

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

3
4 JAMES TRUMPER,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 92-198
10 WASHINGTON COUNTY,)
11) FINAL OPINION
12 Respondent,)
13) AND ORDER
14 and)
15)
16 PAUL CHOBAN,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Washington County.

22
23 James Trumper, Portland, filed the petition for review
24 and argued on his own behalf.

25
26 David C. Noren, Assistant Washington County Counsel,
27 Hillsboro, filed the response brief and argued on behalf of
28 respondent.

29
30 No appearance by intervenor-respondent.

31
32 HOLSTUN, Referee; KELLINGTON, Referee, participated in
33 the decision.

34
35 AFFIRMED 02/19/93

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision amending the county's
4 comprehensive plan to remove a "significant water area and
5 wetland" designation from a portion of a 9.7 acre parcel
6 located within the 100 year flood plain.

7 **MOTION TO INTERVENE**

8 Paul Choban, the applicant below, moves to intervene on
9 the side of respondent. There is no opposition to the
10 motion, and it is allowed.

11 **FACTS**

12 The subject property is located within the 100 year
13 floodplain. When the Cedar Hills-Cedar Mill Community Plan
14 (which is part of the county's comprehensive plan) was
15 adopted in 1983, the subject property was identified and
16 designated as a "significant water area and wetland."

17 There appears to be no dispute that the property owner
18 ultimately wishes to obtain federal, state and county
19 approval to place fill on the subject property and construct
20 a commercial development. However, the challenged decision
21 simply removes the "significant water area and wetland"
22 designation. Commercial development of the subject property
23 would not be possible without removal of that designation.

24 The portion of the subject property for which the
25 decision removes the "significant water area and wetland"
26 designation has been farmed for many years. The challenged

1 decision determines that "farming" falls within an exception
2 to the "significant water area and wetland" designation
3 provided in the plan. Petitioner challenges that
4 determination and also argues the challenged decision
5 violates a plan policy concerning water resources.

6 **DECISION**

7 **A. Farming as Development**

8 The challenged decision explains that the basis for the
9 plan's 1983 "significant water area and wetland designation"
10 is set out in a plan resource document as follows:

11 "WATER AREAS AND WETLANDS - The 100-year flood
12 plain, drainage hazard areas, and ponds identified
13 in the inventory are regarded as significant with
14 the exception of those flood plain areas already
15 developed." (Emphasis added.) Record 12.

16 The decision goes on to explain that "[a] similar definition
17 of water areas and wetlands as a category of significant
18 natural resources" appears at Washington County Community
19 Development Code (CDC) 422-2.1. Record 12. CDC 422-2.1
20 provides as follows:

21 "Water Areas and Wetlands - 100 year flood plain,
22 drainage hazard areas and ponds, except those
23 already developed." (Emphasis added.) Record 13.

24 The challenged decision explains that while the subject
25 property otherwise clearly qualifies for the "significant
26 water area and wetland" designation, the exception for
27 "areas already developed" applies, due to the property's
28 undisputed history of farming.

29 Petitioner argues that "farming" is not "development"

1 as that term is defined at CDC 106-57. CDC 106-57 defines
2 "development" as follows:

3 "Development Any man-made change to improved or
4 unimproved real estate, including but not limited
5 to construction, installation or change of a
6 building or structure, land division,
7 establishment, or termination of right of access,
8 storage on the land, tree cutting, drilling, and
9 site alteration such as that due to land surface
10 mining, dredging, grading, construction of earthen
11 berms, paving, improvements for use as parking
12 excavation or clearing." (Emphasis added.)

13 The county concluded that "this definition is very
14 broad, and does include such farm activities as the
15 cultivation engaged in by the applicant."¹ Supplemental
16 Record 27. Petitioner disputes the county's interpretation.
17 Petitioner attempts to bolster their position that the
18 definition of "development" in CDC 106-57 does not include
19 farming by pointing out that while permits are required for
20 development, certain activities, including farm use, are
21 excluded from the CDC requirement for a permit. CDC 201-1;
22 201-2. From these CDC provisions, petitioner reasons that
23 farm use is not properly viewed as "development."

24 As an initial point, we agree with the county that CDC
25 201-2 simply eliminates the requirement of obtaining a
26 permit for certain activities. That provision does not

¹The list of activities constituting development does not purport to be exhaustive. In other findings, the county explains that "clearing" and "grading," which CDC 106-57 expressly lists as development, "would occur in conjunction with agricultural activities." Record 14.

1 purport to exclude the listed activities from the definition
2 of "development." If anything, CDC 201-2 suggests the
3 excluded activities are viewed as development, otherwise the
4 exclusions from the permitting requirement would be
5 unnecessary.

6 Although the definition of "development" in CDC 106-57
7 is not necessarily determinative of the scope of the
8 exception provided in the plan water areas and wetlands
9 provisions for "flood plain areas already developed,"
10 petitioner does not challenge the relevance of the CDC
11 definition of development. Rather, he argues the county's
12 interpretation of the scope of that definition to include
13 farming is erroneous. We reject the argument. The county's
14 interpretation of the scope of the definition is clearly
15 within its interpretive discretion. Clark v. Jackson
16 County, 313 Or 508, 836 P2d 710 (1992); Goose Hollow
17 Foothills League v. City of Portland, 117 Or App 211, ___
18 P2d ___ (1992); West v. Clackamas County, 116 Or App 89, ___
19 P2d ___ (1992); Cope v. Cannon Beach, 115 Or App 11, 836 P2d
20 775 (1992).

21 **B. Washington County Urban Comprehensive Framework**
22 **Plan (CFP) Policy 6**

23 CFP Policy 6 provides as follows:

24 "IT IS THE POLICY OF WASHINGTON COUNTY TO PRESERVE
25 AND IMPROVE THE QUALITY OF WATER RESOURCES."

26 Petitioner contends the county failed to demonstrate the
27 decision is consistent with CFP Policy 6.

1 Respondent argues CFP Policy 6 does not establish a
2 criterion applicable to the quasi-judicial plan amendment
3 challenged in this proceeding. Rather, respondent contends
4 the policy is implemented by a number of implementing
5 strategies. The challenged decision cites the following CFP
6 Policy 6 Implementing Strategy:

7 "Limit the removal of natural vegetation along
8 river and stream banks, particularly in locations
9 identified as Significant Natural Areas in
10 Community Plans[.]"

11 The county adopted findings explaining that even with
12 the "significant water area and wetland" designation
13 removed, the portions of the site within the riparian zone
14 would be protected under the provisions set out in CDC 422-
15 3.3(A). Petitioner does not challenge those findings.

16 The only specific arguments made by petitioner
17 concerning CFP Policy 6 appear to relate to a specific
18 development proposal that was the subject of a Division of
19 State Lands Removal/Fill permit. However, that proposal is
20 not at issue in this appeal. Without a more focused
21 argument from petitioner, we conclude the county's findings
22 are adequate to demonstrate compliance with CFP Policy 6.

23 The county's decision is affirmed.