he proposed residence may alter the character of the area," as a conclusion that the proposal does not comply with CCZO 1503.5(E). However, if that was the county's intended finding, it is not stated with sufficient clarity. Moreover, CCZO 1503.5(E) prohibits an alteration in the character of the surrounding area only if that

alteration "substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying district." The above-quoted finding does not appear to recognize that limitation on the prohibition in CCZO 1503.5(E).

Assuming the county believes the applicant failed to demonstrate that the proposed dwelling complies with CCZO 1503.5(E), the county's findings must be sufficient to inform the applicant either what modifications or steps may be necessary to obtain approval or that approval is unlikely.[3] Salem-Keizer School Dist. 24-J, 27 Or LUBA at 371 (citing Hill v. Union County Court, 42 Or App 883, 601 P2d 905 (1979) and Commonwealth Properties, 35 Or App at 400 (1978)). We agree with petitioner that the above-quoted finding fails to give the applicant any indication of why the application is defective or how he might go about properly addressing CCZO 1503.5(E).

For the foregoing reasons, the second assignment of error is sustained.

The county's decision is remanded.

[3]Intervenors suggest that the problem with the county's findings concerning CCZO 1503.5(E) is attributable to the applicant's failure to submit evidence that is responsive to CCZO 1503.5(E), other than the most conclusory statements. If the county agrees with intervenor, the county is free on remand to adopt findings that explain why the county believes the evidence submitted in support of the application is inadequate to demonstrate compliance with CCZO 1503.5(E). The finding adopted by the county in the challenged decision does not take that position or include any such explanation.