

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

3
4 JOHN McARTHUR, DANA GARDNER,)
5 and DENISE GARDNER,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 LANE COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 J.S. INVESTMENTS, INC.,)
18)
19 Intervenor-Respondent.)

LUBA No. 95-210
FINAL OPINION
AND ORDER

20
21
22 Appeal from Lane County.

23
24 George B. Heilig, Corvallis, filed the petition for
25 review and argued on behalf of petitioners. With him on the
26 brief was Cable, Huston, Benedict, Haagensen & Ferris.

27
28 Stephen L. Vorhes, Assistant County Counsel, Eugene,
29 filed a response brief and argued on behalf of respondent.

30
31 Allen L. Johnson, Eugene, filed a response brief and
32 argued on behalf of intervenor-respondent. With him on the
33 brief was Johnson, Kloos & Sherton.

34
35 LIVINGSTON, Chief Referee; HANNA, Referee, participated
36 in the decision.

37
38 AFFIRMED 06/26/96

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the county hearings
4 officer that grants approval of a 42-unit mobile home park
5 on a 16.7-acre parcel zoned Suburban Residential (RA).

6 **MOTION TO INTERVENE**

7 J.S. Investments, Inc. (intervenor), the applicant
8 below, moves to intervene in this proceeding on the side of
9 the respondent. There is no opposition to the motion, and
10 it is allowed.

11 **FACTS**

12 The subject property is a roughly triangular, 16.7-acre
13 tract located near the intersection of Applegate Trail (Main
14 Street) and Highway 36, in the community of Cheshire. The
15 property is vacant, except for a mobile home located near
16 the center. A sawmill on the property was abandoned prior
17 to 1975, and the site was then backfilled with coarse rock,
18 bark and soil. The substrate is highly compacted, and
19 drainage on the property itself is poor. At the south end
20 of the property, the base of the triangle, is a former log
21 pond, which provides a habitat for western pond turtles.
22 The turtle is susceptible to significant population decline
23 if subjected to habitat modification.

24 The zoning of the property to RA occurred in an earlier
25 proceeding (PA 4085-94) which concluded on May 25, 1995.
26 The properties to the east and west are also zoned RA, and

1 are occupied by single-family residences. The property to
2 the north is zoned Public Facilities (PF), and is occupied
3 by a fire station. The property to the south is zoned for
4 exclusive farm use (E-40).

5 After notice and a hearing held on July 20, 1995, the
6 hearings officer approved the application on August 4, 1995.
7 Petitioners appealed to the board of county commissioners
8 (commissioners) and, as allowed by Lane Code (LC) 14.535,
9 the hearings officer, on August 15, 1995, issued a modified
10 opinion on reconsideration that again approved the
11 application. The commissioners declined to conduct a
12 hearing on appeal from the reconsidered opinion.

13 This appeal followed.

14 **STANDING OF PETITIONERS DANA AND DENISE GARDNER**

15 The county challenges the standing of petitioners Dana
16 and Denise Gardner (the Gardners). The county contends the
17 Gardners failed to establish they appeared before the
18 hearings officer.

19 ORS 197.830(2)(b) limits the persons who may appear
20 before this Board to those who "[a]ppeared before the local
21 government, special district or state agency orally or in
22 writing." Because the county apparently lost the tapes and
23 minutes of the July 20, 1995 hearing, see McArthur v. Lane
24 County, ___ Or LUBA ___ (LUBA No. 95-210, Order Settling
25 Record, December 1, 1995), there is no way to determine if
26 the Gardners appeared at that hearing. However, the

1 Gardners joined petitioner John McArthur in filing a local
2 appeal from the hearings officer's August 4, 1995 opinion.
3 Record 91. That appeal resulted in the hearings officer's
4 August 15, 1995 opinion on reconsideration. Based on their
5 appearance in the local appeal and in the absence of
6 information about the July 20, 1995 hearing, we conclude the
7 Gardners appeared as required by ORS 197.830(2)(b), and we
8 therefore deny the county's standing challenge.

9 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

10 In these assignments of error, petitioners challenge
11 the adequacy of the findings and the supporting evidence as
12 they establish compliance with LC 16.229(5)(a), which
13 requires that mobile home parks, among other uses listed in
14 LC 16.229(4), "not significantly impact existing uses on
15 adjacent and nearby lands and other uses permitted in the
16 zone in which the subject property is located." Petitioners
17 contend specifically the challenged decision does not
18 address the negative impacts of the proposed development on
19 storm water drainage, sewage, public facilities and
20 services, and water on lands surrounding the subject
21 property.

22 Intervenor argues that petitioners' contentions with
23 respect to all of these impacts, with the exception of
24 water, are not related to a specific approval standard and
25 therefore do not justify remand or reversal. We understand
26 intervenor to say that petitioners do not state a claim

1 cognizable under ORS 197.835, which states various grounds
2 for reversal or remand, including lack of compliance "with
3 applicable provisions of the comprehensive plan or land use
4 regulations." ORS 197.835(8).

5 We disagree with intervenor that petitioners'
6 contentions are not sufficiently tied to LC 16.229(5)(a).
7 All of the potential impacts discussed by petitioners could
8 significantly impact existing uses on adjacent and nearby
9 lands and other uses permitted in the RA zone. We therefore
10 consider each contention.

11 **A. Storm Water Drainage**

12 Petitioners contend the proposal would channel storm
13 water into ditches located to the south and west of the
14 subject property. Petitioners maintain that since these
15 ditches end short of the Long Tom River, drainage would be
16 inadequate, and storm water runoff would flood adjacent
17 residential property to the east. Petitioners state that
18 the "[h]earings Official recites that the 'applicant's
19 actions will improve drainage' without stating what those
20 actions are." Petition for Review 7.

21 Petitioners' contentions with respect to storm water
22 are based on a factual misunderstanding. The challenged
23 decision clearly states that drainage from the subject
24 property will be to a former river channel to the east, from
25 there to the north under Highway 36, and eventually to the
26 Long Tom River. Record 83. Therefore, it is not relevant

1 that ditches to the south and west end short of the Long Tom
2 River.

3 The challenged decision observes that "evidence from
4 applicant's experts was that steps have been taken that will
5 deal with all the identified drainage problems." Record 89.
6 The engineer's report submitted on behalf of the applicant
7 states that "additional ditching would adequately serve the
8 flood flows of the affected drainage basin including the
9 increased flows from the proposed mobile home park
10 development." Record 199. This evidence is sufficient to
11 support the finding that it is feasible to manage storm
12 water drainage, which is all that is required at this
13 approval stage. See Meyer v. City of Portland, 67 Or App
14 274, 280 n5, 678 P2d 741, rev den 297 Or 82 (1984). Once a
15 local government decides a proposed use can meet applicable
16 criteria, the imposition of conditions is an appropriate way
17 to insure the criteria are met. Sigurdson v. Marion County,
18 9 Or LUBA 163 (1983). The county's approval is conditioned
19 on preparation of a formal report on storm water drainage,
20 the subsequent submission of an engineer's plan and proof of
21 plan implementation to insure that a nuisance is not
22 created. Record 85, 89. Nothing more is required.

23 **B. Sewage**

24 Petitioners contend the hearings officer permitted a
25 sand filter sewage system, rather than the standard system
26 proposed in the staff report upon which the hearings officer

1 relied to conclude there would be no significant impact on
2 adjacent properties. However, petitioners' two record
3 citations, one of which is to petitioners' own local appeal
4 petition, do not support their contention. The challenged
5 decision states that "the soil and the layout of the
6 property is [sic] such that the proposed gravel filter
7 septic system cannot be built that will support more than 45
8 units." Record 84. This finding, which indicates a gravel
9 filter septic system can support the proposed 42 units, is
10 consistent with the staff report and the engineer's report.
11 Record 129, 199. The latter explicitly concludes the area
12 deemed appropriate for subsurface disposal is adequate for
13 the proposed development.

14 **C. Public Facilities and Services**

15 Under this heading, petitioners repeat certain
16 arguments made in connection with storm drainage and sewage,
17 and introduce the issue of traffic. The challenged decision
18 finds that "the increase from the proposed mobile home park
19 [on Applegate Trail] make precautionary studies and measures
20 appropriate." Record 82. It imposes, as a condition of
21 final approval, that the applicant, in consultation with the
22 Oregon Department of Transportation, develop a traffic
23 impact study and place the results of the study before the
24 hearings officer. Record 85. That is sufficient, in view
25 of the information received from the county highway
26 department that the additional trips on Applegate Trail

1 "[would] not result in an unacceptable level of service."
2 Record 128.

3 **D. Water**

4 Petitioners dispute the adequacy of both (1) the
5 hearings officer's findings with respect to the impacts on
6 adjacent properties of the wells proposed in connection with
7 the planned development; and (2) the evidence that supports
8 the findings. The challenged decision mingles findings
9 addressing the adequacy of the water supply for the proposed
10 development with findings addressing impacts on the water
11 supplies of adjacent properties. With respect to the
12 latter, it states:

13 "Application for a groundwater appropriation
14 permit will be required. If the wells are drilled
15 into the Willamette Valley aquifer, there should
16 be no effect on surrounding wells. If the wells
17 on the subject property are drilled into the
18 bedrock outside the alluvial soils, there is some
19 chance that the wells will affect other,
20 previously established wells in the same
21 aquifer." Record 84.

22 Having raised the specter that the wells will affect
23 previously established wells, the decision continues:

24 "This [effect] would happen only if the
25 underground stream used flowed in a direction
26 opposite to what the Hearings Officer understands
27 is the normally expected direction of flow. In
28 the unlikely event that this should happen, the
29 prior wells will have the legal right to assert
30 their primary claim to the groundwater." Id.

31 The decision concludes, with respect to water:

32 "The adequacy of the groundwater supply is

1 documented in a report provided by the applicant's
2 agents. Testimony at the hearing also pointed out
3 that, in the unlikely event that the applicant's
4 use of groundwater should have an adverse effect
5 on any adjacent users through reliance on the same
6 bedrock aquifer, the prior user would be able to
7 assert its rights and prevent the loss of water.
8 This protection and the legally required response
9 of the applicant serves as an adequate mitigation
10 measure for the small possibility of an adverse
11 effect. The evidence indicates that there will be
12 adequate groundwater supplies. Condition of
13 approval 1 assures that there will be no
14 significant adverse effect on other groundwater
15 users."¹ Record 87.

16 Because there are no minutes or tapes of the hearing in
17 the record, we do not know what was said to prompt the
18 finding that addresses what might happen if wells are
19 "drilled into the bedrock outside the alluvial soils." The
20 "report provided by the applicant's agents" is apparently a
21 consultant's memorandum that states there is adequate water
22 to support the proposed development and also that "[t]he
23 water resources of the area have not been overtaxed."²
24 Record 161-62.

¹Condition 1 states:

"Any well or wells constructed to supply domestic water shall comply with the requirements of OAR 690, and the well construction report shall be submitted to Lane County upon construction."

²The record contains numerous letters received by the county after the hearings officer made his decision on reconsideration, but before the commissioners decided not to hear the appeal. Because they were not part of the record before the hearings officer, we do not consider these letters in connection with his decision. Petitioners do not assign error to the commissioners' decision, made under LC 14.600.

1 Taking the findings as a whole, we understand them to
2 say it is feasible to provide water to the proposed
3 development without significantly affecting existing uses on
4 adjacent and nearby lands. The findings are adequately
5 supported by substantial evidence in the form of the
6 consultant's memorandum. The challenged decision
7 recognizes that an application for a groundwater
8 appropriation permit will be required before any wells are
9 dug. That application must meet standards that include
10 protections for adjacent property owners. See OAR 690,
11 Division 11. The Oregon Department of Water Resources will
12 ultimately determine whether those standards are met.

13 Conditioning approval on the satisfactory outcome of a
14 separate administrative process, set forth in OAR Chapter
15 690, does not preclude a finding of compliance with
16 LC 16.229(5)(a). See Bouman v. Jackson County, 23 Or LUBA
17 628, 645-49 (1992). The challenged decision is not
18 expressly conditioned on successfully obtaining water
19 rights, a process that incorporates the necessary
20 protections for neighbors, but only on the construction of
21 wells in accord with state requirements. However, to
22 construct wells in accord with state requirements, one must
23 first obtain water rights. See ORS 537.535. The neighbors
24 of the proposed mobile home park are thus protected against
25 significant impacts from the development of wells on the
26 subject property.

1 The first and third assignments of error are denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners contend the challenged decision must
4 include findings addressing Lane County Rural Comprehensive
5 Plan (RCP), Goal 11, Policy 1, which states:

6 "Lane County shall provide an orderly and
7 efficient arrangement for the provision of public
8 facilities, services and utilities. Designation
9 of land into any given use category either
10 initially or by subsequent plan amendment, shall
11 be consistent with the minimum level of services
12 established for that category." (Emphasis added.)

13 The emphasized language makes clear that consideration
14 of service levels is only required when the comprehensive
15 plan designation is amended. Since the challenged decision
16 does not approve a plan map amendment, RCP Goal 11, Policy 1
17 does not apply.

18 The second assignment of error is denied.

19 **FOURTH ASSIGNMENT OF ERROR**

20 Petitioners contend the hearings officer's decision
21 does not contain findings adequate to show compliance with
22 two policies of the RCP, which are made applicable by
23 LC 16.229(5)(c). One of these policies addresses water
24 supply, and is discussed under the first and third
25 assignments of error. The other is RCP Goal 5, Flora and
26 Fauna Planning Policy 3, which provides:

27 "Through the use of County regulations including
28 zoning, seek to minimize the adverse impacts of
29 land use changes on sensitive species (those
30 susceptible to significant population declines

1 resulting from habitat modification.)"

2 The challenged decision imposes, as a condition
3 (condition 6), the requirement that the applicant "implement
4 and abide by" an agreement with the Oregon Department of
5 Fish and Wildlife that is part of the record. Record 86.
6 That agreement imposes certain design and development
7 restrictions and requirements. Record 124-25.

8 We understand the decision to determine that Goal 5,
9 Flora and Fauna Planning Policy 3 is satisfied by the
10 imposition of condition 6. We agree the agreement is
11 enforceable through condition 6, and agree with respondents
12 this is sufficient to satisfy Goal 5, Flora and Fauna
13 Planning Policy 3.

14 The fourth assignment of error is denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 Petitioners contend the challenged decision fails to
17 satisfy certain Statewide Planning Goals. Since this
18 decision appeals a permit approval under the county's
19 acknowledged comprehensive plan and land use regulations,
20 the Statewide Planning Goals are not directly applicable.
21 ORS 197.195(2)(d); Byrd v. Stringer, 285 Or 311, 666 P2d
22 1332 (1983); Central Eastside Industrial Council v. City of
23 Portland, 29 Or LUBA 429, aff'd 137 Or App 554 (1995).

24 The fifth assignment of error is denied.

25 **SIXTH ASSIGNMENT OF ERROR**

26 Petitioners contend the county is estopped from

1 approving the mobile home park by a statement in its
2 previous decision rezoning the subject property (PA 4085-
3 94), which became final on May 25, 1995:

4 "A mobile home park is not one of the uses that
5 will be allowed by this rezoning [to RA], and
6 therefore the potential impact of that plan is not
7 to be considered when the rezoning is considered."
8 Record 69.

9 In order for there to be estoppel by conduct, there
10 must be a false representation made with knowledge of the
11 facts, the other party must have been ignorant of the truth,
12 the representation must have been made with the intention
13 that it should be acted upon by the other party, and the
14 other party must have been induced to act upon it. Coos
15 County v. State of Oregon, 303 Or 173, 180-81, 743 P2d 1348
16 (1987); Crone v. Clackamas County, 21 Or LUBA 102, 109
17 (1991).

18 Petitioners do not show that a false representation was
19 made. LC 16.229 distinguishes between permitted uses,
20 listed in LC 16.229(2); uses allowed with director's
21 approval, listed in LC 16.229(3); and uses allowed with
22 hearings officer's approval, listed in LC 16.229(4). The
23 latter are subject to the "hearings official approval
24 criteria" listed in LC 16.229(5). The statement from the
25 previous decision in PA 4085-94, quoted above, says no more
26 than that the rezoning does not, of itself, allow a mobile
27 home park. That statement is correct.

28 The sixth assignment of error is denied.

1 The county's decision is affirmed.