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

CRAIG ALAN DeSHAZER and COLLEEN)
MARIE DeSHAZER,)
)
Petitioners,)
)
vs.)
)
COLUMBIA COUNTY,)
Respondent,)

LUBA No. 97-174

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Craig Alan DeShazer and Colleen Marie DeShazer, Scappoose, filed the petition for review and argued on their own behalf.

Anne Corcoran Briggs, Assistant County Counsel, filed the response brief and argued on behalf of the respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 04/30/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a seven-lot
4 subdivision on property zoned Rural Residential five-acre
5 minimum (RR-5).

6 **FACTS**

7 The subject property is composed of two parcels totaling
8 approximately 14 acres zoned RR-5, located about one mile
9 outside the city of St. Helens' urban growth boundary. In
10 1995 Keith Settle (the applicant) applied to partition the two
11 parcels into a total of six two-acre parcels. The application
12 relied on the availability of a community water supply from
13 the McNulty Water Association to reach the two-acre density,
14 as permitted by the county's zoning ordinance (CCZO) 604.2.
15 Under the terms of a 1970 settlement agreement, the McNulty
16 Water Association is obligated to accept the owners of the
17 subject property as members of the association. The county
18 approved the partitions, and petitioners appealed. We
19 reversed the county's decision on the basis that the McNulty
20 Water Association's plan to provide water to the applicant's
21 development constituted an "extension" of a water system in
22 violation of Statewide Land Use Planning Goal 11 (Goal 11).
23 DeShazer v. Columbia County, 31 Or LUBA 300 (1996).

24 In 1997, the applicant submitted a new subdivision
25 application to divide the subject property into seven two-acre
26 lots. The subdivision application states that the McNulty

1 Water Association will extend its water system onto the
2 subject property. The application also indicates that the
3 development will require a fire hydrant, and a new water main
4 running to the center of the property to which the seven two-
5 acre lots will connect individual water lines. A drawing
6 attached to the application shows a well and water tank to the
7 northwest of the subject property at an unspecified distance.
8 A line is drawn coming from the water tank, crossing
9 nonadjacent property boundaries and a road, entering the
10 subject property and proceeding approximately 400 feet to the
11 center of the property. A notation identifies the line as the
12 "proposed water line." Record 303.

13 The county planning commission approved the subdivision,
14 which petitioners appealed to the county board of
15 commissioners (commissioners). The commissioners held a de
16 novo hearing, and affirmed the planning commission's approval,
17 adopting its findings of fact and conclusions of law.

18 This appeal followed.

19 **TENTH ASSIGNMENT OF ERROR**

20 Petitioners argue that the county "misconstrued the
21 applicable law and failed to adopt adequate findings to
22 support a determination of compliance with Statewide Land Use
23 Goal 11." Petition for Review 14-15. We understand
24 petitioners to contend that the present case is governed by
25 our decision in DeShazer v. Columbia County, 31 Or LUBA 300
26 (1996), where we held that the county's prior approval of two

1 partitions on the subject property violated Goal 11.
2 DeShazer, 31 Or LUBA at 304. Goal 11 states in relevant part:

3 "For land that is outside urban growth boundaries
4 and unincorporated community boundaries, county land
5 regulations shall not rely upon the establishment or
6 extension of a water system to authorize a higher
7 residential density than would be authorized without
8 a water system." (Emphasis added).

9 Goal 11 defines "water system" as follows:

10 "Water system--means a [system] for the provision of
11 piped water for human consumption subject to
12 regulation under ORS 448.119 to 448.285."

13 We understand petitioners to argue that the extension of
14 the McNulty Water Association's water system onto the subject
15 property constitutes an "extension of a water system" within
16 the meaning of Goal 11, and thus the county erred in approving
17 a subdivision that relies on the extension of a water system,
18 in violation of Goal 11.

19 The challenged decision makes no findings with respect to
20 compliance with Goal 11, but one of the findings adopted by
21 the commissioners rejects petitioners' argument that our
22 decision in Deshazer v. Columbia County controls the current
23 application with respect to Goal 11. The finding states:

24 "[DeShazer v. Columbia County] LUBA No. 95-260
25 (June, 1996) was a ruling based on the DLCD v.
26 Lincoln County case (LUBA No. 95-166, May 1995),
27 which prohibited extending a water system in order
28 to permit smaller lots than would otherwise be
29 allowed in a zone. The DeShazer decision became
30 moot when the LUBA decision in the Lincoln County
31 case was overturned by the Oregon Court of Appeals
32 [in DLCD v. Lincoln County, 144 Or App 9, 925 P2d
33 135, rev den 324 Or 560 (1996)]. Those cases do not
34 apply to this subdivision, which is a new
35 application with a different request." Record 37.

1 It is not entirely clear what the county intended by this
2 finding. Goal 11 is directly applicable to intervenor's
3 application. ORS 197.835(5).¹ Accordingly, the county must
4 find either compliance or noncompliance with Goal 11, or find
5 that intervenor's application does not invoke Goal 11. See
6 O'Rourke v. Union County, 29 Or LUBA 303, 319 (1995). The
7 decision makes no findings, at least no explicit findings,
8 with respect to any of those options. Instead, the finding
9 recites a legal conclusion regarding the effect of the Court
10 of Appeals decision in DLCD v. Lincoln County on our decision
11 in DeShazer.

12 For the following reasons, we agree with petitioner that
13 the county's finding is inadequate. The county fails to find
14 any facts establishing that the instant application does not
15 invoke Goal 11, nor does it provide any explanation or
16 analysis why Goal 11 does not apply. Even assuming that the
17 county is correct that DLCD v. Lincoln County overturned our
18 holding in DeShazer with respect to Goal 11, that result would
19 not relieve the county of its obligation to make findings
20 regarding Goal 11, based on the facts of the present case.
21 Moreover, we disagree with the county that the Court of

¹ORS 197.835(5) states:

"The board shall reverse or remand a land use decision subject to an acknowledged comprehensive plan or land use regulation if the decision does not comply with the goals and the Land Conservation and Development Commission has * * * adopted a new or amended goal under ORS 197.245 requiring the local government to apply the goals to the type of decision being challenged."

1 Appeals decision in Lincoln County necessarily overturned our
2 holding in DeShazer.

3 DLCD v. Lincoln County involved an application for 113-
4 lot subdivision on 50 acres zoned RR-1. The county code
5 permitted increased density if public or community water
6 and/or sewer systems are provided to each lot. The property
7 was within the boundaries of a public water district, which
8 had two water mains at the boundaries of the property. The
9 county approved the subdivision. On appeal to this Board, we
10 reversed, holding that Goal 11 prohibited reliance on an
11 established, existing water system to authorize increased
12 residential density, and further that the term "extension" as
13 used in Goal 11 could refer to connection of a water system to
14 individual properties within district boundaries as well as
15 extension of a water system outside a water district's
16 boundaries. DLCD v. Lincoln County, 31 Or LUBA 240, 246
17 (1996).

18 The Court of Appeals reversed our decision, disagreeing
19 that "establishment" of a water system refers to existing, as
20 well as prospective water systems. Because the application at
21 issue in DLCD v. Lincoln County did not rely on prospective
22 creation of a water system, the court held that we erred in
23 reversing the county's decision on that basis. 144 Or App at
24 15.

25 The court also addressed our determination that
26 "extension of a water system" for purposes of Goal 11 included

1 connecting individual lots to a water system within a water
2 district, stating:

3 "The parties also disagree about the meaning of
4 'extension.' DLCD contends that, as used in the
5 amendment, the term 'extension' includes connections
6 to individual lots within the existing service area,
7 such as those that are planned here. The county and
8 petitioners argue that the word refers only to
9 physical expansions of the service areas or major
10 facilities of existing systems. We agree with
11 petitioners and the county on both points.

12 * * * * *

13 "The word "extension" can be read in the respective
14 ways that the parties espouse, but the more
15 plausible meaning here, in our view, entails a
16 greater expansion than new hookups within an
17 existing service area. Again, many words with more
18 minimalist connotations could have been found, had
19 simple attachments to a proximate water supply been
20 what the drafters wished to describe. Moreover,
21 when the terms "establishment" and "extension" are
22 considered together, the likelier intended parallel
23 was (1) the creation of a new system in an area and
24 (2) the expansion of an existing one into a
25 previously unserved area, rather than (1) the
26 existence of an old system and (2) its connection to
27 serviceable locations in its present area." 144 Or
28 App at 14-15.

29 The court then examined the administrative history of the Goal
30 11 amendments at issue:

31 "Although the administrative history is not as
32 specifically dispositive as to the meaning of the
33 word "extension," in isolation, the history points
34 to a reading of the entire phrase "establishment or
35 extension" that is systematic in scope, and that
36 contemplates the new or expanded presence of water
37 systems in areas where none was present before. The
38 corollary is that the amendment does not proscribe
39 local legislation or decisions, like this one, that
40 base higher densities on existing water systems or
41 new connections to such systems within their
42 existing service areas." 144 Or App at 17.

43

1 DLCD v. Lincoln County is distinguishable from the
2 present case in two material ways. First is that the property
3 at issue in Lincoln County was within the service area of the
4 water district. In contrast, nothing in the present record
5 establishes that the subject property is within the service
6 area of the McNulty Water Association, or whether the
7 Association even has a service area. The record indicates
8 that the McNulty Water Association agreed, as part of a 1970
9 stipulated settlement, to allow the owners of the subject
10 property to join the Association as members. The foregoing
11 suggests that the subject property has no right by virtue of
12 its location to any water from the Association and,
13 conversely, that the Association's obligation to supply water
14 depends not on the boundaries of a service area but rather on
15 membership.

16 Second, the water system at issue in DLCD v. Lincoln
17 County had two water mains on the boundaries of the subject
18 property. Hooking up the new dwellings to the water system
19 required only "simple attachments to a proximate water
20 supply." DLCD v. Lincoln County, 144 Or App at 15. In the
21 present case, the record indicates that the water supply (the
22 Association's well and water tank) is some distance from the
23 subject property and no water mains exist on or near the
24 boundary of the property. The application contemplates that a
25 "proposed water line" will be built from the tank or from
26 mains extending from the tank, the line will cross nonadjacent

1 property boundaries and a county road, and proceed 400 feet
2 inside the subject property to a new water main and fire
3 hydrant, to which seven individual connections will be made.
4 The Association's system is gravity fed, and at least one of
5 the seven lots may require a pump in order to obtain water
6 from the new water line. In short, the record suggests that
7 the present case involves more than "simple attachments to a
8 proximate water supply." The county makes no findings and
9 provides no explanation why the extension of the Association's
10 water line to the subject property under these circumstances
11 does not constitute an "extension of a water system" within
12 the meaning of Goal 11.

13 For the foregoing reasons, the challenged decision must
14 be remanded for the requisite findings regarding Goal 11.

15 The tenth assignment of error is sustained.

16 **REMAINING ASSIGNMENTS OF ERROR**

17 Petitioners have not established that any of the
18 remaining assignments of error, many of which repeat arguments
19 we rejected in DeShazer v. Columbia County, 31 Or LUBA 300,
20 provide a basis to reverse or remand the county's decision.

21 These assignments of error are denied.

22 The county's decision is remanded.