

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON COAST ALLIANCE,
5 WOHINK LAKE ASSOCIATION,
6 and SUZANNE NAVETTA,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF DUNES CITY,
12 *Respondent.*

13
14 LUBA No. 2011-113

15 ORDER

16
17 FINAL OPINION
18 AND ORDER

19
20 Appeal from City of Dunes City.

21
22 Sean Malone, Eugene, filed the petition for review and argued on behalf of
23 petitioners.

24
25 Lauren Sommers, Eugene, filed the response brief and argued on behalf of
26 respondent. With her on the brief was Local Government Law Group PC, A Member of
27 Speer Hoyt LLC.

28
29 HOLSTUN, Board Member; RYAN, Board Member, participated in the decision.

30
31 BASSHAM, Board Chair, did not participate in the decision.

32
33 REMANDED

06/05/2012

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city ordinance that repeals an earlier city ordinance that adopted a mandatory, regulatory septic system maintenance program and adopts in its place a deadline to develop, adopt and implement a voluntary, educational septic system maintenance program.

INTRODUCTION

Dunes City adjoins Woahink Lake and Siltcoos Lake. Dunes City does not have a central sewer system, and the homes in Dunes City are all served by individual septic systems with onsite drainage fields. The Dunes City Comprehensive Plan recognizes the potential pollution danger that the numerous adjoining individual septic systems pose for the water quality of the lakes. The significance of that danger is magnified since city residences rely entirely on those lakes, or on wells that are hydrologically connected to those lakes, for their potable water supply. If we understand the parties correctly, water from those lakes is currently used by adjoining residences without treatment. The remaining facts necessary to frame the issues that must be resolved in this appeal are included in the city’s brief and are set out below:

“The Oregon Department of Environmental Quality (DEQ) is responsible for permitting and inspecting septic systems in the state of Oregon. DEQ has the authority to delegate oversight of septic systems to local governments. DEQ has entered into an agreement pursuant to ORS 454.725, delegating oversight of septic systems in Lane County to the county government.

“On January 14, 2010, the Dunes City Council adopted Ordinance No. 203. Ordinance No. 203 * * * put in place maintenance, inspection, and reporting requirements for septic systems in the City. Ordinance No. 203 did not amend any state law requirements regarding septic systems. Ordinance No. 203 merely required an initial inspection, mapping and pumping of each septic system in Dunes City, as well as periodic inspections to be performed every five years or upon the occurrence of certain conditions, whichever came first. If an inspection revealed that a septic system was being operated in violation of DEQ standards, notice was required to be sent to the appropriate state and

1 county authorities. Failure to inspect, pump, map or repair subjected the
2 property owner to a fine of \$250 per calendar day.

3 “After reviewing the maintenance, inspection, and reporting requirements of
4 Ordinance No. 203, the City Council initiated amendments to Chapter 157 of
5 the Dunes City Code of Ordinances by adopting Ordinance No. 211A on
6 November 10, 2011. Ordinance No. 211A repealed Ordinance No. 203 and
7 replaced it with ‘an educational program for septic system maintenance, to be
8 implemented within one year.’” Respondent’s Brief 2-3 (citations and
9 footnote omitted).

10 The last of the above-quoted sentences could be read to suggest the city has already
11 developed the educational program that will be implemented over the next year. In fact, the
12 city has not yet developed the referenced educational program and apparently plans to
13 develop, adopt and implement that program sometime before November 10, 2012.

14 In adopting Ordinance No. 211A, a majority of the city council apparently was
15 persuaded by at least two arguments during hearings below. First, opponents of Ordinance
16 No. 203 argued that the regulatory program adopted by that ordinance imposed a “one size
17 fits all” approach that unfairly burdened some residents.¹ Second, opponents of Ordinance
18 No. 203 argued there was no empirical evidence that established that failing septic systems in
19 Dunes City are a cause of water pollution in Woahink and Siltcoos Lakes.

20 In this appeal, petitioners argue there is a great deal of evidence in the record that
21 septic systems in close proximity to water bodies pose a potential pollution threat to those
22 water bodies, particularly when they are not maintained properly. Petitioners contend that
23 Ordinance No. 203 actually resulted in improvements in water quality in Woahink and
24 Siltcoos Lakes and that Ordinance No. 211A represents a step backwards in protecting the
25 lakes from pollution from failing septic systems. Petitioners contend that step backwards is

¹ Complaints below included criticism that the regulatory program imposed by Ordinance No. 203 treated part time seasonal residences with a small number of people the same as full-time residences occupied by large families. There were also complaints below that Ordinance 203 did not differentiate between residences that are close to the lakes and residences that are set back some distance from the lakes. Record 82-84, 86-87, 274, 276.

1 inconsistent with Dunes City Comprehensive Plan (DCCP) policies and Statewide Planning
2 Goal 6 (Air, Water and Land Resources Quality).

3 **FIRST ASSIGNMENT OF ERROR**

4 Ordinance No. 211A is an amendment of the city’s acknowledged land use
5 regulations and therefore must be consistent with the city’s acknowledged comprehensive
6 plan. ORS 197.175(2)(d); 197.835(7)(a).² The Dunes City Comprehensive Plan (DCCP)
7 includes “Air, Land and Water Quality” policies, including “General Policies” and “Sewage
8 Systems Policies.” One of the Sewage Systems Policies is DCCP Policy E6, which provides
9 as follows:

10 **“Policy E6.** The city shall adopt a program to improve maintenance of septic
11 systems for the benefit of all residents.

12 To address DCCP Policy E6, the city council adopted the following findings:

13 “The proposals are consistent with this policy because *the proposal improves*
14 *upon the existing code requirements to address maintenance of septic systems*
15 for the benefit of all residents in Dunes City. Dunes City found that the
16 existing requirements for mandatory septic system pumping does not benefit
17 all of the residents and therefore initiated text amendments to the code to
18 *improve upon the existing program.* To ensure that the proposals are
19 consistent with the maintenance requirements established by the Oregon
20 Department of Environmental Quality and administered by Lane County,
21 referrals were sent to the Dunes City Building Official, Lane County
22 Sanitation Department, DEQ and to DLCDC notifying them of the proposed
23 amendments. In response, the Lane County Sanitation Department and the
24 Building Department LLC responded saying they had no comments on the
25 proposed amendments. This criterion is met.” Record 21 (emphases added).

² Dunes City’s comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission. Under ORS 197.175(2)(d), if a city’s comprehensive plan and land use regulations have been acknowledged, its land use decisions (which include land use regulation amendments) must be adopted “in compliance with the acknowledged plan.” If a land use regulation amendment is appealed to LUBA, LUBA must reverse or remand the land use regulation amendment if it “is not in compliance with the comprehensive plan.” ORS 197.835(7)(a).

1 **A. Compared with the Mandatory, Regulatory Program Adopted by**
2 **Ordinance No. 203, the Voluntary, Educational Program Envisioned by**
3 **Ordinance No. 211A Will Not Improve Septic System Maintenance**

4 In their briefs, the parties take different positions regarding the meaning of DCCP
5 Policy E6. Petitioners contend that under DCCP Policy E6 the city must “demonstrate how
6 Ordinance No. 211A will improve upon Ordinance No. 203.” Petition for Review 12. Under
7 petitioners’ interpretation of DCCP Policy E6, the city must demonstrate that the voluntary,
8 educational program envisioned by Ordinance No. 211A will “improve maintenance of
9 septic systems” compared with the mandatory maintenance program that was adopted by
10 Ordinance No. 203.

11 In its brief, the city contends “[i]n determining that Ordinance No. 211A satisfied
12 Dunes City Comprehensive Plan Policy E6, the Council interpreted Policy E6 to require a
13 program to improve septic system maintenance beyond the regulatory floor set by state law.”
14 Respondent’s Brief 4. The city contends Ordinance No. 211A need not improve upon the
15 septic system maintenance achieved under Ordinance No. 203 and need only improve the
16 level of septic system maintenance that would otherwise be achieved by DEQ and Lane
17 County without any assistance from the city. The city contends that interpretation “is
18 plausible and consistent with the express language of that policy,” and therefore LUBA must
19 defer to the interpretation under *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776
20 (2010) and ORS 197.829(1)(a).

21 LUBA would almost certainly be required to defer to the interpretation advocated by
22 the city in its brief, if the city council actually adopted that interpretation. But it did not
23 adopt that interpretation, and therefore LUBA cannot defer to that interpretation in this
24 appeal. *Green v. Douglas County*, 245 Or App 430, 438-40, 263 P3d 355 (2011). On the
25 contrary, in the italicized language in the findings quoted above the city council implicitly
26 interpreted DCCP Policy E6 to require substantially the same thing petitioners argue it
27 requires. In two places the city council found that the voluntary educational program to be

1 adopted under Ordinance No. 211A “will improve upon the existing program,” which we
2 understand to be a reference to the Ordinance No. 203 program. There would be no reason
3 for the city council to find that the voluntary, educational program envisioned by Ordinance
4 No. 211A will improve upon the regulatory program adopted by Ordinance No. 203 unless
5 the city council interpreted DCCP Policy E6 to impose that requirement. The city council’s
6 findings that the voluntary, educational program envisioned by Ordinance No. 211A is
7 consistent with DEQ regulations and acceptable to DEQ, DLCDD and Lane County do not
8 suggest the city council interprets DCCP Policy E6 in the more limited way the city argues in
9 its brief.

10 Our resolution of this appeal is relatively straightforward with the question of how
11 the city council interpreted DCCP Policy E6 resolved. Although there may not be evidence
12 in the record that compels a conclusion that Ordinance No. 203 has played a role in the
13 improved water quality in Woahink and Siltcoos Lakes, there is certainly substantial
14 evidence to support that conclusion. More to the point, the record clearly supports a
15 conclusion that Ordinance No. 203 has improved “maintenance of septic systems,” which is
16 what DCCP Policy E6 calls for.³ At least in the short term, by adopting Ordinance No.
17 211A, the city has repealed the Ordinance No. 203 program and has replaced it with a
18 program that has not yet been developed or adopted. Ordinance No. 211A simply calls for
19 development of an educational program before November 10, 2012. Until that voluntary,
20 educational program is developed and adopted so that the city can begin implementing that
21 program, the city has no “program to improve maintenance of septic systems for the benefit
22 of all residents.” We agree with petitioners that in that respect Ordinance No 211A is

³ Petitioners testified below “It is especially noteworthy that of the 534 households that have complied [with Ordinance No. 203] thus far, 65 had failed septic, or needed replacements or repairs.” Record 50. It may be as opponents of Ordinance No. 203 argued below that many of the septic system inspections under that ordinance were unnecessary, but since those inspections identified 65 problematic septic systems and presumably led to them being repaired or replaced, there can be no question that Ordinance No. 203 improved septic system maintenance.

1 inconsistent with DCCP Policy E6 and therefore must be remanded. While it may be, as the
2 city argues, that DCCP Policy E6 does not specify *when* the city must adopt a “program to
3 improve maintenance of septic systems for the benefit of all residents,” once the city has
4 adopted a program to comply with DCCP Policy E6 it may not repeal that program without
5 at the same time adopting another DCCP Policy E6 program to replace it.

6 Although we sustain petitioners’ first subassignment of error, we need not and do not
7 consider whether a voluntary, educational program that the city might adopt in the future
8 violates DCCP Policy E6. At pages 14-16 of their petition for review petitioners appear to
9 argue that it is not possible that a voluntary, educational program would improve septic
10 system maintenance, compared to the mandatory, regulatory program adopted by Ordinance
11 No. 203. To resolve that issue we would have to speculate about what that voluntary,
12 educational program might look like, and it would not be appropriate for LUBA to do so.

13 To summarize, on remand the city must develop its voluntary, educational program;
14 and, at the same time it repeals Ordinance No. 203, it must adopt that voluntary, educational
15 program. Moreover, unless the city council adopts a different interpretation of DCCP Policy
16 E6 on remand like the interpretation advanced in the city’s brief, in place of the implied
17 interpretation it adopted in Ordinance No. 211A, the city must establish that the voluntary,
18 educational program will improve septic system maintenance, compared to the mandatory,
19 regulatory program that was adopted by Ordinance No. 203.

20 The first subassignment of error is sustained, in part.

21 **B. Ordinance No. 211A is an Impermissible *De Facto* Amendment of DCCP**
22 **Policy E6**

23 Under this subassignment of error, petitioners argue “Ordinance No. 211A
24 impermissibly attempts to amend the Dunes City Comprehensive Plan because it reads out of
25 policy E6 the requirement of a ‘program’ and the requirement that the program ‘improve
26 septic system maintenance.” Petition for Review 16. In support of that argument,
27 petitioners cite LUBA’s decision in *Foland v. Jackson County*, 54 Or LUBA 287, 293, *aff’d*

1 215 Or App 157, 168 P3d 1238, *rev den* 343 Or 690, 174 P3d 1016 (2007), where LUBA
2 determined that the county’s decision in that case was so at odds with the text of the relevant
3 county land use regulation that it amounted to a *de facto* amendment of the land use
4 regulation.

5 We have already sustained petitioners’ first subassignment of error in which they
6 argue the city erroneously applied DCCP Policy E6. But we do not agree that the city’s
7 interpretation and application of DCCP Policy E6 is so at odds with its language that it must
8 be characterized as a *de facto* amendment of DCCP Policy E6. Neither would such a
9 characterization add anything of substance to our decision in this appeal.

10 Petitioners’ second subassignment of error is denied.

11 **C. A Voluntary, Educational Program is not a Program to Improve**
12 **Maintenance of Septic Systems**

13 In their final subassignment of error under the first assignment of error, petitioners
14 argue that the *educational* program envisioned by Ordinance No. 211A is not consistent with
15 DCCP Policy E6, because that policy calls for *improved maintenance*. Petitioners argue that
16 “[i]n adopting Ordinance No. 211A, [the city] has substituted the idea of ‘maintenance’ in
17 Policy E6 for the idea of ‘education’ in Ordinance [No.] 211A.” Petition for Review 19.

18 Petitioners appear to be arguing that the requirement in DCCP Policy E6 that the city
19 “adopt a program to improve maintenance of septic systems for the benefit of all residents”
20 can only be satisfied by a mandatory, regulatory program such as the one adopted by
21 Ordinance No. 203 and cannot be satisfied by a voluntary, educational program. We have
22 already determined that it is premature to attempt to resolve the issue of whether the
23 particular voluntary, educational “program to improve maintenance of septic systems” that
24 the city may adopt in the future in accordance with Ordinance No. 211A will actually
25 improve maintenance of septic systems. But however that issue is resolved, DCCP Policy E6
26 only expresses a policy of improving “maintenance” of septic systems. DCCP Policy E6 is
27 silent about the *type* of program (regulatory, educational or otherwise) that the city must

1 adopt to achieve that policy of improving septic system maintenance. While the program
2 that the city adopts to comply with DCCP Policy E6 must improve maintenance of septic
3 systems, petitioners cite no textual support in DCCP Policy E6 or elsewhere for the
4 proposition that only a mandatory, regulatory program such as the one adopted by Ordinance
5 No. 203 could be sufficient to comply with DCCP Policy E6.

6 Petitioners' third subassignment of error is denied.

7 The first assignment of error is sustained for the reasons set forth in our disposition of
8 petitioners' first subassignment of error.

9 **SECOND ASSIGNMENT OF ERROR**

10 In their second assignment of error, petitioners argue the city council's findings that
11 the voluntary, educational program envisioned by Ordinance No. 211A is consistent with
12 DCCP Policies B8, E1, E3 and E4 are not supported by substantial evidence.⁴

13 The city first responds that this assignment of error should be denied because the
14 challenged decision is a legislative decision and "there is no statute, goal or rule that
15 generally requires that legislative decisions must in all cases be supported by findings that
16 demonstrate compliance with applicable criteria." Respondent's Brief 12 (quoting *Friends of*
17 *Umatilla County v. Umatilla County*, 58 Or LUBA 12, 15 (2008)). We understand the city to

⁴ The text of those policies is set out below:

"Policy B8. Dunes City shall strive to maintain the high water quality of Siltcoos and Woahink Lakes through monitoring recreation use, commercial and industrial use, and run-off of septic tank effluent. A Water Quality Control Committee will be formed to examine problems with water quality."

"Policy E1. The city shall strive to preserve the quality of the land, air, and water resources in the city."

"Policy E3. Waste discharges from future facilities shall not exceed the carrying capacity nor degrade the quality of the land, air, and water resources."

"Policy E4. Regulations involving land, air, and water resources of the city shall be based upon long-term capabilities of the available natural resources to both support economic activity and absorb the future, resulting man-made pollutants."

1 argue that if the city is not legally required to adopt findings it does not matter whether there
2 is substantial evidence to support the city’s findings.

3 In view of our ultimate disposition of petitioners’ second assignment of error below,
4 the city’s argument concerning the lack of any express legal requirement for findings in this
5 case presents an abstract question that we need not resolve. However, as the city recognizes,
6 the Court of Appeals has observed that despite the lack of a general requirement that
7 legislative decisions must be supported by adequate findings, for LUBA and the appellate
8 courts to perform their review function when legislative land use decisions are appealed,
9 there “must be enough in the way of findings or accessible material in the record of the
10 legislative act to show that applicable criteria were applied and that required considerations
11 were indeed considered. *Citizens Against Irresponsible Growth v Metro*, 179 Or App 12, 16
12 n 6, 38 P3d 956 (2002). The city does not dispute that DCCP Policies B8, E1, E3 and E4
13 apply in this case. The scope and meaning of at least some of those policies are sufficiently
14 unclear that it is highly unlikely that a decision to replace the existing mandatory, regulatory
15 program to improve septic system maintenance with a voluntary, educational program to
16 achieve the same goal will be defensible on appeal without adequate findings.

17 However, as was the case with petitioners’ challenge under the first subassignment of
18 error under the first assignment of error regarding whether a voluntary, educational program
19 that the city might adopt in the future violates DCCP Policy E6, petitioners argument that
20 such a voluntary, educational program violates DCCP Policies B8, E1, E3 and E4 is
21 premature. Whether a voluntary, educational program is sufficient to comply with DCCP
22 Policies B8, E1, E3 and E4 cannot be determined until the city has actually developed and
23 adopted such a program.

24 Although we need not and do not resolve petitioners’ evidentiary challenge under the
25 second assignment of error, we note that petitioners’ challenge is directed at the evidentiary

1 support for the following finding, which the city adopted to address DCCP Policies B8, E1,
2 E3 and E4:

3 “Samples have been collected from Siltcoos and Woahink Lakes; however,
4 there has been no correlation established between water quality and erosion or
5 septic system effluent.” Record 19-20.

6 If the above finding is understood to take the position that the evidentiary record does
7 not establish a correlation between (1) erosion and septic tank effluent and (2) water quality
8 in nearby water bodies, there appears to be a substantial amount of evidence in the record to
9 the contrary, *i.e.* that there is such a correlation. But if the above finding is understood to
10 take the more limited position that there is no evidence that specifically establishes a
11 correlation between septic tank effluent run-off and the water quality in Siltcoos and
12 Woahink Lakes, that finding appears to be supported by the record.

13 However, it is not at all clear to us that such a finding is sufficient to dispose of any
14 obligations the city may have under DCCP Policies B8, E1, E3 or E4. The clearest example
15 is DCCP Policy B8, which calls for “monitoring * * * run-off of septic tank effluent.” That
16 obligation does not appear to require that there first be evidence that is sufficient to establish
17 a specific correlation between (1) erosion and septic tank effluent run-off and (2) water
18 quality in Siltcoos and Woahink Lakes. Ordinance No. 203 was presumably adopted in part
19 to satisfy the obligations the city imposed on itself under DCCP Policies B8, E1, E3 and E4,
20 and it seems highly unlikely that the lack of a study that specifically establishes a correlation
21 or causative connection between (1) erosion and septic tank effluent and (2) decreased water
22 quality in the lakes, by itself, is a sufficient answer to petitioners’ contention that repealing
23 Ordinance No. 203 is not consistent with DCCP Policies B8, E1, E3 and E4. But it may be
24 that the lack of any such specific evidence along with the actions that will be required under
25 the as-yet-undeveloped voluntary, educational program will be sufficient to establish that it is
26 consistent with DCCP Policies B8, E1, E3 and E4 to replace the mandatory, regulatory

1 program adopted by Ordinance No. 203 with the voluntary, educational program. If so, on
2 remand, the city will need to provide that explanation.

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 In their final assignment of error, petitioners argue the city erred by failing to adopt
6 findings that specifically address Statewide Planning Goal 6 (Air, Water and Land Resources
7 Quality).

8 Goal 6 is “[t]o maintain and improve the quality of the air, water and land resources
9 of the state.” The DCCP includes a section that is entitled “Air, Land and Water Quality,”
10 and that section of the DCCP includes a total of 13 “General Policies,” “Sewage Systems
11 Policies,” “Water Supply Policies,” “Solid Waste Policies,” “Noise Policies,” and “Air
12 Quality Policies.” The text of Sewage Systems Policy E6 was set out in our discussion of the
13 first assignment of error and the text of General Policies E1, E3 and E4 is set out at n 4. The
14 text of Lakes Policy B8, also set out at n 4, appears in a different section of the DCCP
15 entitled “Open Space, Scenic Areas, and Natural Resources.” The city argues that because
16 its comprehensive plan and land use regulations have been acknowledged by LCDC to
17 comply with the statewide planning goals, the land use regulation amendment adopted by
18 Ordinance No. 211A is only reviewable for consistency with the acknowledged
19 comprehensive plan under ORS 197.835(7)(a). *See* n 2. The city contends that Ordinance
20 No. 211A is only directly reviewable for compliance with the statewide planning goals if
21 “[t]he comprehensive plan does not contain specific policies or other provisions which
22 provide the basis for the regulation * * *.” ORS 197.835(7)(b). We agree with the city. We
23 also agree with the city that DCCP Policies B8, E1, E3, E4 and E6 collectively are sufficient
24 to qualify as “specific policies or other provisions which provide the basis for the
25 regulation,” within the meaning of ORS 197.835(7)(b). In particular, DCCP Policy E6
26 expressly calls for the city to adopt a program to improve septic system maintenance, and

1 could hardly be more specific. *See Barnard Perkins Corp. v. City of Rivergrove*, 34 Or
2 LUBA 660, 685 (1998) (where acknowledged comprehensive plan calls for half acre
3 minimum lot size in flood hazard zone, zoning ordinance amendment to adopt half acre
4 minimum lot size in the flood hazard zone is not reviewable against the statewide planning
5 goals). It follows that Ordinance No. 211A is reviewable for compliance with those policies
6 and any other relevant DCCP policies that the city may have adopted to implement Goal 6,
7 and is not directly reviewable for compliance with Goal 6.

8 The third assignment of error is denied.

9 The city's decision is remanded.