

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

FEB 25 2 55 PM '88

3	RICHARD C. BERGSTROM and)	
	CAROL A. PATZKOWSKY,)	
4)	
	Petitioners,)	LUBA No. 87-099
5)	
	vs)	FINAL OPINION
6)	AND ORDER
	KLAMATH COUNTY OREGON, and)	
7	ED SHIPSEY, ¹)	
)	
8	Respondents.)	

9
10 Appeal from Klamath County.

11 Carol A. Patzkowsky and Richard C. Bergstrom filed a
12 petition for review. Richard C. Bergstrom argued on his own
13 behalf.

14 Steven A. Zamsky filed a brief and argued on behalf of
15 Participant-Respondent Ed Shipsey. With him on the brief was
16 Zamsky & Belcher.

17 Michael L. Spencer, Klamath Falls, filed a brief for
18 Respondent Klamath County.

19 BAGG, Chief Referee; HOLSTUN, Referee; SHERTON, Referee,
20 participated in the decision.

21 REMANDED 02/25/88

22 You are entitled to judicial review of this Order.
23 Judicial review is governed by the provisions of ORS 197.850.
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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners seek review of a Klamath County Board of
4 Commissioners order approving a preliminary subdivision plat
5 creating 15 lots of slightly more than one acre each out of a
6 20 acre parcel. The subject property is designated rural in
7 the comprehensive plan and is zoned for rural residential use
8 with a one acre minimum (R-1). Petitioners ask that we reverse
9 the county's decision.

10 FACTS

11 This is the second time approval of this subdivision has
12 been before this Board and the third time it has been before
13 the county. We remanded the matter in Patzkowsky v. Klamath
14 County, 8 Or LUBA 64 (1983).

15 In 1984, the Land Conservation and Development Commission
16 (LCDC) acknowledged portions of the Klamath County
17 Comprehensive Plan (plan) and Land Development Code (code)
18 affecting the subject property. LCDC Compliance Acknowledgment
19 Order 84-ACK-135 (August 6, 1984). Two of the significant
20 natural resource areas identified in the acknowledged plan are
21 the Bear Valley Eagle Roosting Area and the Pearson Butte Deer
22 Winter Range. Plan Goal 5, Policy 13 states that the county
23 shall protect the roosting area (including the core area,
24 primary buffer zone, and secondary buffer zone) and the
25 flyway. With regard to the Pearson Butte Deer Winter Range,
26 plan Goal 5, Policy 16 states that the county shall protect

1 significant big game winter ranges. The county code
2 Significant Resources Overlay (SRO) zone was applied to both
3 natural resource areas. Code Article 83.

4 On October 21, 1987, the board of commissioners issued the
5 appealed order approving a preliminary subdivision plat for the
6 subject property.

7 FIRST ASSIGNMENT OF ERROR

8 "The action of the County approving the subject
9 preliminary subdivision Plat violates the County's
Goal 5 Comprehensive Plan policies.

10 Petitioners argue that the plan Goal 5, Policy 13
11 "implementation" statement that "density in the secondary
12 buffer zone will be no greater than one unit per 20 acres"
13 prohibits a density of greater than one unit per 20 acres
14 within the Bear Valley eagle roosting area secondary buffer
15 zone.² According to petitioners, the county order approving
16 the plat recognizes the subject property is within this zone
17 but finds that the resource importance of the area is slight.
18 The county then applied Code Section 83.004(C)(2) to justify
19 creation of residential lots one acre in size. Petitioners
20 argue this choice of action was impermissible.

21 Petitioners claim that the county's use of Code Section
22 83.004(C)(2) constitutes a defacto amendment to the
23 comprehensive plan. In petitioners' view, the comprehensive
24 plan prohibition against density greater than one unit per 20
25 acres is absolute.

26 We do not read the acknowledged comprehensive plan and land

1 use regulations in the same way as petitioners. The plan also
2 includes the "Bear Valley ESEE Paper" (paper).³ The paper
3 identifies "subdivision density greater than one unit/20 acres"
4 as a conflicting use within the secondary buffer area, and
5 makes a determination that the secondary buffer area will be
6 treated as a "3C - limit conflicting uses" area.⁴

7 The acknowledged code requires the SRO zone to be applied
8 to the significant natural resource areas designated by the
9 plan. Code Section 83.001. The SRO zone specifically
10 recognizes that if a use permitted in the underlying zone is
11 listed as a conflicting use in Code Section 83.007, the
12 applicant shall comply with the review procedure and criteria
13 of Code Section 83.004(C). Code Section 83.004(D). Code
14 Section 83.007(D) lists residential density greater than one
15 unit per 20 acres as a conflicting use within the Bear Valley
16 Eagle Refuge secondary buffer area.

17 Code Section 83.004(C) states that when a "3C [limit
18 conflicting uses] decision has been made for a particular
19 resource, (as indicated on the adopted Goal 5 inventory
20 sheets)", an applicant for development approval is "encouraged"
21 prior to county review to meet with the agency having
22 responsibility for the resource. The meeting is to identify
23 the resource and to discuss development and management plans
24 which would allow both resource preservation and development to
25 occur. If the agency and the applicant cannot agree on a
26 management plan, the following findings must be made:

1 "a. The resource or site must be disturbed to provide
2 for reasonable use of the site, and if not
3 disturbed, the applicant would be substantially
4 damaged.

5 "b. The use proposed will directly benefit the
6 community and satisfies a substantial public need
7 or provides for a public good which clearly
8 outweighs retention of the resource.

9 "c. The proposed development would not result in the
10 loss of a rare, irretrievable, or irreplaceable
11 natural feature or scientific opportunity or the
12 disturbance of a substantially unaltered natural
13 feature or area in or adjacent to the proposed
14 site, unless the benefit to the public from the
15 proposed use clearly outweighs the public good
16 from retaining the feature or area.

17 "d. The public benefit due to the development of the
18 particular site would be maximized when compared
19 to development of similar properties in the area
20 not possessing a unique site or resource.

21 "e. The identified site or resource cannot be
22 physically developed for an energy source or has
23 a low potential for an energy development based
24 upon an evaluation of environmental, social, and
25 economic factors.

26 "f. The proposed development will disturb or destroy
only an area or areas of low preservation value,
and will not significantly alter or disturb other
portions of the resource area on or adjacent to
the site.

"g. In big game winter ranges, the cumulative effect
of the proposed land use change and other
development in the area must be consistent with
the maintenance of long term big game habitat
values."

Code Section 83.004(C)(2).

While some ambiguity exists in the acknowledged plan and
code provisions, we cannot say that the county's interpretation
of its plan and code is unreasonable. The county reads the
regulations together to permit residential density of greater

1 than one unit per 20 acres in the Bear Valley Eagle Refuge
2 secondary buffer area if the requirements of Code Section
3 83.004(C)(2) are met, notwithstanding the "implementation"
4 provision in the plan which would otherwise limit density to
5 one unit per 20 acres. Because we find this interpretation
6 reasonable, we must uphold it. Alluis v. Marion County, 64 Or
7 App 478, 481, 668 P2d 1242 (1983).

8 The first assignment of error is denied.

9 SECOND ASSIGNMENT OF ERROR

10 "The board of commissioners did not allow petitioners
11 to present arguments at the hearing held by the board
12 of commissioners thereby violating petitioners' right
13 of due process."

13 Petitioners state the county board remanded the matter to
14 the planning commission after the planning commission's denial
15 of the subdivision application. The planning commission again
16 denied the application, and that denial was again appealed to
17 the board of commissioners. The board of commissioners
18 eventually reversed the planning commission and approved the
19 request. Under Code Section 33.005, appeal of a decision on a
20 preliminary subdivision plat is limited to the record. Code
21 Section 33.006(B) allows persons filing a notice of appeal the
22 right to present argument but does not permit others to
23 testify. Petitioners say they attempted to present arguments
24 but were denied the opportunity to do so. In contrast,
25 however, petitioners say the applicant's attorney was allowed
26 to make substantial comments about the case.

1 Petitioners complain that the county's procedure violated
2 petitioners' right to due process. Petitioners also claim the
3 procedure employed violated Article I Section 20 of the Oregon
4 Constitution as it granted to a class of citizens, i.e.
5 applicants for land development approval, the privilege to
6 address the decisionmaker but denied that privilege to
7 opponents of the development.

8 We do not agree. The record reveals that petitioner
9 Bergstrom did present argument to the board. Record 17-19.
10 The argument was, however, limited by the county to two
11 provisions of the county zoning code. The procedures outlined
12 in the county code for appeals of land use decisions to the
13 county board of commissioners give the county board broad
14 authority to limit the issues on appeal. Code Section
15 33.006(B) provides that the appeal authority (in this case the
16 board of commissioners) is to make its decision on the record
17 after first granting a right of argument "but not the
18 introduction of additional evidence to any party who has filed
19 a notice of appeal." The county clearly had authority to limit
20 petitioner's argument.

21 Petitioners' complaint that the applicant was allowed to
22 present argument while petitioner was not is not well founded.
23 The applicant's representative did discuss matters having to do
24 with eagle roosting areas, but the discussion was in the
25 context of two criteria applicable in the case. The two
26 criteria, Code Section 83.004(C)(2)(b) and (d), were the same

1 criteria to which the county commission restricted petitioner
2 Bergstrom's argument. We do not find the fact that petitioner
3 Bergstrom presented his argument in a different manner than the
4 applicant's representative to be significant.⁵

5 We find nothing in the county's action to unduly limit the
6 petitioner or benefit the applicant.

7 The second assignment of error is denied.

8 THIRD ASSIGNMENT OF ERROR

9 "The county's order fails to address relevant criteria
10 contained in the county's land development code."

11 Petitioners argue the code requires that the county's order
12 state applicable criteria and contain statements of facts
13 establishing compliance with those criteria. Petitioners also
14 argue that the code requires the county to find that the
15 preliminary plat is in conformance with the comprehensive
16 plan. Petitioners refer us to the county planning department
17 staff report, which identifies a number of plan provisions as
18 applicable to approval of the preliminary plat. Record 22-38.
19 According to petitioners, the county's order does not identify
20 or address relevant comprehensive plan policies and only
21 includes conclusional statements that the application is in
22 conformity with the comprehensive plan.

23 Participant-respondent Shipsey argues that the county
24 finding that the preliminary plat is in conformance with the
25 plan "after resolution of the Goal 5 issues as set forth in
26 Code Section 83.004C(2) and the fire issue" is sufficient to

1 demonstrate compliance with the plan, given that the resolution
2 of those issues is discussed in the county's order.

3 County Code Section 46.003(A) sets out the following
4 criterion for approval of a preliminary plat:

5 "The preliminary plat of the proposed subdivision is
6 in conformance with the Klamath County Comprehensive
Plan."

7 Furthermore, Code Section 31.011(A) requires that the county's
8 order and findings include

9 "A statement of the applicable criteria and standards
10 against which the proposal was tested, and of the
11 hearing body's interpretation of what would be
required to achieve compliance with the criterion
standards."

12 This provision clearly requires the county to identify in its
13 order the relevant criteria and to make findings addressing
14 those criteria.

15 Read together, the above-quoted code provisions clearly
16 require a county order approving a subdivision preliminary plat
17 to identify applicable comprehensive plan provisions and to
18 adopt findings of fact demonstrating, and a statement of
19 reasons explaining its conclusion of, compliance with such
20 provisions. We agree with petitioners that the county's order
21 does not do this.

22 In addition, petitioners point out that Code Section
23 83.004(C) (2) (a) requires a finding that

24 "The resource or site must be disturbed to provide for
25 reasonable use of the site and if not disturbed, the
applicant will be substantially damaged."

26 Petitioners argue the county's order says the applicant

1 claims he will suffer an economic loss of \$150,000 if five acre
2 minimum lot sizes were imposed upon him. The county's order
3 then goes on to state the following:

4 "No determination that the applicant would suffer such
5 a loss is made." Record 8.

6 In other words, petitioners contend the county did not make a
7 determination that the applicant would suffer such a loss.

8 Petitioners argue the county's finding that the applicant would
9 be substantially damaged if the lot sizes were greater than one
10 acre is not supported by the order or the record.

11 Participant-respondent says there is uncontroverted
12 evidence in the record that the value of the property would be
13 substantially less with either a 20 acre or a five acre minimum
14 lot size as opposed to the approximately one acre size lots
15 approved by the county board. Participant-respondent argues
16 that the county code allows weighing the value of the natural
17 resource against damage to the applicant seeking to develop the
18 property. Participant-respondent concludes the county properly
19 found the value of the secondary buffer area was slight and the
20 buffer area exceeded what could be reasonably considered
21 necessary to protect eagles and the deer winter range.

22 We do not believe it is up to this Board to determine what
23 amount of damage constitutes "substantial damage" to an
24 applicant.⁶ The county order states the applicant presented
25 evidence of the cost to fence the boundary amounting to
26 approximately \$20,000. Further, the county order states the

1 applicant claims he will lose \$150,000 if a five acre minimum
2 lot size is imposed. However, the county immediately follows
3 that statement of evidence with the statement that it has made
4 no determination that the applicant would suffer such a loss.

5 We believe the county must consider the facts and decide
6 for itself whether not disturbing the natural resources of the
7 property will indeed cause damage to the applicant. If the
8 county determines there would be damage to the applicant, its
9 order must describe the nature and extent of such damage and
10 determine whether it constitutes "substantial" damage within
11 the meaning of Code Section 83.004(C) (2) (a).

12 The third assignment of error is sustained.

13 FOURTH ASSIGNMENT OF ERROR

14 "The order issued by the county is not supported by
15 substantial evidence in the record."

16 In this assignment of error, petitioners complain that
17 there is no evidence to support the county's finding that the
18 importance of the subject eagle roost secondary buffer area and
19 deer winter range is "slight." Record 8. Petitioners further
20 argue that there is no evidence to support the applicant's
21 claim of substantial damage. In addition, petitioners claim
22 there is no evidence to support findings 17, 18, 19, 20, 21 and
23 22. These findings are about the natural resource qualities of
24 the subject property, and address the requirements of Code
25 Section 83.004(C) (2) (b) through (g).

26 Neither respondent nor participant-respondent has cited us

1 to evidence in the record supporting the findings claimed to
2 lack supportive evidence by petitioners. We will not search
3 the record for such evidence. We rely on respondents to
4 provide us with citations to evidence in the record adequately
5 supporting challenged findings. City of Salem v. Families for
6 Responsible Govt, 64 Or App 238, 249, 668 P2d 395 (1983);
7 Grindstaff v. Curry County, 15 Or LUBA 100, 109 (1986).

8 Because the respondents have not cited us to such evidence, we
9 must sustain this assignment of error.

10 CONSTITUTIONAL ISSUES

11 Participant-respondent argues that county imposition of a 5
12 or 20 acre limitation on the minimum size of parcels which
13 could be created from the subject property would be "no
14 different than placing an easement over property for the
15 benefit of the public, without compensating the property
16 owner." Participant-respondent contends such an imposition is
17 contrary to the 5th Amendment and the 14th Amendment
18 guarantees", citing Nollan v. Coastal Comm., ___ U.S. ___, 107
19 S.Ct. 312, 93 L.Ed.2d 286 (1987).

20 We will not review this claim. The county has not imposed
21 such restrictions, and all we have from participant-respondent
22 is an undeveloped argument speculating on constitutional
23 violation if such a lot size limitation is imposed. There is
24 nothing for us to review in participant-respondents' claim.

25 The decision of Klamath County is remanded for further
26 proceedings not inconsistent with this opinion.

FOOTNOTES

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Ed Shipsey, the applicant below, did not file a notice of intent to participate or a motion to intervene. We consider him a party, however, as he filed a brief and there is no objection to his status as a party in this proceeding. We will refer to Mr. Shipsey in our opinion as "participant-respondent" in order to distinguish him from respondent county.

2

The plan states the following with regard to the relationship between plan "policies," "rationales" and "implementations":

"Mandatory policies are those policies under each goal headings [sic] contained in Part I of the Comprehensive Plan Policies document which contain a Policy, Rationale, and Implementation and 'shall' and 'will' statements. The Policy Statement is the governing language. Both Rationale and Implementations are subordinate to the policy."

Plan, p.2.

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The "Bear Valley ESEE Paper" identifies the location, quality and quantity of the resource, identifies conflicting uses, determines the economic, social, environmental and energy (ESEE) consequences of such conflicts, and identifies a program to achieve the goal of resource protection, as required by Statewide Planning Goal 5 and OAR 660-16-000 to 660-16-010. The Bear Valley ESEE Paper was adopted as part of the county's comprehensive plan on February 16, 1984 by Klamath County Ordinance 44.2, of which we take official notice.

4

By contrast, the paper determines that the core and primary buffer areas (i.e., the area within the refuge boundary) will be treated as "3A - protect the resource" areas.

The county's use of the terms "3A" and "3C" uses relates to the following provisions in Code Sec. 83.004 - "Review Procedure/Criteria":

1 "A. 'Protect the Resource Decision (3A)'

2 "1. When a '3A' decision has been made for a
3 particular resource (as indicated on the
4 adopted Goal 5 inventory sheets), the
5 applicant in coordination with the
6 responsible agency must:

7 "a. Identify the type and extent of
8 resources involved;

9 "b. Determine the exact location of the
10 resource; and

11 "c. In coordination with the responsible
12 agency (as noted in Section 83.008 -
13 Agency/Resource List), develop a
14 management plan which protects the
15 resource.

16 "2. If the responsible agency and applicant
17 cannot agree on an acceptable management plan
18 which protects the resource, the land use
19 request shall be denied.

20 "3. If, in the opinion of the agency having
21 statutory responsibility or an agency listed
22 on the Agency/Resource List (Section 83.008),
23 the resource is not on the applicant's
24 property, or that the development proposal
25 will not impact the resource, the standards
26 in this Article shall not apply.

"B. 'Allow Conflicting Uses Decision (3B)'

"1. When a '3B' decision has been made for a
particular resource (as indicated on the
adopted Goal 5 inventory sheets), the
applicant and request shall not be subject to
the standards of this Article.

"C. 'Limit Conflicting Uses Decision (3C)'

"1. When a '3C' decision has been made for a
particular resource (as indicated on the
adopted Goal 5 inventory sheets), the
applicant shall, prior to review by the
appropriate reviewing body, be encouraged to
meet with the agency having responsibility
for the resource in order to:

- 1 "a. Identify the type and extent of
2 resources involved;
- 3 "b. Determine the exact location for the
4 resource; and
- 5 "c. Discuss possible development and
6 management plans that would allow for
7 both resource preservation and
8 development to occur.

9 "2. If the responsible agency and the applicant
10 cannot agree on a management plan which would
11 allow for both resource preservation and
12 development, the following findings of fact,
13 if applicable to the disagreement must be
14 made;

15 * * * * *

16 "3. If, in the opinion of the agency having
17 statutory responsibility or an agency listed
18 on the Agency/Resource List (Section 83.008),
19 the resource is not on the applicant's
20 property, or that the development proposal
21 will not impact the resource, the standards
22 in this Section shall not apply."

23 5

24 Mr. Bergstrom's complaint appears to be based on the
25 following admonition by a county commissioner:

26 "JIM ROGERS: Mr. Bergstrom, when I started this, I
said we would keep our remarks or arguments to two
things. The use proposed will directly benefit the
community and so on, and the public benefit due to the
development of the particular site would be maximized
when compared. We are not here to look at the eagle
overlay. That's a fact of life. So, would you please
make sure your arguments focus on Article 2b and 2d."
Record 18.

The county commissioner was referring to the following
provisions of Code Section 83.004(C)(2):

"b. The use proposed will directly benefit the
community and satisfies a substantial public need
or provides for a public good which clearly
outweighs retention of the resource.

1 "d. The public benefit due to the development of the
2 particular site would be maximized when compared
3 to development of similar properties in the area
not possessing a unique site or resource."

4 6

5 The county order recites evidence that the total increase
6 to the tax base due to development of the property would be one
million dollars in the event a one acre minimum is applied, but
only \$150,000 if a five acre minimum is applied. This fact,
7 however, has nothing to do with damage to the applicant.
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