

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) LUBA No. 95-166
11 LINCOLN COUNTY,)

12) FINAL OPINION
13 Respondent,) AND ORDER

14)
15 and)

16)
17 PACIFIC H.W. INVESTMENTS, INC.)

18 and JAMES L. WATSON,)

19)
20 Intervenors-Respondent.)

21
22
23 Appeal from Lincoln County.

24
25 Celeste J. Doyle, Assistant Attorney General, Salem,
26 filed the petition for review and a cross-response brief and
27 argued on behalf of petitioner and cross-respondent. With
28 her on the briefs were Theodore R. Kulongoski, Attorney
29 General, Thomas A Balmer, Deputy Attorney General, and
30 Virginia L. Linder, Solicitor General.

31
32 Wayne Belmont, County Counsel, Newport, filed a
33 response brief and argued on behalf of respondent.

34
35 Daniel Kearns, Portland, filed a cross-petition for
36 review and a response brief, and argued on behalf of
37 intervenors-respondent and cross-petitioners. With him on
38 the briefs were Preston Gates & Ellis.

39
40 LIVINGSTON, Chief Referee; GUSTAFSON, Referee,
41 participated in the decision.

42
43 REVERSED 05/31/96

44
45 You are entitled to judicial review of this Order.

1 Judicial review is governed by the provisions of ORS
2 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county board of
4 commissioners (commissioners) approving a 113-lot planned
5 development on approximately 50 acres of rural land zoned
6 Single Family Residential (R-1) and designated Suburban
7 Residential on the county comprehensive plan.

8 **MOTION TO INTERVENE**

9 Pacific H.W. Investments, Inc. and James L. Watson
10 (intervenors) move to intervene in this proceeding. There
11 is no opposition to the motion, and it is allowed.

12 **MOTION TO FILE CROSS-RESPONSE BRIEF**

13 Petitioner moves to file a cross-response brief. There
14 is no opposition to the motion, and it is allowed.

15 **FACTS**

16 We adopt petitioner's summary of material facts:

17 "The subject property is a single tract of
18 approximately 50.15 acres. It is bordered by
19 Highway 101 to the west, and is located
20 approximately five miles north of Newport. The
21 property is designated Suburban Residential on the
22 [c]ounty comprehensive plan map, and is zoned R-1
23 Single-Family Residential. The [c]ounty land use
24 code provides that residential densities in the R-
25 1 zone shall be two acres per dwelling, except
26 that lot sizes may be as small as 6,000 square
27 feet if public or community water and/or sewer
28 services are provided to the lot.
29 LUC § 1.1310(3)(a).^[1]

¹LUC 1.1310(3)(a) provides, in relevant part:

1 "The property is bordered on the north by an
2 undeveloped 56 acre parcel, zoned [Rural
3 Residential] RR-1, and on the east by a 68 acre
4 parcel zoned Timber Conservation (TC). The
5 property is bounded to the south by developed and
6 vacant residential lots, and there are several
7 dwellings on oceanfront [sic] lots to the west
8 across Highway 101.

9 "The property is vacant, and is within the
10 boundaries of the Seal Rock Water District. The
11 Water District owns two main lines that pass
12 adjacent to the subject property: One line is in
13 the Highway 101 right of way to the west of the
14 property, and the other runs north-south through
15 property directly west of the subject property.

16 "This case represents the applicants' second
17 attempt to win approval for a high-density planned
18 development on the subject property. The first
19 effort included 131 lots on the 50 acre parcel.
20 By December 7, 1994, the proposal was modified to
21 include only 113 lots, and to eliminate community

"Lot Size and Dimensions

"The minimum lot size and dimensions shall be as follows:

"(A) The minimum lot area shall be 6,000 square feet for a single family dwelling unit and 10,000 square feet for a duplex when a lot is served by both a public or community water supply system and public or community sewage system.

"(B) The minimum lot area shall be 15,000 square feet per dwelling unit when a lot is served by either a public or community water source, or public or community sewage disposal system.

"(C) The minimum lot area per dwelling unit shall be 2 acres when a lot is not served by either a public or community sewage disposal or water supply system.

"* * * * *"

1 sewer and water systems.^[2] The Lincoln County
2 Planning Commission approved the proposal on April
3 10, 1995, and adopted findings and conclusions in
4 support of that approval on May 22, 1995.
5 [Petitioner] appealed that approval to the Lincoln
6 County Board of Commissioners * * * . The
7 [commissioners] held a public hearing on the
8 record on July 5, heard oral arguments from
9 Petitioner and the applicants, and affirmed the
10 Planning Commission's approval. This appeal
11 followed." (Emphasis in original; citations
12 omitted.) Petition for Review-3-4.

13 **INTERVENORS/CROSS-PETITIONERS' ASSIGNMENT OF ERROR**

14 This appeal concerns the application of amendments to
15 Statewide Goal 11, adopted on October 28, 1994, which became
16 effective on December 5, 1994.³ Petitioner and the county
17 agree the amendments apply to the planned development
18 application involved in this proceeding. Intervenors
19 disagree. In this assignment of error, intervenors contend,
20 based on ORS 197.646(1) and (3), that although goal
21 amendments apply directly to local governments (i.e., local
22 governments going through periodic review or amending their
23 comprehensive plans or land use regulations), they do not
24 apply directly to local permit decisions of local
25 governments.

26 ORS 197.646 provides, in relevant part:

²Intervenors and the county (together, respondents) do not dispute the application for a planned development was submitted on December 7, 1994.

³Goal 11 concerns public facilities and services. The short statement of the goal is "To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development."

1 "(1) A local government shall amend the
2 comprehensive plan and land use regulations
3 to implement new or amended statewide
4 planning goals, [Land Conservation and
5 Development Commission (LCDC)] administrative
6 rules and land use statutes when such goals,
7 rules or statutes become applicable to the
8 jurisdiction. Any amendment to incorporate a
9 goal, rule or statute change shall be
10 submitted to the department as set forth in
11 ORS 197.610 to 197.625.

12 "* * * * *

13 "(3) When a local government does not adopt
14 comprehensive plan or land use regulation
15 amendments as required by subsection (1) of
16 this section, the new or amended goal, rule
17 or statute shall be directly applicable to
18 the local government's land use decisions.
19 The failure to adopt comprehensive plan and
20 land use regulation amendments required by
21 subsection (1) of this section may be the
22 basis for initiation of enforcement action
23 pursuant to ORS 197.319 to 197.335."

24 Intervenors contend these provisions imply a grace
25 period, perhaps until the completion of periodic review,
26 during which the local government may amend its local
27 regulations to comply with amendments to the Statewide
28 Planning Goals (goals), LCDC administrative rules, and
29 statutes. Intervenors maintain the effect of ORS
30 197.646(3), as interpreted by petitioner, is to make local
31 governments, even those acting in good faith, subject to
32 enforcement actions overnight. Intervenors consider
33 petitioner's interpretation absurd.

34 Petitioner responds that the terms of the goals,
35 administrative rules and statutes determine when they apply.

1 Petitioner comments that absent a compelling reason,
2 ORS 197.245 does not require that local plans, land use
3 regulations and decisions be made consistent with a new or
4 amended goal until one year after the date of adoption.
5 Finally, petitioner notes the Goal 11 amendments that give
6 rise to this appeal contain a statement of compelling
7 reasons that makes them immediately applicable.

8 We are not persuaded by intervenors' arguments that,
9 read together, ORS 197.646(1) and (3) imply the existence of
10 a grace period prior to the application of goal amendments
11 to local land use decisions. Since ORS 197.646(3) provides
12 that if the local government does not adopt amendments as
13 described, "the new or amended goal, rule or statute shall
14 be directly applicable to the local government's land use
15 decisions," enforcement actions serve primarily a
16 housekeeping role, and are likely to be limited to the few
17 local governments that are positively slothful in making the
18 required amendments.

19 Intervenors also contend OAR 660-22-070 provides a
20 special schedule for compliance with the Goal 11 amendments
21 that means they do not become "applicable to the
22 jurisdiction" until January 1, 1998. However, OAR 660-22-
23 070 applies only to "unincorporated communities," a term
24 defined in OAR 660-22-010(9). Intervenors acknowledge the
25 subject property is not an "unincorporated community." The
26 schedule for goal compliance in OAR 660-22-070 does not

1 apply.

2 The challenged decision is correct in applying Goal 11,
3 as amended, to intervenors' application. Intervenors'
4 assignment of error is denied.

5 **PETITIONER'S ASSIGNMENT OF ERROR**

6 Petitioner and respondents dispute the meaning of the
7 emphasized language in the following paragraphs, added to
8 Goal 11 by amendment:

9 * * * * *

10 "For land that is outside urban growth boundaries
11 and unincorporated community boundaries, county
12 land regulations shall not rely upon the
13 establishment or extension of a water system to
14 authorize a higher residential density than would
15 be authorized without a water system.

16 * * * * *

17 "Water system - means a systems [sic] for the
18 provision of piped water for human consumption
19 subject to regulation under ORS 448.119 to
20 448.285." (Emphasis added.)

21 There is no dispute the subject area is within an area
22 served by an established water system. As the challenged
23 decision observes, there are at least two water mains of
24 adequate size to serve the development. The property owner
25 has paid assessments to the Seal Rock Water District for
26 many years. Record 6. However, petitioner contends the
27 emphasized language in the Goal 11 amendments precludes the
28 application of LUC 1.1310(3)(a)(A) and (B), which means the
29 minimum lot size on the subject property is two acres, the

1 size permitted under LUC 1.1310(3)(a)(C).

2 Petitioner views the central issue in this case to be
3 whether the term "extension" as used in Goal 11 applies. We
4 understand petitioner to argue that the connection of the
5 water system from the existing water mains to the proposed
6 lots is an "extension" of the sort upon which the county may
7 not rely to authorize a higher residential density than
8 would be authorized without a water system.

9 Respondents dispute petitioner's interpretation of
10 "extension" as including the connection of the water system
11 from the existing water mains to the proposed lots.
12 Respondents contend that "extension" refers only to the
13 extension of major infrastructure improvements beyond
14 established service territories. Respondents reason that
15 since the proposed development does not require that type of
16 "extension," the amendments to Goal 11 do not preclude the
17 application of LUC 1.1310(3)(a)(A) and (B) to justify
18 smaller lot sizes. Respondents note the definition of
19 "water system" includes a reference to ORS 448.119 to
20 448.285, which regulate water systems in the state. They
21 maintain that ORS 448.165(3), included by that reference,
22 addresses the extension of water service in the context of
23 an extension of system boundaries.⁴ Respondents conclude

⁴ORS 448.165(3) provides:

"Counties or boundary commissions are authorized to approve the formation, consolidation and expansion of water systems not

1 the Goal 11 amendments should be interpreted to incorporate
2 by reference the same limitation on the word "extension"
3 they find in ORS 448.165(3).

4 We review the county's interpretation of Goal 11, a
5 state regulation, to determine whether it is reasonable and
6 correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323
7 (1988); Testa v. Clackamas County, 29 Or LUBA 383, 389,
8 aff'd 137 Or App 21 (1995).

9 We think the arguments of petitioner and respondents
10 miss the most important point. We read "establishment" to
11 include both the prior and future establishment of a water
12 system. Nothing in the above-quoted language of the Goal 11
13 amendment limits the application of "establishment" to the
14 future. It is undisputed that there is an established water
15 system on or closely adjacent to the subject property. The
16 challenged decision relies on that fact to justify smaller
17 lot sizes under LUC 1.1310(3)(a)(A) and (B). The decision
18 therefore violates the Goal 11 amendment.

19 Furthermore, we do not find persuasive intervenors'
20 argument that the definition of "water system" as "* * *
21 subject to regulation under ORS 448.119 to 448.285" was
22 intended to import the implied limitation in ORS 448.165(3)
23 of "water systems" to "water districts." The term

owned by cities in keeping with county and city plans. In
doing so, counties or boundary commissions should consider
whether water service is extended in a logical fashion and
water systems have a financial base sufficient for operation
and maintenance."

1 "extension," which is not limited in any way, can refer to
2 either an extension of a water system beyond district
3 boundaries or to a connection of a water system to
4 individual properties. The clear emphasis in Goal 11 is on
5 providing appropriate levels of service to urban,
6 urbanizable and rural communities, thereby preserving the
7 distinctions between them, as mandated by Goal 14. See 1000
8 Friends of Oregon v. DLCD (Curry County), 310 Or 447, 724
9 P2d 268 (1986). The interpretation of Goal 11 suggested by
10 respondents would frustrate these goals by facilitating
11 development at urban densities outside an urban growth
12 boundary.

13 The assignment of error is sustained.

14 The county's decision is reversed.