

LAND USE  
BOARD OF APPEALS

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

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CITY OF DUNES CITY, )  
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 Petitioner, )  
 )  
 vs. )  
 )  
 LANE COUNTY BOARD OF )  
 COMMISSIONERS, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 MARTHA JAKOB, )  
 )  
 Intervenor, )

LUBA NO. 80-032  
FINAL OPINION  
AND ORDER

Appeal from Lane County.

Dwight Ronald Gerber, Florence, filed the petition for review and argued the brief on behalf of petitioner Dunes City.

Christie C. McGuire, Eugene, filed a brief and argued the cause for respondent Lane County.

Martha Jakob argued the cause pro per.

Cox, Referee, Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Reversed and Remanded. 9/18/80

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 COX, Referee

2 NATURE OF PROCEEDING

3 This matter is before the Board on petitioner's notice of  
4 intent to appeal which was filed with LUBA on March 26, 1980.  
5 Petitioners are contesting respondent's land use decision,  
6 dated February 26, 1980, which rezoned a parcel of land from  
7 Rural Residential to Tourist Commercial. The property is owned  
8 by Intervenor Martha Jakob.

9 STANDING

10 Standing is not an issue in this case.

11 ASSIGNMENT OF ERROR

12 Petitioner asserts one assignment of error as follows:

13  
14 "The re-zoning of JAKOB's parcel from Rural  
15 Residential to Tourist Commercial was unlawful in that  
16 it violated L.C.D.C. Goal Number 17 because JAKOB'S  
17 parcel was within the area, (sic) should have been  
18 included as a coastal shoreland, and the approved use  
19 is in violation of acceptable coastal shoreland uses  
20 in that applicant failed to establish that the  
existing services could not fulfill the need or demand  
in the area, and further that applicant was unable to  
establish that other available lands within the area  
designed (sic) Tourist Commercial could not  
accommodate this need."

21 FACTS

22 The subject property was zoned Rural Residential. The  
23 applicant requested a Tourist Commercial zone classification in  
24 order to permit her to develop and operate an antique and gift  
25 shop. The subject property is located south of Florence and  
26 immediately adjacent to the Dunes City limit. It is bordered

1 on the east by Highway 101 and on the west by the Oregon Dunes  
2 National Recreation Area (NRA). Directly north of the property  
3 is a small myrtlewood factory and gift shop and also a 40-unit  
4 mobile home park. The northern most portion of the subject  
5 property is adjacent to the city limits of Dunes City. The  
6 property south of the subject property is presently unzoned  
7 although farm forestry-20 has been proposed by respondent Lane  
8 County.

9 Of the total 13.63 acres owned by applicant, the portion  
10 which is the subject of this zone change contains approximately  
11 6 acres. There is a lily pond located in the southeast corner  
12 of the rezoned parcel extending over the southern property  
13 line. The pond is located entirely on private property and  
14 presently is not accessible to the general public. West of the  
15 subject property is a sand dune. Portions of the dune, unless  
16 stabilized, will continue to advance eastward at various  
17 speeds.

18 The applicant has constructed a permanent residence upon  
19 the subject property and intends to reside there while also  
20 operating her proposed antique and gift shop. The soil on the  
21 subject property is Westport Fine Sand, 205C, Class VIe. The  
22 lily pond and the subject property are separated from Woahink  
23 Lake (an identified coastal lake) by Highway 101, the major  
24 north/south Oregon coast highway.

25 DECISION

26 Inasmuch as respondent has not obtained acknowledgment of

1 its comprehensive plan, it must apply the statewide goals  
2 before reaching its decision to rezone the property in  
3 question. Statewide Goal 17 "Coastal Shorelands" is designed  
4 to conserve, protect, where appropriate develop and where  
5 appropriate restore the resources and benefits of coastal  
6 shorelands, recognizing their value for protection and  
7 maintenance of water quality, fish and wildlife habitat, water  
8 dependent uses, economic resources and recreation and  
9 aesthetics. In order to achieve this overall goal, statewide  
10 goal 17 establishes a means whereby a coastal shorelands  
11 planning area is established. This planning area is not an  
12 area within which development or use is prohibited. It is,  
13 however, an area for inventory, study, and initial planning for  
14 development and use to meet the coastal shorelands goal. Goal  
15 17 requires that the planning area shall be defined by the  
16 following (pertinent parts in relation to this case):

17 "1. All lands west of the Oregon Coast Highway as  
18 described in ORS 366.235, . . . :

19 " . . .

20 "and

21 "2. All lands within an area defined by a line  
22 measured horizontally:

23 "(a) 1000 feet from the shoreline of estuaries; and

24 "(b) 500 feet from the shoreline of coastal lakes."

25 Once these planning areas are established, inventories  
26 shall be conducted to provide information necessary for  
identifying coastal shorelands and designating uses and

1 policies. These inventories shall provide information on the  
2 nature, location and extent of geologic and hydrologic hazards  
3 and shoreland values, including fish and wildlife habitat,  
4 water dependent uses, economic resources, recreational uses,  
5 and aesthetics in sufficient detail to establish a sound basis  
6 for land and water use management.

7 Lane County in its findings regarding Goal 17 concluded  
8 that while the subject property was within a coastal  
9 shoreland's planning area because of its location west of  
10 Highway 101 and within 500 feet of a coastal lake (Woahink  
11 Lake) it nevertheless need not be included within any  
12 management unit of the coastal shorelands inventory because it  
13 is not subject to any of the conditions of those units. Lane  
14 County's conclusion is based upon a draft document entitled  
15 "Coastal Goals Compliance Report", which states that where a  
16 major physical barrier separates property from a coastal lake,  
17 that property need not be included in the management unit. The  
18 respondent concluded that in this case Highway 101 is such a  
19 major physical barrier and therefore, the subject property need  
20 not be included within the inventory required under Goal 17.

21 Petitioner alleges that such a conclusion is an error  
22 because the subject property should have been included as a  
23 coastal shoreland and, therefore, be in the inventory required  
24 by Goal 17. Petitioner bases this allegation on the grounds  
25 that the property is within 500 feet of Woahink Lake and the  
26 mere fact that Highway 101 separates the property from Woahink

1 Lake is not enough to remove it from the area to be included in  
2 Goal 17's inventory.<sup>1</sup>

3 In light of the overall purpose of Goal 17, which is to  
4 protect coastal shoreland resources, a finding that Highway 101  
5 separates Woahink Lake from the subject property is not  
6 sufficient, on its own, to exclude that property from the  
7 inventory requirement. One must look at the effect Highway 101  
8 has on the lake and the surrounding areas to determine whether  
9 the highway created a physical barrier sufficient to exclude  
10 the surrounding property from consideration in the inventory.  
11 Goal 17 lists a minimum of seven considerations which if  
12 answered in the affirmative require land contiguous with  
13 coastal lakes to be identified as coastal shorelands.<sup>2</sup>

14 Respondent failed to make findings regarding these seven  
15 items, and, therefore, we agree with petitioner that respondent  
16 erred in its threshold conclusion. We find that in the present  
17 case there are insufficient findings for Lane County to  
18 conclude that the property should not be included in the  
19 inventory. Therefore, requirements of Goal 17 are applicable  
20 and should have been addressed before granting the contested  
21 zone change. That conclusion, however, does not end  
22 consideration of the matter before this Board. The mere fact  
23 that respondent failed to find that Goal 17 was applicable is  
24 not reversible error on its face. Since we have ruled that  
25 Goal 17 is applicable, it is still possible to uphold the  
26 respondent's decision provided proper, supportable findings

1 were nevertheless made to allow for the proposed use.

2 In that regard, petitioners allege that since goal 17 is  
3 applicable, respondent should have made findings that applicant  
4 complied with section (3)(f) of Goal 17 in order to allow the  
5 contested use.<sup>3</sup> Petitioners allege such findings were not  
6 made.

7

8 Goal 17, Section (3)(f) states:

9 "(3) Shorelands in rural areas other than those  
10 designated in (1) above shall be used as appropriate  
for:

11 ". . . .

12 "(f) subdivisions, major and minor partitions  
13 and other uses only upon a finding by the governing  
14 body of the county that such uses satisfy a need which  
15 cannot be accommodated at other upland locations or in  
urban or urbanizable areas and are compatible with the  
objectives of this goal to protect riparian vegetation  
and wildlife habitat; and

16 ". . . ."

17 Section (3)(f) is a legislative standard which sets forth a  
18 need and other available property test, and therefore the  
19 Oregon Supreme Court's holding in Neuberger v. City of  
20 Portland, 288 Or 155, \_\_\_ P2d \_\_\_ (1980) is not controlling.

21 This Board reviewed respondent's findings of fact in an  
22 attempt to determine whether sufficient findings were made  
23 regarding the above cited Goal 17 (3)(f) test. Although the  
24 3(f) test was not specifically addressed, we nevertheless made  
25 our review under the ruling of the Oregon Supreme Court in  
26 Sunnyside Neighborhood vs. Clackamas Co. Comm., 280 Or 3, 569

1 p2d 1063 (1977) wherein it was stated that no particular form  
2 is required for findings of fact in support of land use  
3 decisions.

4 As regards elements contained in the Section (3)(f) test,  
5 the respondent's finding no. 6 states:

6 "In this particular case both the staff report  
7 and the Applicant addressed these two criteria and it  
8 was determined by both West Lane Planning Commission  
9 and the Board of Commissioners that the Applicant had  
established a public need for tourist commercial  
zoning in this area and the Subject Property was the  
best available parcel to satisfy that need."

10 Respondent's finding no. 14 states:

11 "Dunes City has purposely not allocated in its  
12 comprehensive plan sufficient commercial land for  
either local needs or tourist commercial uses."

13 Finding no. 16 states:

14 "The Coastal Subarea Plan identifies the  
15 substantial impact of the tourist industry on this  
16 area (pp. 21, 47-49) and recommends emphasis on the  
expansion of tourist-commercial services. (p. 46)."

17 Finding no. 19 states:

18 "(e) Oregon Dunes NRA and other natural  
19 restraints limit the amount of land which might be  
used for tourist commercial uses in this area and  
along Highway 101.

20 Finding no. 29 states in pertinent part:

21 "The city attorney further acknowledged that  
22 Dunes City does not provide sufficient commercial land  
23 within its boundaries to serve its residents and that  
Dunes City residents must travel to Glenada and  
Florence to accommodate their commercial needs."

24 On their face the above findings are sufficient to comply  
25 with the 3(f) test, however, the petitioner also alleges that  
26 there is insufficient evidence in the record to support the

1 findings. Our review of the record, especially that portion  
2 cited by respondent Lane County in its brief, leads this Board  
3 to conclude that, as a matter of law, the record does not  
4 support a finding of need for a Tourist Commercial zone on the  
5 subject property. It is the applicants burden to supply such  
6 evidence. Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d  
7 23 (1973).

8 Respondent strongly relies on statements by the Lane County  
9 planning staff as support for its findings regarding the need  
10 and other available property tests. The staff reports states:

11  
12 "2. PUBLIC NEED

13 "Existing Tourist Commercial districts are  
14 essentially developed with few vacant lots or  
15 buildings available. A question is raised concerning  
16 the future increase of the touring public in light of  
17 energy availability. Encouragement of commercial  
18 activity in communities may satisfy some tourist  
19 commercial needs if the commercial areas present a  
20 form of sight-seeing in their own right either by  
21 their unusual character or adjacent to sight-seeing  
22 and recreational features. The elongated character of  
23 coastal recreation lends itself to a linear pattern of  
24 tourist commercial uses providing periodic rest stops  
25 as a public need.

26 "3. APPROPRIATE LOCATION

27 "Tourist Commercial properties occur  
28 intermittently along Hwy. 101 between this property  
29 and Florence. Two districts are fairly pronounced:  
30 the first is in Glenada and the second in Dunes City.  
31 These districts are separated by Woahink and Honeyman  
32 State Parks. The Dunes City district is not as  
33 compact as Glenada having a scatteration of tourist  
34 commercial ending in the south with a myrtlewood shop  
35 adjacent to the applicant's proposal. Further south  
36 beyond applicant's property is Woahink Lake east of  
37 Hwy. 101 and a pond west of Hwy. 101. As the last

1 parcel in this commercial district, the expansion of  
2 existing Tourist Commercial zoning would appear  
3 appropriate, if the physical characteristics of the  
4 property can accommodate development."

5 In addition, finding no. 16, supra, refers to the Coastal  
6 Subarea Plan and its emphasis on need. Respondent did not  
7 include that document as part of the record against which we  
8 can test substantiality.

9 As regards the above quoted paragraphs from respondent's  
10 staff report they fail to support a finding that a need exists  
11 for the proposed use at the subject location. They do not  
12 include any measurable data against which respondent Lane  
13 County's findings can be reviewed.

14 Section 3(f) of Goal 17 requires a consideration of "other  
15 upland locations or . . . urban or urbanizable areas." This  
16 Board has not been directed to substantial evidence indicating  
17 compliance with that directive.

18 In addition the third element of the 3(f) test was not  
19 sufficiently addressed. The test requires evidence that the  
20 use will be compatible with the objectives of Goal 17. This  
21 evidence may have been obtainable had the seven part test  
22 (footnote 2) necessary to determine whether the subject  
23 property should be in a shorelands inventory been completed.  
24 That, however, was not done.

25 Based on the foregoing, respondent Lane County's land use  
26 decision granting the applicant's rezone as set forth in Order  
27 No. 80-2-26-10 adopting findings of fact and conclusions of law

1 identified as WZC No. 78-274, is reversed and remanded for  
2 further consideration consistent with this opinion.<sup>4</sup>

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FOOTNOTES

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4 Based on our decision regarding the property's relation to  
5 Woahink Lake and Highway 101, petitioner's allegation that the  
6 lily pond is a coastal lake is not necessary to address.

7

8 "Identification

9 "Land contiguous with the ocean, estuaries, and coastal  
10 lakes shall be identified as coastal shorelands. The  
11 extent of shorelands shall include at least:

12 "(1) Lands which limit, control, or are directly  
13 affected by the hydraulic action of the coastal water body,  
14 including floodways;

15 "(2) Adjacent areas of geologic instability;

16 "(3) Natural or man-made riparian resources,  
17 especially vegetation necessary to stabilize the shoreline  
18 and to maintain water quality and temperature necessary for  
19 the maintenance of fish habitat and spawning areas;

20 "(4) Areas of significant shoreland and wetland  
21 biological habitats;

22 "(5) Areas necessary for water-dependent and  
23 water-related uses, including areas of recreational  
24 importance which utilize coastal water or riparian  
25 resources, areas appropriate for navigation and port  
26 facilities, and areas having characteristics suitable for  
27 aquaculture;

28 "(6) Areas of exceptional aesthetic or scenic  
29 quality, where the quality is primarily derived from or  
30 related to the association with coastal water areas; and

31 "(7) Coastal headlands."

32

33 Petitioner does not allege sections 1 or 2 are applicable.

1 FOOTNOTES (CONTINUED)

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3 On September 17, 1980, LCDC supplied the following to the  
4 Board in reply to the Board's Recommendation:

4 "The Land Conservation and Development Commission  
5 was unable to concur in any action on the allegations  
6 of goal violations in LUBA 80-032, Dunes City v. Lane  
7 County, at its meeting on September 5, 1980.

7 "Therefore the Commission makes no determination  
8 in this case."  
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CERTIFICATE OF MAILING

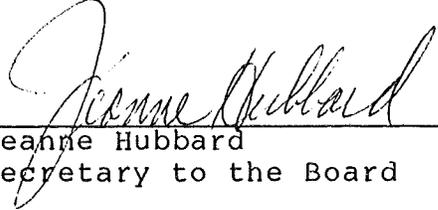
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 80-032, on September 18, 1980, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Dwight Ronald Gerber  
Attorney at Law  
P.O. Box 0  
Florence, OR 97439

Margie Hendriksen  
Legal Counsel  
128 East 8th Avenue  
Eugene, OR 97401

Allen L. Johnson  
Attorney at Law  
Suite 200, 915 Oak Street  
Eugene, OR 97401

Dated this 18th day of September, 1980.

  
\_\_\_\_\_  
Jeanne Hubbard  
Secretary to the Board

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1 COX, Referee.

2 This case is back before the Land Use Board of Appeals on  
3 remand from the Court of Appeals, CA No. 19061. The petitioner  
4 has moved this Board for dismissal on the grounds that the case  
5 has been settled to the satisfaction of the petitioners.

6 Petitioner has designated his motion as a stipulated motion for  
7 dismissal to which all parties involved stipulated during a  
8 conference call held on 6/05/81.

9 It is, therefore, the order of this Board that this case is  
10 dismissed with prejudice to the claims of the Petitioner and  
11 without costs or disbursements being awarded to any party.  
12 Petitioner's \$150 deposit for costs shall be refunded to it.

13 Dismissed.

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