BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CRAIG ALAN DeSHAZER and COLLEEN MARIE DeSHAZER, Petitioners, vs. COLUMBIA COUNTY, Respondent, and KEITH SETTLE, Intervenor-Respondent.	LUBA No. 95-260 FINAL OPINION AND ORDER

Appeal from Columbia County.

Craig Alan DeShazer and Colleen Marie DeShazer, Scappoose, filed the petition for review and argued on their own behalf.

No appearance by respondent.

Valerie T. Auerbach, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Farleigh, Wada & Witt.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee, participated in the decision.

REVERSED 06/25/96

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal the county's approval of two partitions.[1]

MOTION TO INTERVENE

Keith Settle (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor obtained approval from the county of two partitions on properties zoned rural residential (RR-5). In Order 289-95, the board of commissioners (board) approved a minor partition of a 7.98-acre parcel into three parcels, each of which is at least two acres. In Order 288-95, the board approved a major partition of a 6.74-acre parcel into three parcels, each of which is also at least two acres. The two parent parcels were created in 1994 through a three-lot partition of a 21.04-acre parcel. That original parcel had been the subject of a previous comprehensive plan amendment in 1993, which resulted in a zone change from forest/agriculture to RR-5. In approving the requests, the board relied on a 1970 stipulated settlement agreement between intervenor's predecessors in interest and the

[1]Petitioners appeal the two partition approval orders in a single appeal. Neither the county nor intervenor object to the characterization of the two orders as a single decision.

McNulty Water District (water district), in which the water district agreed to provide service to the original parcel. Water service now extends to the boundaries of the two parent parcels.

Petitioners appeal the county's decision to approve the two partitions.

FOURTH AND FIFTEENTH ASSIGNMENTS OF ERROR

In the fourth assignment of error, petitioners challenge the county's finding that the proposed partitions will not require the extension of a water system. In the fifteenth assignment of error, petitioners contend the county's decision violates Statewide Planning Goal 11 (Goal 11), because the partition depends upon the extension of a water system.

Intervenor responds that the partitions will not require the extension of a water system, because a water main presently extends to the boundary of the parcels, and because the water district has, by stipulation, agreed to provide water to the parcels. Intervenor further responds that because the county's decision establishes compliance with Columbia County Zoning Ordinance (CCZO) 604.2(A), which requires the use be served by a public or community water system, the decision also complies with Goal 11.[2]

[2]CCZO 604, establishes standards for development in the RR-5 zone, and states:

Goal 11, which addresses public facilities and services, states as the goal:

> "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."

Goal 11 was amended in 1994 to add the following language:

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

Goal 11 defines water system as follows:

> "Water system - means a systems [sic] for the provision of piped water for human consumption subject to regulations under ORS 448.119 to 448.285."

As an initial matter, we reject intervenor's argument that because the county's decision complies with CCZO

> ".1 The minimum lot size for uses permitted under Section 602 shall be 5 acres.
>
> ".2 The minimum lot size for uses permitted under Section 602 shall be 2 acres when it can be shown that:
>
> "A. The use will be served by a public or community water system.
>
> "B. Adequate area exists on the property to facilitate an individual subsurface sewage system; or, the property is served by a public or community sewer system.
>
> "C. The property has direct access onto a public right-of-way.
>
> "D. The property is within, and is capable of being serviced by a rural fire district."

604.2.A, it also complies with Goal 11. The amendments to Goal 11 became effective and applicable to all local decisions on December 5, 1994. To the extent CCZO 604.2.A violates the Goal 11 amendments, the county may not rely on that code provision to either establish compliance with Goal 11, or to approve the challenged partitions. DLCD v. Lincoln County, ___ Or LUBA ___ (LUBA No. 95-166, May 31, 1995), slip op at 6. Thus, the sole inquiry here is whether the county's decision complies with Goal 11.

In finding compliance with Goal 11, the county's orders state:

> "There is substantial rural residential development in the vicinity of the property which is the subject of this application, and that [sic] those surrounding properties are already served by a community water supply. The proposed land partition will not cause the extension of a water line, as applicant has shown that water lines already exist at the boundaries of the parcels to be developed. Therefore, the proposed partition complies with Goal 11." Record 10, 27.

The orders also adopt the findings of the staff reports, which add, with regard to the provision of water:

> "The submitted application indicates that water will be provided to all parcels by the McNulty Water Association. A letter from the Association verifying service availability will be required prior to final approval." Record 16, 34.[3]

Intervenor explains that the water district agreed to

[3]With regard to findings of compliance with Goal 11, the language in the two orders and staff reports is identical.

extend water to the parcels as a result of a 1970 settlement agreement, which states, in part:

> "In the event that [intervenor's predecessors] shall sell the whole or any part of the property now owned by them, the purchaser or purchasers of said property shall have the right to become members of the Association, upon making application therefor, subject to all the rules and regulations of the Association and upon payment of hookup charges and membership fees." Record 127.

We understand that the property subject to this settlement agreement includes all of the property subject to the 1993 comprehensive plan amendment and the 1994 partition. We also accept intervenor's representation that, through this settlement agreement, the water district agreed to extend water to the subject parcels. However, we are cited to no evidence that a water system presently serves the parcels. The fact that the water district may have agreed to provide water to the subject parcels, or that a water main now extends to the boundaries of the parcels, does not establish that the proposed partitions will not require extension of a water system.[4]

As quoted above, under the amendments to Goal 11, counties cannot "rely upon the establishment or extension of a water system to authorize a higher residential density

[4]We note that even if a water system was already established on the subject parcels, intervenor's requested partitions would still be prohibited under Goal 11, since the goal prohibits increased densities based on either the establishment or extension of a water system. DLCD v. Lincoln County, slip op at 8-9.

than would be authorized without a water system." Intervenor's requested partitions would create parcels as small as two acres. These partitions are expressly prohibited by the Goal 11 amendments since, but for the extension of the water system to serve the proposed partitioned parcels, the minimum lot size on the subject parcels is five acres.

The fourth and fifteenth assignments of error are sustained.

THIRD, SIXTH, TENTH, ELEVENTH, TWELFTH, SIXTEENTH, AND EIGHTEENTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioners challenge aspects of the 1993 comprehensive plan amendment and the 1994 partition, neither of which was appealed. Petitioners cannot collaterally attack previous decisions through this appeal. Sahagian v. Columbia County, 27 Or LUBA 592 (1994).

These assignments of error are denied.

REMAINING ASSIGNMENTS OF ERROR

Petitioners have not, in the remaining assignments of error, established any basis for reversal or remand of the county's decision.

These assignments of error are denied.

The county's decision is reversed.