

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON  
3

4	OREGON DEPARTMENT OF	)	
5	TRANSPORTATION,	)	
6		)	
7	Petitioner,	)	LUBA No. 96-026
8		)	
9	vs.	)	FINAL OPINION
10		)	AND ORDER
11	CLACKAMAS COUNTY,	)	
12		)	
13	Respondent.	)	

14  
15  
16           Appeal from Clackamas County.

17  
18           Kathryn A. Lincoln, Assistant Attorney General, Salem,  
19 filed the petition for review on behalf of petitioner. With  
20 her on the brief was Theodore R. Kulongoski, Attorney  
21 General.

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23           Michael E. Judd, Chief Assistant County Counsel, filed  
24 the response brief on behalf of respondent.

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26           LIVINGSTON, Referee; HANNA, Chief Referee, participated  
27 in the decision.

28  
29                           AFFIRMED                           10/11/96

30  
31           You are entitled to judicial review of this Order.  
32 Judicial review is governed by the provisions of ORS  
33 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county hearings officer's denial  
4 of petitioner's conditional use application for a road  
5 realignment through rural wetlands.

6 **FACTS**

7 Petitioner seeks approval of a 0.6 mile realignment of  
8 state highway 211. The new alignment would disturb existing  
9 wetlands, and is subject to Division of State Lands (DSL)  
10 regulation independent of any county land use requirements.  
11 Road realignments requiring new right of way are allowed as  
12 a conditional use in the subject Timber (TBR) district. All  
13 conditional use applications are subject to Clackamas County  
14 Zoning and Development Ordinance (ZDO) 1203.01E, which  
15 requires that the use satisfy the goals and policies of the  
16 county comprehensive plan that apply to the use.

17 Water Resources Policy 17.3 of the comprehensive plan  
18 was adopted pursuant to the Goal 5 implementing rules set  
19 forth in OAR chapter 660, division 16. The policy expresses  
20 a "1B" decision pursuant to OAR 660-16-000(5)(b)<sup>1</sup> to delay

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<sup>1</sup>OAR 660-16-000(5)(b) provides:

"(b) Delay Goal 5 Process: When some information is available, indicating the possible existence of a resource site, but that information is not adequate to identify with particularity the location, quality and quantity of the resource site, the local government should only include the site on the comprehensive plan inventory as a special category. The local government must express its intent relative to the resource site through a

1 Goal 5 implementation for wetlands outside urban areas  
2 because of insufficient information, but it also establishes  
3 interim protection measures for such wetlands:

4 "The County has insufficient information as to  
5 location, quality, and quantity of wetland  
6 resources outside of the Mt. Hood urban area and  
7 the Urban Growth Boundary to develop a management  
8 program at this time. If such information becomes  
9 available, the County shall evaluate wetland  
10 resources pursuant to Goal 5 and OAR Chapter 660,  
11 Division 16, prior to the next Periodic Review.  
12 In the interim, the County will review all  
13 conditional use, subdivision, and zone change  
14 applications and commercial and industrial  
15 development proposals to assure consistency with  
16 Section 1000 of the Zoning and Development  
17 Ordinance and goals and policies of Chapter 3 of  
18 the Plan."

19 Section 1000 of the Zoning and Development Ordinance  
20 sets forth the general development standards for the county,  
21 regulating such matters as protection of natural features  
22 (ZDO 1002); flood, fire and earthquake hazards (ZDO 1003);  
23 roads and parking (ZDO 1007); drainage (ZDO 1008); open  
24 space and parks (ZDO 1011); density standards and transfers  
25 (ZDO 1012); and various design standards for land divisions,  
26 mixed use developments, and solar access.

27 The hearings officer found that the realignment

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plan policy to address that resource site and proceed through the Goal 5 process in the future. The plan should include a time frame for this review. Special implementing measures are not appropriate or required for Goal 5 compliance purposes until adequate information is available to enable further review and adoption of such measures. The statement in the plan commits the local government to address the resource site through the Goal 5 process in the post-acknowledgment period. Such future actions could require a plan amendment[.]"

1 proposal met (or with appropriate conditions could meet) all  
2 these standards except ZDO 1011, which regulates open space  
3 and parks. ZDO 1011.02B identifies wetlands as "high  
4 priority" open space, and ZDO 1011.03B provides that "high  
5 priority open space shall be preserved outright," except  
6 that commercial and industrial developments affecting  
7 wetlands may be allowed pursuant to a special review  
8 procedure.

9 The hearings officer denied the application solely on  
10 the grounds that the realignment would disturb wetlands that  
11 are protected by ZDO 1011.03B. Pursuant to the county's  
12 regulations, the hearings officer's decision is final.

13 **ASSIGNMENT OF ERROR**

14 ODOT contends the county hearings officer improperly  
15 construed applicable law in concluding that rural wetlands  
16 on the county's "1B" inventory are protected outright. ODOT  
17 argues that the provisions of Section 1000, and particularly  
18 ZDO 1011.03B, should not be applied to roads because the  
19 requirement of Water Resources Policy 17.3 should be  
20 balanced against other Plan policies, including those  
21 concerning transportation. However, ODOT does not identify  
22 any provision of the comprehensive plan that requires or  
23 allows the "balancing" of Water Resources Policy 17.3 in a  
24 way that nullifies its express language, which requires  
25 review of all conditional use applications for consistency  
26 with Section 1000.

1 ODOT also argues that the county "does not have the  
2 discretion to require blanket protection of all the county's  
3 wetlands," citing Ramsey v. City of Portland, 115 Or App 20,  
4 836 P2d 772 (1992), and Friends of Forest Park v. LCDC, 129  
5 Or App 28, 877 P2d 130 (1994). However, those cases concern  
6 amendments to comprehensive plans and land use regulations  
7 subject to review for compliance with Goal 5 and its  
8 implementing rules, either by LCDC on periodic review or by  
9 LUBA on direct review. The county's review of this  
10 application for a conditional use permit is for compliance  
11 with the county's acknowledged plan and land use  
12 regulations, not the statewide goals. ORS 197.175(2)(d).  
13 Our review of the county's decision is for compliance with  
14 the acknowledged comprehensive plan and land use  
15 regulations. ORS 197.835(8). Because neither the Goal 5  
16 implementing rules nor the holdings in Ramsey, supra, and  
17 Friends of Forest Park, supra, apply to a decision governed  
18 by an acknowledged comprehensive plan and land use  
19 regulations, they provide no basis for reversal or remand  
20 under ORS 197.835(9)(a)(D).

21 ODOT states that the applicability provisions of  
22 ZDO 1001.02 specify a list of uses to which Section 1000  
23 applies, and neither "roads" nor "conditional uses" is on  
24 that list. ODOT argues that the county was required to  
25 interpret both plan Policy 17.3 and ZDO 1001.02 in order to  
26 conclude that ZDO Section 1011 applies to all conditional

1 uses in wetland areas, rather than to uses identified in the  
2 applicability provision of ZDO 1001.02A. ODOT then contends  
3 that this interpretation may not be affirmed pursuant to ORS  
4 197.829(1)(d), because it is contrary to the following  
5 language from the administrative rule that authorizes "1B"  
6 delay decisions: "Special implementing measures are not  
7 appropriate or required for Goal 5 compliance purposes until  
8 adequate information is available to enable further review  
9 and adoption of such measures." OAR 660-16-000(5)(b).

10 The rule of deference to a local government's  
11 interpretation of its plan and land use regulations, which  
12 is codified in ORS 197.829(1), does not apply to our review  
13 of local government decisions not made by the governing  
14 body. Watson v. Clackamas County, 129 Or App 428, 879 P2d  
15 1309 (1994). It follows that the exceptions to the rule,  
16 set forth in ORS 197.829(1)(a) through (d), also do not  
17 apply. However, interpretations of the county's  
18 acknowledged plan and land use regulations should be  
19 "consistent with state law." Byrd v. Stringer, 295 Or 311,  
20 318, 666 P2d 1332 (1983).

21 Moreover, in this case the hearings officer did not  
22 specifically address ODOT's argument that the proposed use  
23 is not listed in the applicability provision of ZDO 1001.02;  
24 although an interpretation of that provision is implicit in  
25 the county's denial, it is inadequate for review. While the  
26 lack of an adequate interpretation explaining the county's

1 rejection of ODOT's argument is sufficient grounds for  
2 remand, see Norvell v. Portland Metro Area LGBC, 43 Or App  
3 849, 853, 604 P2d 896 (1979), we may make our own  
4 determination of whether the local government decision is  
5 correct where the facts are undisputed and the issue is a  
6 pure question of law. ORS 197.829(2); Miller v. Clackamas  
7 County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 95-204, April 23, 1996)  
8 slip op 4.

9 Review of a conditional use pursuant to plan Policy  
10 17.3 "to assure consistency with Section 1000" necessarily  
11 requires consideration of Section 1000 itself. ODOT is  
12 therefore correct in arguing that the applicability  
13 provisions of ZDO 1001.02 are relevant and should be  
14 addressed.<sup>2</sup> However, ODOT's argument focuses on ZDO

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<sup>2</sup> ZDO 1001.02 provides in part:

"APPLICATION OF THESE STANDARDS

"A. The standards set forth in Section 1000 shall apply to major and minor partitions; subdivisions; commercial and industrial projects; multi-family and common-wall structures of three (3) or more dwellings. Single-family detached residences and two-family common-wall structures shall be subject to other codes under subsection 1001.03, and to development standards pertaining to:

- "1. Hazards to safety, under Section 1003.
- "2. Slopes of twenty (20) percent or greater, under 1002.03
- "3. Rivers and stream corridors, under subsection 1002.05.
- "4. Wildlife habitats and distinctive resource areas, under subsection 1002.06.

1 1001.02A and ignores ZDO 1001.02B.

2 ZDO 1001.02A specifies one list of uses to which all of  
3 Section 1000 applies, and a second list of uses to which  
4 only identified portions of Section 1000 apply. As the  
5 county points out in its brief, ZDO 1001.02A does not state  
6 that Section 1000 applies, wholly or in part, only to the  
7 listed uses. More importantly, ZDO 1001.02B provides that  
8 "the application of these standards shall be modified" so  
9 that "development standards which are unique to a particular  
10 district or area shall be set forth in the section governing  
11 that district or area." In this case, the standards  
12 governing open space areas (including wetlands) are set  
13 forth in ZDO Section 1011. ZDO 1011.02, "Area of

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"5. Cultural resources and historic sites, under Section  
1004.

"6. Natural drainage channels, under subsection 1008.03B.

"B. The application of these standards to a particular  
development shall be modified as follows:

"1. Development standards which are unique to a  
particular use, or special use, shall be set forth  
within the district or in Section 800.

"2. Those development standards which are unique to a  
particular district or area shall be set forth in  
the section governing that district or area.

"3. When conflicts arise in the application of the  
various standards set forth in Section 1000,  
identification and resolution of such conflicts  
shall be a function of the Review Process set forth  
in Section 1100."



1 Application," provides in relevant part:

2 "The standards and requirements of this section  
3 shall apply to areas generally indicated as Open  
4 Space on the Comprehensive Plan, Northwest Urban  
5 Area map, or when one or more of the following  
6 open space resources is present:

7 \* \* \* \* \*

8 "5. Wetlands, including recharge areas[.]"

9 A conditional use in a rural wetland area is subject to  
10 the restrictions of ZDO 1011.03. ZDO 1203.01E and plan  
11 Policy 17.3 require all conditional uses in wetland areas to  
12 be reviewed for consistency with the various provisions of  
13 Section 1000, including Section 1011. ZDO 1011.02A provides  
14 that the standards of Section 1011 shall apply to areas  
15 where wetlands are present, without exemption for any use.  
16 Pursuant to ZDO 1001.02B, the applicability of development  
17 standards which are unique to a particular district or area  
18 are set forth in the section governing that area. Nothing  
19 in ZDO 1001.02 limits the applicability established by ZDO  
20 1011.02A. The county's decision was correct.

21 The interpretation urged by ODOT is no more consistent  
22 with the rule language concerning the appropriateness of  
23 special implementing measures than the interpretation that  
24 supports the county's decision. ODOT's fundamental  
25 challenge is not to the county's interpretation of its  
26 regulations, but to the regulations themselves. That  
27 challenge should have been mounted before the regulations  
28 were deemed acknowledged.

1           The decision of the county did not improperly construe  
2 applicable law. The assignment of error is denied.

3           The county's decision is affirmed.

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