

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

1
2
3
4 HELVETIA COMMUNITY ASSOCIATION,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 WASHINGTON COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 KEVIN BENDER,)
17)
18 Intervenor-Respondent.)

LUBA No. 95-231

FINAL OPINION
AND ORDER

19
20
21 Appeal from Washington County.

22
23 Vincent P. Salvi, Portland, filed the petition for
24 review and argued on behalf of petitioner.

25
26 David C. Noren, Assistant County Counsel, Hillsboro,
27 filed a response brief and argued on behalf of respondent.
28 With him on the brief was John M. Junkin, County Counsel.

29
30 William C. Cox, Portland, filed a response brief and
31 argued on behalf of intervenor-respondent.

32
33 LIVINGSTON, Chief Referee; GUSTAFSON, Referee,
34 participated in the decision.

35
36 AFFIRMED 08/15/96

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county board of
4 commissioners approving a comprehensive plan amendment
5 redesignating the subject property from Agricultural and
6 Forest District-10 (AF-10) to Agricultural and Forest
7 District-5 (AF-5).

8 **MOTION TO INTERVENE**

9 Kevin Bender, the applicant below, moves to intervene
10 in this proceeding. There is no opposition to the motion,
11 and it is allowed.

12 **MOTION TO DISMISS**

13 Intervenor moves to dismiss this proceeding on the
14 ground that petitioner is not a "person," as that term is
15 used in ORS 197.830(2), which specifies who may petition
16 this Board.¹ ORS 197.015(18) defines "person" as:

17 "any individual, partnership, corporation,
18 association, governmental subdivision or agency or
19 public or private organization of any kind."

20 Intervenor contends the context in which "person" is

¹ORS 197.830(2) provides, in relevant part:

"* * * a person may petition the board for review of a land use decision or limited land use decision if the person:

"(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

"(b) Appeared before the local government, special district or state agency orally or in writing." (Emphasis added.)

1 used in ORS 197.830(2) requires a more restrictive
2 definition than that stated in ORS 197.015(18).²
3 Intervenor's arguments in support of his contention are
4 without merit. The motion to dismiss is denied.

5 **FACTS**

6 We adopt the recitation of background facts from the
7 challenged decision:³

8 "The [subject property] is 20.18 acres and
9 consists of two parcels, tax lots 612 (9.56 ac)
10 and 613 (10.62 ac). Tax lot 613 supports a
11 dwelling and accessory buildings. Most of the
12 land is cleared and in grass; a small portion of
13 tax lot 612 is forested. * * * The site is not
14 served by public or community water service.

15 "In 1993, separate plan amendment applications
16 were submitted for each parcel. The application
17 on tax lot 612 was the only one to reach a hearing
18 * * *. Both applications were withdrawn before a
19 decision was made. There was considerable
20 opposition to the applications, much of which
21 related to groundwater issues. This application *
22 * * is a new application, however, the applicant
23 has addressed a number [of] issues raised in the
24 previous plan amendment requests." Record 90.

25 After planning staff recommended denial, the county
26 planning commission approved intervenor's application with
27 conditions. Petitioner appealed to the board of

²The preface to ORS 197.015 states "As used in ORS chapters 195, 196 and 197, unless the context requires otherwise: * * *" (Emphasis added.)

³The challenged decision consists of a board of commissioners' resolution and order (Record 9-10); incorporated supplemental board findings (Record 11-17); and incorporated planning commission findings and conditions (Record 81-112).

1 commissioners, which, on October 31, 1995, adopted the
2 planning commission's findings and conditions, supplemental
3 findings and one additional condition.⁴ This appeal
4 followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioner contends the plan amendment adopted by the
7 challenged decision violates Policy 6 of the county's
8 Rural/Natural Resource Plan Element and, in particular, the
9 following implementing strategy:

10 "a. Strive to ensure adequate water supplies for
11 all uses by:

12 "1. Encouraging water conservation programs
13 by water users and purveyors;

14 "2. Reviewing and revising existing
15 development regulations where necessary
16 or limiting the location or operation of
17 new wells as a condition of development
18 approval, considering advice and/or
19 recommendations received from the State
20 Water Resources Department;

21 "3. Coordinating with State and Federal
22 agencies in evaluating and monitoring
23 ground water supplies; and

24 "4. Complying with the May 17, 1974 Order of
25 the State Engineer establishing and
26 setting forth control provisions for the
27 Cooper Mountain-Bull Mountain Critical

⁴Although under the AF-5 designation, each parcel is eligible for partitioning into three parcels through the "Rural Planned Development" (RPD) procedure for a total of six parcels, intervenor agreed to a condition of approval that precludes RPD partitioning, but allows the development of up to five lots under county code provisions that permit a "lot of exception" in certain circumstances.

1 Ground Water Area." (Emphasis added.)
2 Petitioner contends specifically that the county failed to
3 make findings demonstrating compliance with the language
4 emphasized above, which petitioner aptly analogizes to the
5 coordination requirement imposed by Statewide Planning Goal
6 2. See Waugh v. Coos County, 26 Or LUBA 300, 314 (1993).
7 As we explained in ONRC v. City of Seaside, 29 Or LUBA 39,
8 56 (1995), the coordination obligation requires that a local
9 government adopt findings responding to legitimate concerns
10 raised by a state agency.

11 The Oregon Water Resources Department (OWRD) submitted
12 two letters concerning new wells and water availability in
13 the area of the subject property. In the first letter,
14 dated January 24, 1995, OWRD questioned certain approaches
15 taken by intervenor's experts. However, OWRD also stated
16 that "[m]any of the problems pertaining to water quality in
17 the area are probably related to poor well construction and
18 poorly designed pumping systems." Record 110. OWRD
19 concluded:

20 "The proposed plan amendment, in and of itself,
21 will result in the addition of only 3 wells and
22 therefore may present a low risk to the
23 groundwater resource in the area. However, the
24 Department is concerned that continued development
25 of this nature in this and similar areas of
26 Washington County poses a significant risk of
27 groundwater overdraft.

28 "Future development should be done with extreme
29 care until the groundwater resources are better
30 defined." Record 110-11.

1 In the second letter, dated May 24, 1995, OWRD offered
2 additional advice pertaining to appropriate testing for well
3 interference and the collection of short- and long-term
4 data. Record 133-34.

5 The planning commission supplemental findings,
6 incorporated by reference into the challenged decision,
7 discuss the conflicting evidence pertaining to water
8 availability, and reach the conclusion that intervenor's
9 studies are more persuasive, because based on better
10 evidence, than the comments of OWRD. The supplemental
11 findings observe that the conclusions of the OWRD
12 representative "seem to be based on a balancing of
13 inconsistent factors. Some of those factors are not based
14 on year long studies and observations by scientifically
15 trained and experienced geotechs." Record 33-34. The
16 challenged decision imposes safeguards in the form of
17 conditions that require additional pump tests and an
18 analysis of possible well-to-well interference prior to
19 approval of any lot division on the subject property.
20 Record 112.

21 The letters of ODWR and the testimony of the ODWR
22 representative raise concerns about the potential of
23 "groundwater overdraft" and about long-term water
24 availability. The county's findings respond to those
25 concerns in sufficient detail to satisfy the coordination

1 requirement imposed by Policy 6(a)(2).⁵ A reasonable person
2 could reach the decision with respect to water availability
3 made by the county in view of all the evidence cited in the
4 record, and we therefore defer to the county's choice
5 between conflicting evidence. Carter v. Umatilla County, 29
6 Or LUBA 181, 185 (1995).

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioner's second assignment of error is based on
10 Policy 22 of the county's Rural/Natural Resource Plan
11 Element.⁶ The applicable strategy implementing Policy 22
12 requires that the county review the adequacy of public
13 services, including schools, in conjunction with "new
14 development." The school superintendent of the West Union
15 School District responded to an inquiry from the county with
16 a statement that the district does not have the capacity to
17 absorb the 400 students who are projected to be added to the
18 district by developments already under way.

⁵As the county points out in its response brief, the "Summary Findings and Conclusions" to Policy 6 itself address potential water shortages in the area of the subject property and provide a remedy -- restriction to one or two acre lots -- that limits development less than the challenged decision.

⁶Policy 22 states:

"It is the policy of Washington County to provide public facilities and services in the rural/natural resource area in a coordinated manner, at levels which support rural type development, are efficient and cost effective, and help maintain public health and safety."

1 The challenged decision concludes that since the
2 application before the county is limited to a plan
3 amendment, and since any development likely to lead to more
4 students would require subsequent applications and approvals
5 at a future date, Policy 22 should not be applied until
6 then. Record 15. The board of commissioners'
7 interpretation of Policy 22 as a standard that should be
8 applied when development approval is sought, instead of when
9 the plan map is amended, is within its discretion under ORS
10 197.829(1) and Clark v. Jackson County 313 Or 508, 836 P2d
11 710 (1992). See also DeBardelaben v. Tillamook County, ____
12 Or App ____, ____ P2d ____ (July 31, 1996).

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioner contends the challenged decision does not
16 address the issue of "rural character," as required by the
17 Scenic Resources policy of the county's Rural/Natural
18 Resource Plan Element. According to petitioner, the "rural
19 character" standard is stated in the first paragraph of the
20 county's Comprehensive Development Code (CDC) 348-1, which
21 begins: "The AF-5 district is intended to retain an area's
22 rural character and conserve the natural resources while
23 providing for rural residential use in areas so designated
24 by the Comprehensive Plan."

25 The decision finds petitioner's argument focuses not on
26 the requested plan amendment, but instead on development or

1 partitioning that might occur after the plan amendment is
2 approved. We agree with the county's argument in its brief
3 that the redesignation of the subject property from AF-10 to
4 AF-5 cannot, of itself, violate the intent statement of the
5 AF-5 zone.

6 Petitioner next argues the decision mistakenly employs
7 "rural character" to mean "rural density." The decision
8 finds:

9 "The opponent [petitioner] alleges the Planning
10 Commission findings fail to demonstrate that the
11 requested plan amendment from AF-10 to AF-5 is
12 compatible with the character of the area, citing
13 to various Comprehensive Plan elements and
14 policies. We do not agree. The extensive
15 Planning Commission findings reflect the
16 proposal's consistency with the lot size and
17 development history in the area." Record 37.

18 We understand this passage to say that "character" may be
19 equated with "lot size and development history." Record 37.
20 We find the interpretation to be within the board of
21 commissioners' discretion under ORS 197.829(1) and Clark.

22 Finally, petitioner challenges the evidentiary support
23 for the county's finding that the proposed plan amendment is
24 based upon "[t]he state of development and commitment that
25 existed in July 1, 1983," as required by Policy 1,
26 Implementing Strategy (p)(2)(B)(1) of the county's
27 Rural/Natural Resource Plan Element of the county's
28 Rural/Natural Resource Plan Element. The county's finding
29 is based in part on percentages that tend to show the
30 proposed plan amendment is consistent with development in

1 1983. Petitioner contends different percentages apply.
2 However, petitioner does not provide citations to the record
3 where the data upon which it relies to calculate its own
4 percentages can be found. We will not search the record for
5 such evidence. See Calhoun v. Jefferson County, 23 Or LUBA
6 436, 439 (1992). Petitioner has not shown this aspect of
7 the decision is not supported by substantial evidence in the
8 whole record.

9 The third assignment of error is denied.

10 **FOURTH ASSIGNMENT OF ERROR**

11 Petitioner contends staff introduced new information in
12 its September 15, 1995 report to the board of commissioners
13 after the record had closed, and argues LUBA should remand
14 the challenged decision to the county to provide an
15 opportunity for rebuttal.⁷ The decision expressly excludes
16 from the record the staff comment to which petitioner
17 objects, and states it will not be considered by the board
18 of commissioners. Record 12. See J.C. Reeves Corp. v.
19 Washington County, ___ Or LUBA ___ (LUBA No. 95-045, April
20 25, 1996), slip op 14 (under CDC 205-7.2, erroneous
21 admission of evidence shall not invalidate or preclude
22 action unless shown to have prejudiced the substantial
23 rights of a party). Petitioner has not shown its rights
24 were substantially prejudiced by the staff comment.

⁷The information pertains to DLCD's decision to treat Policy 1 as a local policy instead of as a policy based on a state regulation.

1 Moreover, since the staff's purpose in making the
2 comment was to explain the scope of the commissioners'
3 interpretative discretion, the comment is not evidence. See
4 Sullivan v. City of Woodburn, ___ Or LUBA ___ (LUBA No. 95-
5 195, May 24, 1996), slip op 11; McInnis v. City of Portland,
6 25 Or LUBA 376, 381-82, aff'd 123 Or App 123 (1993).

7 **FIFTH ASSIGNMENT OF ERROR**

8 Petitioner challenges the county's interpretation of
9 Policy 1 of the county's Rural/Natural Resource Plan
10 Element. We find the board of commissioners' interpretation
11 of Policy 1 to be within its discretion under ORS 197.829(1)
12 and Clark.

13 The fifth assignment of error is denied.

14 The county's decision is affirmed.