

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS JUN 2 12 41 PM '80

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the)
assumed name of Oregon Land)
Use Project, Inc, and)
RICHARD REES, JEFF WERNER,) LUBA NO. 80-003
JANICE EMERY, LARRY)
DILDINE, JOHN F. WILSON,) FINAL OPINION AND ORDER
DEBORAH WILSON, JOHN LIS,)
Petitioners,)
vs.)
CURRY COUNTY BOARD OF)
COMMISSIONERS,)
Respondent.)

Appeal from Curry County.

Richard Benner, Portland, waived oral argument,
but submitted a petition for review for Petitioners.

Richard K. Mickelson, Gold Beach, waived oral argument
and did not submit a brief.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee;
participated in the decision.

Reversed and remanded. 6/2/80

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of
Oregon Laws 1979, ch 772, sec 6(a).

1 "4. The plan violates Goal 10 by 1) failing to
2 inventory buildable land in urban and urbanizable
3 areas; 2) failing to identify housing needs; and 3)
4 failing to allocate buildable land among needed
5 housing type.

6 "5. The plan violates Goal 11 by 1) failing to
7 include a key facilities plan; 2) failing to assess
8 service needs; and 3) failing to develop a plan to
9 meet service needs.

10 "6. The plan violates Goal 14 by failing to
11 consider the seven goal factors for establishment of
12 urban growth boundaries of Port Orford, Gold Beach and
13 Brookings.

14 "7. The plan violates Goal 16 by 1) assigning
15 overall estuary classifications in conflict with
16 LCDC's Administrative Rule Classifying Oregon
17 Estuaries (OAR ch. 660, Division 17); 2) failing to
18 establish management units in the Winchuck River
19 estuary; 3) by failing to limit uses in some estuaries
20 and designating uses in others that violate the goal;
21 4) failing to include a dredge material disposal
22 program for the Chetco River estuary; 5) failing to
23 restrict single-purpose docks and piers; 6) failing to
24 discuss or designate restoration areas; and 7) failing
25 to justify designation of Euchre Creek and Hunter
26 Creek estuaries as 'Conservation' estuaries.

 "8. The plan violates the Coastal Shoreland Goal
(Goal 16) because 1) the county's inventory of coastal
shorelands is incomplete; 2) the plan authorizes uses
of coastal shorelands not allowed by Goal 16; 3) the
Marine Activity Plan and Zone designations fail to
protect areas for water-dependent uses; 4) plan
policies on erosion control conflict with
Implementation Requirement (6); and 5) the plan fails
to protect urban shorelands.

 "9. The plan violates Goal 2 by failing to
demonstrate that lands excepted from Goals 3 and 4 are
committed to or needed for nonfarm use."

FACTS

 On December 4, 1979, the Curry County Board of
Commissioners adopted the Curry County Comprehensive Plan and
implementing zoning ordinance. The plan establishes policies

1 COX, Referee

2 NATURE OF DECISION AND RELIEF SOUGHT

3 Petitioners seek this Board's review of respondent's
4 Ordinances 79-010 and 79-011 dated December 4, 1979, which
5 adopted Curry County's comprehensive plan and implementing
6 zoning ordinance. Petitioners urge this Board to declare
7 invalid those portions of the respondent's comprehensive plan
8 and zoning ordinance that violate statewide goals.

9 STANDING

10 Respondents do not contest petitioners' standing to bring
11 this action.

12 ALLEGATIONS OF ERROR WHICH PETITIONERS SEEK TO HAVE REVIEWED

13 Petitioners seek this Board's review of respondent's land
14 use decisions alleging that said decisions are erroneous for
15 the following reasons:

16 "1. The plan and zoning ordinance violate Goal 3
17 by 1) failing to inventory 'agricultural land'
18 properly; 2) designating rural 'agricultural land' for
19 nonfarm and nonforest use without proper exception
20 under Goal 2; 3) imposing upon land designated for
21 'Agriculture' a non-exclusive farm zone; 4) failing to
22 justify the F-1 minimum lot size; and 5) authorizing
23 land divisions in the F-1 zone without proper
24 standards.

25 "2. The plan violates Goal 4 by 1) designating
26 forest land for nonforest uses; and 2) authorizing
27 nonforest uses without assurance that the forest lands
28 will be retained for forest uses.

29 "3. The plan violates Goal 5 by 1) failing to
30 determine whether there are conflicts over use of
31 identified resources; 2) failing to determine the
32 consequences of the conflicts; 3) failing to develop a
33 program to achieve the goal; and 4) failing to protect
34 resources identified in the plan inventory.

1 for land and water use in the county and the plan map and
2 zoning map designate uses to implement plan policies.

3 On February 29, 1980, respondent moved to dismiss
4 petitioners' Notice of Intent to Appeal and anticipated
5 petition for review on the grounds that the action lacked
6 ripeness. The heart of respondent's motion was that the plan
7 and ordinance being contested had been sent to the Land
8 Conservation and Development Commission (LCDC) for
9 acknowledgment pursuant to ORS 197.250 et seq. As such,
10 respondent argued this Board is without authority to review
11 adopted comprehensive plans which had been submitted to LCDC
12 for acknowledgment. They argued that the anticipated petition
13 for review filed by petitioners is a needless duplication of
14 planning review inasmuch as the entire acknowledgment process
15 by LCDC allows for input by petitioner.

16 This Board denied respondent's Motion to Dismiss on March
17 19, 1980, citing Oregon Laws 1979, ch 772. The Board reasoned
18 that the legislature did not authorize this Board to
19 discontinue its review of an appeal just because an
20 acknowledgment review was proceeding simultaneously before
21 LCDC. As was stated in our order denying respondent's motion
22 to dismiss:

23 "It may very well be that an early determination by
24 LCDC in the acknowledgment process will moot this
25 appeal. However, this Board has no authority to
26 dismiss or suspend its review of this appeal for the
reasons advanced by respondent."

Specific reference was made to Section 6(5) of Oregon Laws

1 1979, Chapter 772, pointing out the Legislature, in creating
2 this Board, realized that LCDC might want to have some
3 flexibility to postpone its acknowledgment review while a
4 petition for review challenging the comprehensive plan and
5 implementing ordinance was being considered by this Board. The
6 converse, however, is not true. This Board cannot delay
7 consideration of a petition for review pending the outcome of
8 LCDC's decision on an acknowledgment request. This may very
9 well be a problem which needs to be reviewed by the Legislature
10 in the future. However, it is beyond the Board's power to
11 delay its action or refuse jurisdiction merely because LCDC has
12 a concurrent jurisdiction.

13 Respondent, in light of the Board's decision on its Motion
14 to Dismiss submitted its brief which merely stated:

15 "The Curry County Board of Commissioners elect to
16 stand moot at this stage of the proceedings."

17 Respondent waived oral argument. In light of respondent's
18 position, petitioners also waived oral argument. Therefore,
19 the decision of this Board is made strictly on the petitioner's
20 brief and the record submitted by respondent.

21 DECISION

22 We have reviewed petitioners' first allegation of error.
23 This Board finds error in respondent's plan regarding goal 3
24 and based on that finding as well as the pending comprehensive
25 plan acknowledgment review by LCDC does not address
26 petitioners' other allegations of error.¹ Respondents'

1 comprehensive plan and implementing zoning ordinance are
2 remanded for reconsideration consistent with this decision.

3 PETITIONERS' FIRST ALLEGATION OF ERROR

4 Petitioners allege that respondent's plan and zoning
5 ordinance violates goal 3 by:

6 "1) failing to inventory 'agricultural land'
7 properly; 2) designating rural 'agricultural land' for
8 nonfarm and nonforest use without proper exception
9 under Goal 2; 3) imposing upon land designated for
10 'Agriculture' a non-exclusive farm zone; 4) failing to
11 justify the F-1 minimum lot size; and 5) authorizing
12 land divisions in the F-1 zone without proper
13 standards."

14 Petitioners argue under subsection 1) above that respondent
15 violated goal 3 by failing to include lands other than those
16 containing Class I-IV soils in its definition of "agricultural
17 land". With this allegation, the Board agrees.

18 Goal 3 states that respondent must "preserve and maintain
19 agricultural lands." Agricultural land in Western Oregon is
20 defined as:

21 (1) Land of predominantly Class I, II, III and
22 IV soils as identified in the Soil Capability
23 Classification System of the United States Soil
24 Conservation Service.

25 (2) Other lands which are suitable for farm use
26 taking into consideration soil fertility, suitability
for grazing, climatic conditions, existing and future
availability of water for farm irrigation purposes,
existing land use patterns, technological and energy
inputs required, or accepted farming practices.

(3) Lands in other classes which are necessary
to permit farm practices to be undertaken on adjacent
or nearby lands.

1 A review of the record indicates that Respondent has
2 defined agricultural land differently:

3 "Agricultural lands are those which have an SCS
4 agricultural capability classification of class I to
5 IV. The County as a whole possesses 32,496 acres of
6 agricultural soil." Plan, p. 133

7 In addition, the findings that accompany the plan
8 merely state:

9 "Agricultural soils are those soils which are
10 being intensively farmed for the commercial production
11 of food or fiber or requested by the property owner to
12 be defined as farmland." Plan Findings, p. 2.

13 Respondent's definition of agricultural land is at variance
14 with the Statewide Goal No. 3 definition. The county erred by
15 failing to include in its definition and therefor its
16 agricultural lands inventory other lands suitable for farm use
17 and lands not suitable for farm use but which must be protected
18 in order to permit farm practices to be undertaken on adjacent
19 or nearby lands. If there are no lands other than those
20 containing Class I-IV soils which fall within Goal 3's
21 definition of agricultural lands, then the respondent should so
22 state. If, on the other hand, there are lands which fit within
23 the non-class I-IV soil definition of agricultural lands, the
24 respondent must identify them and make provisions for their
25 protections as set forth in Statewide Goal No. 3.

26 Based on the foregoing, this Board finds that respondent
failed to comply with Statewide Goal No. 3 and it is unnecessary
for this Board to consider petitioners' other allegations of

1 error. Therefore, this Board reverses and remands to
2 respondent Ordinances 79-10 and 79-11 for action consistent
3 with this opinion.

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FOOTNOTE

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As we stated in Kerns, et al v. City of Pendleton, et al, LUBA No. 79-001 (1980), at Footnote 6, this Board is desirous whenever practical, of providing guidance to governing bodies and assisting them in avoiding repeated errors. In this case, respondent will be obtaining LCDC review and assistance during its acknowledgment process. Our involvement at this point is unnecessary, especially in light of this Board's relationship with LCDC regarding allegations of goal violations.



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 4/22/80

FROM: LAND USE BOARD OF APPEALS

SUBJECT: 1000 FRIENDS OF OREGON, ET AL V. CURRY COUNTY
LUBA NO. 80-003

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

The issues in this case regard respondent's comprehensive plan and implementing ordinance which are before LCDC on respondent's request for acknowledgment. This case brings to the commission an important question which seems to have arisen due to the terminology of the legislation which created the Land Use Board of Appeals. This is the second time the Board has been asked to review adopted but unacknowledged comprehensive plans concurrently with LCDC's acknowledgment review. The Board cannot stay its determination on a petition for review contesting an adopted but unacknowledged comprehensive plan (see Senate Bill 435, § 6(5)). There nevertheless are times when our review unnecessarily duplicates the acknowledgment review process. As a practical matter, this Board is not constituted nor given sufficient time to do an acknowledgment review such as is inherently requested by petitioners in this case. Consequently, it is this Board's intention that in such cases, we will follow the statute creating us and take jurisdiction of these cases. However, our review will be extremely limited, such as the situation in the case before you. We reviewed a portion of petitioner's first allegation of error and found that the respondent had erred.

The issue upon which the Board has ruled involves the definition of agricultural land dictating the amount of land respondents include in their agricultural land inventory. Our decision finds that respondent's limited definition of agricultural lands does not coincide with Goal 3's definition. We recommend that the matter be remanded to the respondent for further consideration. This recommendation is based on an understanding that respondent's entire comprehensive plan is now before LCDC for acknowledgment and this decision along with any other adjustments required by LCDC can be dealt with by respondent upon remand.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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LUBA NO. 80-003
PROPOSED OPINION AND ORDER

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