

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)
7 Petitioner,)

8)
9 vs.)

10 CROOK COUNTY,)

11 Respondent,)

12)
13 and)

14)
15 WESTERN RANCH PROPERTIES, INC.,)

16)
17 Intervenor-Respondent.)

LUBA No. 92-132

FINAL OPINION
AND ORDER

18)
19)
20)
21)
22 Appeal from Crook County.

23
24 Jane Ard, Assistant Attorney General, Salem, filed the
25 petition for review and argued on behalf of petitioner.
26 With her on the brief was Theodore R. Kulongoski, Attorney
27 General; Thomas A. Balmer, Deputy Attorney General; and
28 Virginia L. Linder, Solicitor General.

29
30 No appearance by respondent.

31
32 Robert S. Lovlien, Bend, filed the response brief.
33 With him on the brief was Holmes, Hurley, Bryant, Lovlien &
34 Lynch. Neil R. Bryant argued on behalf of intervenor-
35 respondent.

36
37 HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,
38 Referee, participated in the decision.

39
40 REMANDED 03/22/93

41
42 You are entitled to judicial review of this Order.
43 Judicial review is governed by the provisions of ORS
44 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision granting
4 subdivision and planned unit development (PUD) preliminary
5 development plan approval for a portion of a ranch located
6 in the county's Exclusive Farm Use (EFU-3) zone.

7 **MOTION TO INTERVENE**

8 Western Ranch Properties, Inc., the applicant below,
9 moves to intervene on the side of respondent. There is no
10 opposition to the motion, and it is allowed.

11 **FACTS**

12 Prior to amendments adopted by the county in March
13 1991, the Crook County Zoning Ordinance (CCZO) allowed PUDs
14 as a conditional use in the EFU zone.¹ In February 1991,
15 just before the March 1991 amendments were adopted,
16 intervenor submitted an application for subdivision and PUD
17 approval.² Thereafter, the county planning commission
18 granted outline development plan (ODP) approval on May 9,
19 1991.³ One of the conditions of the May 9, 1991 ODP

¹Crook County's acknowledged land use regulations include the Crook County Land Development Ordinance (CCLDO), which establishes standards and procedures for approval of land divisions and PUDs, and the Crook County Zoning Ordinance (CCZO), which establishes zoning districts and regulates uses within those zoning districts.

²The exact nature of the application and the time it was submitted and made complete is disputed by the parties.

³Under the CCLDO, as we explain more fully below, applicants may obtain approval of a PUD following a two-stage or a three-stage approval process.

1 approval is that a statewide planning goal exception be
2 justified for the portion of the property to be developed
3 residentially. Following a public hearing on March 25,
4 1992, the county planning commission granted PDP approval on
5 April 24, 1992. That decision was appealed to the county
6 court, which affirmed the planning commission decision on
7 June 23, 1992.

8 Other material facts are stated in the petition for
9 review as follows:

10 The subject property, part of the historic Red
11 Cloud Ranch, consists of 1,200 acres of EFU land
12 with an existing ranch house and barn. The
13 property is taxed under the preferential farm use
14 assessment program. Presently, the property is
15 not irrigated and has no water rights. There are
16 two springs (with ponds) on the property, however,
17 and evidence in the record indicates ground water
18 is available.

19 "The property contains soils of [U.S. Soil
20 Conservation Service] classes II-VII.
21 Historically, the property has been used for
22 grazing cattle and dry land farming, and it is
23 presently leased for grazing. * * *

24 "To the west of the subject property are
25 residential developments and small vacant parcels.
26 Lands to the east of the subject property are used
27 for grazing. The Central Oregon Experimental
28 Station and other irrigated crop lands lie to the
29 north of the subject property across Highway 126.

30 "Under the county-approved subdivision and [PUD],

Under the three-stage process followed by the applicant in this appeal, the three steps are as follows: (1) outline development plan (ODP) approval, (2) preliminary development plan (PDP) approval, and (3) final development plan approval. The two-stage process skips ODP approval and begins with approval of a PDP.

1 part of the property would be divided into 120
2 lots with an average lot size of one acre. The
3 PUD is intended to be a 'vacation home development
4 with a western theme.' The ranch house, barn and
5 remaining 1,080 acres will be used for employee
6 housing, corrals, subsurface sewage disposal
7 system drainfields, a community center, and to
8 'run small numbers of cattle in order to enhance
9 the western ranch theme.'

10 "The proposed PUD lots would be served by a public
11 water system operated by a privately owned water
12 company that serves a nearby residential area.
13 Sewage service will be provided by individual
14 septic systems or an off-site subsurface sewage
15 disposal system. These systems will be maintained
16 and operated by the PUD's home owners association.
17 Garbage service and fire protection would also be
18 provided by the homeowners association." (Record
19 citations omitted.) Petition for Review 2-3.

20 **FIRST ASSIGNMENT OF ERROR**

21 Under the first assignment of error, petitioner
22 contends the county erred by granting the challenged PDP
23 approval under the pre-March 1991 version of its land use
24 regulations. Petitioner contends the county should have
25 instead required compliance with the CCZO as amended in
26 March 1991, which precludes approval of a PUD in the EFU-3
27 zone. Petitioner relies on ORS 215.428(3), which provides
28 as follows:

29 "If [a permit] application was complete when first
30 submitted or the applicant submits the requested
31 additional information within 180 days of the date
32 the application was first submitted and the county
33 has a comprehensive plan and land use regulations
34 acknowledged under 197.251, approval or denial of
35 the demonstrating application shall be based upon
36 the standards and criteria that were applicable at
37 the time the application was first submitted."

1 Petitioner offers three reasons why it believes the March
2 1991 CCZO amendments apply to the disputed application.

3 **A. Application Not Submitted Prior to CCZO Amendments**

4 Petitioner first argues "the record contains no clear
5 evidence that the applicant filed a complete ODP application
6 prior to the effective date of the new [CCZO]." Petition
7 for Review 6.

8 The record includes an application form dated February
9 1991 and application material requesting subdivision and ODP
10 approval. Petitioner offers no reason to question that the
11 application was actually submitted prior to the March 1991
12 amendments, and statements in the record support a
13 conclusion that it was filed before March 1991. Record 73.

14 Petitioner's next argument under this subassignment of
15 error questions the completeness of the February 1991
16 application. However, this contention is based on a
17 misunderstanding of how the provisions of ORS 215.428 work.
18 With certain exceptions, ORS 215.428(1) requires that a
19 county take final action on a permit application within 120
20 days after the application is complete. ORS 215.428(3)
21 gives permit applicants the certainty of having permit
22 applications reviewed under the standards and criteria in
23 effect on the date the application is first submitted,
24 provided the application is complete when submitted, or any
25 "requested additional information" is submitted "within 180
26 days of the date the application was first submitted." ORS

1 215.428(2) provides as follows:

2 "If an application for a permit * * * is
3 incomplete, the governing body or its designate
4 shall notify the applicant of exactly what
5 information is missing within 30 days of receipt
6 of the application and allow the applicant to
7 submit the missing information. The application
8 shall be deemed complete for the purpose of
9 subsection (1) of this section upon receipt by the
10 governing body or its designate of the missing
11 information. * * *" (Emphasis added.)

12 We construe ORS 215.478(1) to (3) to establish that a permit
13 application is considered complete when submitted, except
14 when the county notifies an applicant of missing
15 information, as provided in ORS 215.428(2).

16 Petitioner offers no reason to believe the application
17 was incomplete when submitted. Even if it were incomplete,
18 petitioner does not contend the county notified the
19 applicant of any missing information required for the
20 application to be complete. Therefore, under
21 ORS 215.428(3), the applicant was entitled to have its
22 application judged by the CCZO provisions in effect when the
23 application was submitted in February 1991; and the county
24 committed no error in doing so.

25 This subassignment of error is denied.

26 **B. Amendment to ODP Constitutes New Application**

27 Petitioner next argues that sometime after the planning
28 commission's May 9, 1991 decision granting ODP approval, the
29 applicant requested that a condition of approval be

1 deleted.⁴ Petitioner contends the CCLDO does not include
2 any provisions for amending an ODP approval, after a
3 decision granting ODP approval is made. Therefore,
4 petitioner argues, the request for an amendment to the ODP
5 should be viewed as a new application for permit approval,
6 thus subjecting the disputed application to the amended
7 CCZO.⁵

8 We reject this argument. Under the CCLDO, an
9 application for approval of a PUD is initiated by either an
10 application for ODP approval or an application for PDP
11 approval. CCLDO 6.100. Petitioner does not contend there
12 is a general requirement under the CCLDO for a separate
13 application for PDP approval, following ODP approval.⁶
14 Petitioner appears to be correct that the CCLDO does not
15 include specific provisions allowing an ODP to be amended,

⁴As noted earlier in this opinion, the planning commission included a condition requiring that a statewide planning goal exception be taken for the portion of the subject property to be developed residentially. This condition subsequently was deleted by the planning commission and county court in granting PDP approval.

⁵The record does not indicate when the request to amend the ODP was made. However, since the ODP approval itself occurred after the March 1991 CCZO amendments, the request to amend the ODP also must have occurred after those CCZO amendments took effect.

⁶We construed the analogous code language in Gage v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-057, September 15, 1992), slip op 5, and Tuality Lands Coalition v. Washington County, 22 Or LUBA 317, 329 (1991), as requiring that a new application be filed for the later stage approvals at issue in those cases. Because petitioner does not contend the CCLDO imposes a general requirement that separate applications be filed for later stage PUD approval decisions, those cases are inapposite.

1 and the lack of such provisions may provide a basis for
2 challenging the county's decision to allow the ODP to be
3 amended. However, this does not provide a basis for
4 characterizing a request that the ODP be amended as a new
5 application for PUD approval.⁷

6 This subassignment of error is denied.

7 **C. PDP Not Submitted Within Six Months of ODP**
8 **Approval**

9 Petitioner's final argument under this assignment of
10 error is that following the May 9, 1991 ODP approval, the
11 applicant failed to submit its PDP for approval within six
12 months, as CCLDO 6.130(1) requires. Petitioner also argues
13 there is no evidence the planning commission issued a timely
14 extension of the six month deadline for submission of a PDP.

15 Intervenor argues petitioner waived its right to raise
16 this issue by failing to raise the issue at any point during
17 the local proceedings. ORS 197.763(1); 197.835(2); Wethers
18 v. City of Portland, 21 Or LUBA 78, 92 (1991); Boldt v.
19 Clackamas County, 21 Or LUBA 40, 44-47, aff'd 107 Or App 619
20 (1991).

21 Petitioner does not identify any place in the record
22 where it raised this issue. We therefore reject this

⁷While the challenged decision does indicate that the ODP is amended by the challenged decision, we seriously question whether that action needed to be included as part of the challenged decision. Under CCLDO 6.130(2), in granting PDP approval where ODP approval has previously been given, the county may "reapprove, disapprove, disapprove or reapprove with modifications the planned unit development based on the [PDP]."

1 subassignment of error.

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 CCLDO 6.160(1) provides that PUDs must be consistent
5 with the comprehensive plan and CCZO. Under CCZO
6 3.030(2)(P), the standards of CCZO 3.030(4)(A) apply to PUDs
7 in the EFU-3 zone. The standards of CCZO 3.030(4)(A) are
8 substantially identical to those imposed by ORS 215.283(3)
9 for approval of nonfarm dwellings in EFU zones.⁸ Petitioner
10 contends the county's findings are inadequate to demonstrate
11 compliance with CCZO 3.030(4)(A).

12 The county has not appeared in this proceeding.

⁸CCZO 3.030(4)(A) provides as follows:

"Non-farm residential uses and land divisions * * * may be established on generally non-productive agricultural lands upon a finding by the Commission that each such use:

- "(a) Is compatible with farm uses and is consistent with the intent and purposes set forth in ORS 215.243, the County's Comprehensive Plan, this Ordinance, and more specifically this Section.
- "(b) Does not significantly interfere with accepted farming practices on adjacent agricultural lands.
- "(c) Does not materially alter the stability of the overall land use pattern of the area.
- "(d) Is situated upon generally unsuitable land for the production of farm crops and livestock considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of tract, historical cropping patterns, availability of water for irrigation, and is not definable in this section as agricultural land.

"* * * * *"

1 Intervenor argues the county is not obligated to address the
2 standards of CCZO 3.030(4)(A) in granting PDP approval,
3 because those standards were addressed when the county
4 granted ODP approval on May 9, 1991.

5 Local government interpretations that particular PUD
6 approval standards apply at one stage of PUD approval and do
7 not also apply at subsequent stages of approval have been
8 sustained by this Board, where the relevant code language
9 supports such construction and application of the code. See
10 Hoffman v. City of Lake Oswego, 20 Or LUBA 64, 70-72 (1990);
11 Edwards Industries, Inc., v. Board of Commissioners, 2 Or
12 LUBA 91, 96 (1980). The difficulty with intervenor's
13 attempt to rely on that principle in this case is that the
14 challenged decision does not interpret the CCZO and CCLDO as
15 applying in that manner. Rather than take the position that
16 the standards of CCZO 3.030(4)(A) need not be found
17 satisfied in granting PDP approval, the decision explicitly
18 adopts and relies upon the planning commission findings
19 addressing those standards.⁹ Record 1. Moreover, in the
20 challenged decision, the county court adopted its own
21 finding of compliance with the generally unsuitable standard
22 of CCZO 3.030(4)(A)(d).

23 The challenged decision does not express the

⁹The county court's decision explicitly references findings supporting the planning commission's May 9, 1991 decision granting ODP approval and the planning commission's April 24, 1992 decision granting PDP approval.

1 interpretation advocated by intervenor, and the county's
2 apparent interpretation that the standards of CCZO
3 3.030(4)(A) do apply to PDP approval is not "clearly wrong."
4 Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992);
5 Goose Hollow Foothills League v. City of Portland, 117 Or
6 App 211, ___ P2d ___ (1992); West v. Clackamas County, 116
7 Or App 89, ___ P2d ___ (1992); Cope v. Cannon Beach, 115 Or
8 App 11, 836 P2d 775 (1992). Therefore, we turn to the
9 question of the adequacy of the county's findings to
10 demonstrate compliance with those standards.

11 **A. Compatibility with Farm Uses (CCZO 3.030(4)(A)(a))**

12 The only finding adopted addressing
13 CCZO 3.030(4)(A)(a), see n 8, supra, is as follows:

14 "The [planning commission] has determined in
15 Conclusion 1 that the request is consistent with
16 the Comprehensive Plan."¹⁰

17 This finding is not sufficient to explain why the proposal
18 is compatible with farm uses, as required by
19 CCZO 3.030(4)(A)(a).

¹⁰As far as we can tell, the reference to "Conclusion 1" is to the following:

"(1) The request before the [planning commission] is to consider whether the Outline Development Proposal complies with the policies of the Comprehensive Plan, the intent of the EFU section of the Zoning Ordinance, and that the proposal is properly designed with the natural features of the property to be preserved [and] that it would be compatible with surrounding area, and the financing is available to complete the project." Supplemental Record 9.

1 This subassignment of error is sustained.

2 **B. Significant Interference With Accepted Farming**
3 **Practices (CCZO 3.030(4)(A)(b))**

4 The planning commission adopted the following finding
5 addressing this criterion:

6 "The PUD concept with the vacation homesites is
7 buffered from the adjacent farm practices by the
8 area of the ranch to be left for cattle grazing as
9 well as open space. The irrigated cropland to the
10 north of Highway 126 will be located one (1) mile
11 to the north of the homesites." Supplemental
12 Record 10.

13 These findings state relevant facts that could lead a
14 reasonable person to conclude that the proposal will not
15 significantly interfere with accepted farming practices on
16 adjacent agricultural lands. Petitioner does not really
17 attempt to explain why it believes the findings are
18 inadequate, but does fault the findings for not identifying
19 the types of farming practices on adjacent lands and asserts
20 the findings are not supported by substantial evidence.
21 Intervenor makes no attempt to defend the findings or to
22 identify evidence in the record supporting the findings. In
23 the absence of some assistance from the county or
24 intervenor, we sustain this subassignment of error.

25 **C. Stability of the Overall Land Use Pattern of the**
26 **Area (CCZO 3.030(4)(A)(c))**

27 The findings address this criterion are as follows:

28 "The land use pattern to the west and north is
29 residential in character with five (5) acre
30 density. The overall density of this project is a
31 10 acre density. The access to the property will

1 be limited to Highway 126 and will not create an
2 impact to Stillman or Riggs Road." Supplemental
3 Record 11.

4 The above findings identify some facts that might, with
5 other relevant facts, provide a basis for an explanation of
6 why the proposed PUD satisfies CCZO 3.030(4)(A)(c).
7 However, without more, they are inadequate to identify the
8 relevant area, examine the uses existing in that area,
9 establish the overall land use pattern of the area, and
10 explain why the proposed PUD will not materially alter the
11 stability of that overall land use pattern.¹¹

12 This subassignment of error is sustained.

13 **D. Generally Unsuitable Land (CCZO 3.030(4)(A)(d))**

14 The decision adopts the following findings to
15 demonstrate compliance with CCZO 3.030(4)(A)(d):

16 "The subject parcel is relatively non-productive
17 land. There are no water rights attached to the
18 land, and insufficient natural forage exists to
19 support livestock without supplemental feed.

20 "[CCZO] 3.030(8) establishes the criteria for
21 defining agricultural land. A parcel is
22 determined to be agricultural if five (5) criteria
23 are met. Through testimony only four (4) criteria
24 are met, and therefore, [the subject property] is
25 not considered to be productive agricultural
26 land." Supplemental Record 11.

27 Petitioner argues the above findings are inadequate to
28 demonstrate the property is generally unsuitable for

¹¹The detailed findings required to demonstrate compliance with this criterion are explained in Sweeten v. Clackamas County, 17 Or LUBA 1234, 1245-46 (1989).

1 agricultural production, as required by CCZO 3.030(4)(A)(d),
2 "given that the property has two active springs and is
3 currently leased for grazing."¹² Petition for Review 13.
4 We agree. See Clark v. Jackson County, 17 Or LUBA 594, 606
5 (1989) (historic use of large parcel for grazing is a
6 substantial obstacle to finding the property is generally
7 unsuitable for farm use).

8 This subassignment of error is sustained.

9 The second assignment of error is sustained.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner contends the county failed to demonstrate
12 compliance with comprehensive plan and land use regulation
13 provisions adopted by the county to implement Statewide
14 Planning Goals 11 (Public Facilities and Services) and 14
15 (Urbanization). The Crook County Comprehensive Plan
16 includes the following Public Facilities and Services
17 Policies:

18 * * * * *

19 "2. Public facilities and services for rural
20 areas shall be provided at levels appropriate
21 for rural use only and should not support
22 urban uses.

23 * * * * *

24 "7. Public facilities and services shall not be

¹²CCZO 3.030(4)(A)(d) also requires that the subject property not satisfy the definition of "Agricultural land" found in CCZO 3.030(8). Petitioner does not challenge the county's finding that the CCZO 3.030(8) definition is not met.

1 allowed beyond a level that development
2 supported by such services exceeds the
3 carrying capacity of the air, land and water
4 resources; therefore, public facilities and
5 services shall be the principal framework for
6 gaging density levels and types of urban and
7 rural land developments.

8 "* * * * *."

9 In addition, CCZO 3.030(4)(C) requires that the county
10 consider "[i]mmediate and future impacts on public services,
11 existing road systems and traffic demands * * *." CCLDO
12 6.040(2) requires that a PUD have "no greater demand on
13 public facilities and services than other authorized uses
14 for the land."

15 Petitioner correctly notes the county did not adopt
16 findings specifically addressing these criteria. Petitioner
17 contends that the findings the county did adopt which may
18 have some bearing on these criteria are inadequate to
19 demonstrate that a 120 unit PUD may be approved consistently
20 with these criteria. We agree with petitioner.

21 Intervenor argues these issues should have been raised
22 at the ODP approval stage and cannot be raised now. For the
23 reasons explained above under the second assignment of
24 error, we reject the argument.

25 The third assignment of error is sustained.

26 The county's decision is remanded.¹³

¹³Petitioner argues that we can determine from the record in this case that the challenged PUD is prohibited as a matter of law under CCLDO 6.040(2), quoted supra in the text. While it may well be that the

impacts associated with a 120 unit PUD are such that the county will not be able to demonstrate the proposal will have "no greater impact on public facilities and services" than other EFU-3 uses, we cannot say that such is the case as a matter of law.