

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

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DR. MATT GRUBER, )  
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Petitioner, )  
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vs. )  
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LINCOLN COUNTY, )  
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Respondent, )  
 )  
and )  
 )  
DEPARTMENT OF LAND )  
CONSERVATION AND DEVELOPMENT, )  
 )  
Intervenor-Respondent.)

LUBA No. 87-108  
FINAL OPINION  
AND ORDER

Appeal from Lincoln County.

Dr. Matt Gruber, Salem, filed a petition for review and argued on his own behalf.

Wayne Belmont, Newport, filed a brief and argued on behalf of Respondent Lincoln County.

Gabriella I. Lang, Salem, filed a brief and argued on behalf of Intervenor-Respondent Department of Land Conservation and Development. With her on the brief were Dave Frohnmayer, Attorney General; William F. Gary, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

BAGG, Chief Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 03/15/88

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a Lincoln County Board of Commissioners'  
4 decision denying a request for approval of a planned unit  
5 development (PUD) and accompanying zone change.

6 FACTS

7 The affected property is subject to an exception from  
8 Statewide Planning Goal 4 (Forest Lands). The exception was  
9 based on a county determination that the property is committed  
10 to nonforest uses. The property is designated for rural  
11 residential use and is zoned RR-5, a rural residential zoning  
12 designation with a five acre minimum lot size.<sup>1</sup>

13 Petitioner's request is for approval of a 71 unit PUD on 74  
14 acres of land. Under petitioner's proposal, the development,  
15 including individual dwelling units, would occupy about 14.5  
16 acres of the property. The remaining 60 acres would be in  
17 common area open space.

18 Along with the request for PUD approval, petitioner asked  
19 for a RR 1-2 PD zone designation. This designation is a rural  
20 residential, one to two acre minimum lot size zone with a  
21 planned unit development overlay. Petitioner's request was  
22 granted by the county planning commission, but the Department  
23 of Land Conservation and Development (DLCD) filed an appeal of  
24 that decision to the county board of commissioners. The county  
25 board of commissioners considered the matter, and on April 29,  
26 1987, voted to deny the request. An order was prepared and

1 signed by the county board on November 4, 1987. This appeal  
2 followed.

3 FIRST ASSIGNMENT OF ERROR

4 "There is substantial evidence in the whole record to  
5 support the Planning Commission approval, but there is  
6 not substantial evidence to support the County  
7 Commissioners' denial."

8 Petitioner argues that there is sufficient evidence in the  
9 record to show that changes have occurred since adoption of the  
10 comprehensive plan and zoning ordinance. Specifically,  
11 petitioner mentions the inclusion of a grocery store, gas  
12 station and sporting goods facility in the area of his proposed  
13 PUD. Petitioner claims that these changes are sufficient  
14 evidence to justify a change in the zoning of the property from  
15 a five acre minimum lot size to petitioner's requested one to  
16 two acre minimum lot size.

17 The Lincoln County Code (LCC), Section 1.1235(2), requires  
18 an applicant for a zone change to demonstrate a substantial  
19 change in the character of an area since the existing zoning  
20 was established.<sup>2</sup> Respondent county argues that the  
21 surrounding properties include timber conservation zoning, a  
22 mixture of large and small parcels, golf courses and  
23 residential lots. The addition of a grocery store and gasoline  
24 station is not sufficient, according to respondent, to  
25 constitute the substantial change in character of the area  
26 required by the ordinance for a zone change. Respondent  
reminds the Board that it is petitioner's responsibility to

1 show that substantial changes occurred, and the record is  
2 devoid of sufficient evidence to show such a substantial  
3 change.

4 We agree with respondent. What constitutes a substantial  
5 change in the character of an area is a matter for county  
6 determination. The county found the changes cited by  
7 petitioner did not constitute such a substantial change. We  
8 find the county's conclusion reasonable. Alluis v. Marion  
9 County, 64 Or App 478, 668 P2d 1242 (1983). Petitioner does  
10 not cite us to other evidence in the record (either before the  
11 planning commission or the county board), showing other changes  
12 in the area which are sufficient to cast doubt on the county's  
13 conclusion that LCC 1.1235(2) is not met by this proposal. The  
14 addition of the uses cited by the petitioner does not show that  
15 the character of the area has undergone a substantial change.

16 The First Assignment of Error is denied.

17 SECOND ASSIGNMENT OF ERROR

18 "The allegation that a planned development of 74 acres  
19 with average density less than one housing unit per  
20 acre, but clustered in smaller size lots is urban  
density is contrary to the acknowledged definitions in  
the Comprehensive Plan and zoning ordinances."

21 Under this assignment of error, the petitioner claims that  
22 the planned unit development standards found at LCC 1.1380  
23 allow variation from the lot sizes permitted in the underlying  
24 zone as long as the average residential lot size is equal to or  
25 greater than the minimum lot sizes in the zone. Petitioner  
26 then argues:

1 "Nowhere in the Curry County case is there any  
2 indication by the Court that in an acknowledged county  
3 plan, which sets standards approved by LCDC, and which  
4 are specific as to method of determining lot size,  
5 does the application of those lot sizes, whatever  
6 size, change rural residential land to urban land.  
7 [301 Or 447 (1986) pg 452] Nowhere has LCDC defined  
8 'rural' or 'urban,' which is applicable to an  
9 acknowledged plan. (Id. pg.) As the Court mentions,  
10 what is within an urban growth boundary is urban; all  
11 else is rural. (Id. pg 456) Allegations by DLCD  
12 cannot arbitrarily make such determinations for a  
13 specific location where DLCD has consistently not  
14 challenged similiar [sic] RR 1-2 changes and uses."  
15 Petition for Review at 17.

16 We understand petitioner to challenge the county's  
17 characterization of petitioner's request as resulting in lot  
18 sizes so small as to be inconsistent with the rural residential  
19 character of the area (See Record 12, 17). Petitioner seems to  
20 argue that the county impermissibly relied on a determination  
21 that the proposal would "not continue the rural residential  
22 character of the subject site." Record 17.

23 We believe the allegations contained in this assignment of  
24 error are adequately considered under our discussion of the  
25 sixth assignment of error.

26 However, as to petitioner's claim that the county's  
27 characterization is "contrary to the acknowledged definitions  
28 in the comprehensive plan and zoning ordinances," we note that  
29 petitioner does not advise us in what manner the county's  
30 characterization violates the plan and zoning ordinances, nor  
31 does petitioner advise what definitions or provisions in the  
32 comprehensive plan and zoning ordinance dictate a result other  
33 than that reached by the county. Petitioner provides us with

1 no basis to reverse or remand the county's decision.

2 The second assignment of error is denied.

3 THIRD ASSIGNMENT OF ERROR

4 "That the repeated usage of the terms 'urban density,  
5 urban use, intensity of use, type of use' in the  
6 testimony and letters from DLCD, 1000 Friends of  
7 Oregon, and the testimony of the County counsel are in  
8 error, not based on fact or citations, and not defined  
9 in DLCD rules, land use goals, court decisions, County  
10 Plan or ordinances and were prejudicial to the  
11 applicant/petitioner."

12 FOURTH ASSIGNMENT OF ERROR

13 "That the Commissioners relied on the statements from  
14 1000 Friends and the County counsel as 'conclusions of  
15 law' and not supported by substantial citations or  
16 factual evidence."

17 Under the third and fourth assignments of error, petitioner  
18 complains that statements by DLCD, 1000 Friends of Oregon and  
19 the county legal counsel characterizing the proposed PUD as  
20 having urban density are simply personal opinions and not  
21 founded on evidence or legal citation.

22 We find no basis under these assignments of error to  
23 overturn the county's decision. It is the county commission's  
24 order which is subject to our review, not the views of  
25 interested persons or the county legal counsel. Petitioner's  
26 challenge to the county's decision must be based upon  
27 challenges to specific and necessary portions of the county's  
28 decision. Here, in contrast, the petitioner is challenging the  
29 views of parties to the proceeding and of county staff. These  
30 views do not make up the county's decision and are not  
31 reviewable by this Board. See, Citadel Corporation v.

1 Tillamook County, 9 Or LUBA 61, 67 (1983), dismissed 66 Or App  
2 965, 675 P2d 1114 (1984). See also Oatfield Ridge Residents  
3 Rights v. Clackamas County, 14 Or LUBA 766, 768-769 (1986).

4 The Fourth Assignment of Error is denied.

5 FIFTH ASSIGNMENT OF ERROR

6 "That allowing the County counsel to present lengthy  
7 legal analysis and opinion after the public hearing was  
8 closed without reopening the hearing and allowing  
9 rebuttal by the applicants when the County counsel did  
10 not appear nor testify at the Planning Commission  
11 hearing, and such testimony was contrary to the  
12 counsel's advice as submitted by the Planning Director  
13 (Record pg. \* ), was detrimental to the applicant, was  
14 not part of the record, constituted surprise and denied  
15 applicant a fair hearing and right to be heard (see  
16 County counsel's letter of March 19, 1987, pg. 41)."

17 Petitioner argues that the county counsel argued at length  
18 after the public hearing was closed, without notice to the  
19 applicants and the appellants to the county's proceeding and  
20 without giving the opportunity to rebut counsel's analysis.  
21 According to petitioner, petitioner was prejudiced by this  
22 alleged error.

23 Our review of legal counsel's discussion before the Board  
24 (see Record 28-29) does not show new factual evidence was  
25 presented. The discussion includes the legal counsel's views  
26 as to the arguments made by the parties and, as such,  
27 constitutes staff advice. We do not believe that rebuttal need  
28 be provided under such circumstances.<sup>3</sup> We believe the county  
29 is entitled to rely on its county counsel for legal advice and  
30 an analysis of the case. Petitioner had ample opportunity to  
31 address all of the issues, and the fact that the county counsel

1 provided commentary on the issues is not error. See Urquhart  
2 v. LCOG and City of Eugene, 14 Or LUBA 335, 339, rev other  
3 grounds 80 Or App 176, 721 P2d 870 (1986).

4 The Fifth Assignment of Error is denied.

5 SIXTH ASSIGNMENT OF ERROR

6 "That reliance on and reference to 1000 Friends v.  
7 DLCD/Curry County in this proceeding was in error  
8 because that case was prior to acknowledgement,  
9 applied to the procedure of taking exception to the  
10 Goals prior to acknowledgement, was not about areas  
11 already excepted and zoned for housing in an  
12 acknowledged plan and did not set a definition for  
13 urban v. rural density as alleged by DLCD."

14 We understand petitioner to complain that the county erred  
15 in relying on OAR 660-04-018 as a basis for denial of the  
16 proposed zone change and PUD. The rule provides as follows:

17 "Planning and Zoning for Exception Areas

18 "660-04-018 (1) Purpose. This rule explains the  
19 requirements for adoption of plan and zone  
20 designations for exception areas. Exceptions to  
21 one goal or a portion of one goal do not relieve  
22 a jurisdiction from remaining goal requirements  
23 and do not authorize uses or activities other  
24 than those recognized or justified by the  
25 applicable exception. Physically developed and  
26 irrevocably committed exceptions under OAR  
660-04-025 and 660-04-028 are intended to  
recognize and allow continuation of existing  
types of development in the exception area.  
Adoption of plan and zoning provisions which  
would allow changes in existing types of uses  
requires application of standards outlined in  
this rule."

Petitioner believes that the county's characterization of  
his proposed PUD as an "urban" rather than a "rural" use is  
mistaken. According to petitioner, the county's

1 characterization allowed it to view the proposed PUD as  
2 violating OAR 660-04-018 because a change from rural to urban  
3 use in the area is not consistent with the requirements of the  
4 rule. Petitioner argues his request is for uses similar to  
5 those approved in the acknowledged exception to Goal 4 (that  
6 is, rural uses). Petitioner states:

7 "Since the proposal continues residential uses allowed  
8 in a dispersed residential area, it does not change  
9 the type of use, and therefore OAR 660-04-018 does not  
10 apply to the proposal, and actions based on it or  
11 Curry County findings were in error."<sup>4</sup> Petition for  
12 Review at 22.

13 The county adopted a "physically developed" or "irrevocably  
14 committed" exception to Goal 4 for the subject area.

15 OAR 660-04-018(2) provides as follows:

16 "(2) 'Physically Developed' and 'Irrevocably  
17 Committed' Exceptions to goals other than Goals 11 and  
18 14. Plan and zone designations shall limit uses to:

19 "(a) Uses which are the same as the existing  
20 types of land use on the exception site; or

21 "(b) Rural uses which meet the following  
22 requirements:

23 "(A) The rural uses are consistent with all other  
24 applicable Goal requirements; and

25 "(B) The rural uses will not commit adjacent or  
26 nearby resource land to nonresource use as defined in  
OAR 660-04-028; and

"(C) The rural uses are compatible with adjacent  
or nearby resource uses.

"(c) Changes to plan or zone designations are  
allowed consistently with subsections (a) or (b) of  
this section, or where the uses or zones are  
identified and authorized by specific related policies  
contained in the acknowledged plan.

1           "(d) Uses not meeting the above requirements may  
2           be approved only under provisions for a reasons  
3           exception as outlined in OAR 660-04-020 through  
4           660-04-022."

5           The county found the proposed PUD did not comply with the  
6           rule because it was not a continuation of existing rural uses  
7           on the site as allowed under the Goal 4 exception taken for  
8           this property. That is, the county found petitioner did not  
9           comply with OAR 660-04-018(2)(a), (b) or (c).<sup>5</sup> The county  
10          specifically notes the requested RR 1-2 zoning (without the PD  
11          overlay) could be allowed, but only if the intensity of use  
12          remained similar to existing uses. The county found that  
13          approval of the proposed PUD would establish "an intensity of  
14          use which departs from, and is not the same as, the type of  
15          uses existing in the exception area." Record 17.

16          We understand the county to view the proposal as one which  
17          concentrates urban sized lots in one section of the property.  
18          The county found the proposed development would allow four and  
19          one half to five units per acre of developed land. The county  
20          advises this higher intensity is allowable under its R-1  
21          through F-4 residential zoning classifications, but not under  
22          the RR 1-2 zone. The county concludes that the 7,000 square  
23          foot average lot size of the proposed single family lots and  
24          the 1500 to 2500 square foot lot size for the proposed  
25          condominiums, over a total of 79 units, "would not continue the  
26          rural residential character of the site." Record 17.<sup>6</sup>

          The area is designated in the county's plan for dispersed

1 residential use, and petitioner's proposed clustering of  
2 dwellings in the PUD is inconsistent with that designation,  
3 according to the county. Dispersed Residential is described in  
4 the county plan as follows:

5 "(A) Dispersed Residential areas are committed to  
6 residential use and shall be defined on the basis  
7 of population and as areas having a historic land  
8 use pattern of low density settlement with few  
9 if any public services and facilities either  
10 existing or planned.

11 "(B) Those public services and facilities considered  
12 appropriate for Dispersed Residential areas shall  
13 be limited to existing services and facilities  
14 and those services and facility improvements that  
15 are needed for the maintenance of the existing  
16 low density residential uses."

17 We believe the county's characterization of this proposal  
18 as creating urban intensities is sufficient to allow the county  
19 to determine the proposed development failed to comply with  
20 under OAR 660-04-018(2) (a) or (b). The county articulated what  
21 it understood to be the rural character of the area. It then  
22 compared the proposal to the existing level of development  
23 before concluding the proposal was not a rural use and would  
24 not continue the existing rural use in the area. We do not  
25 believe the county was obliged to do more. In addition, we  
26 believe the county's findings and conclusion are supported by  
the record.<sup>7</sup> Failure to comply with OAR 660-04-018(2) was  
sufficient basis for county denial of the proposed zone change.

We find no error as alleged.

The Sixth Assignment of Error is denied.

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1 SEVENTH ASSIGNMENT OF ERROR

2 "Designation of the applicant's plan as changing rural  
3 use to urban use by the County was arbitrary, contrary  
4 to the County Comprehensive Plan and zoning  
5 ordinances, not based on substantial evidence, and  
6 contrary to previous actions and findings of the  
7 County in respect to the area at issue and other land  
8 use actions. (In the matter of the appeal of Kelson  
9 to Lincoln County Board of Commissioners 8/26/83; In  
10 the matter of McMillan change of zone for 20 acres  
11 from TC (Timber Conservation) to RR 1-2 4/25/84 (no  
12 appeal by DLCD) (Lincoln County file of DLCD).  
13 (appended) "

14 Petitioner argues that the purpose of the county's  
15 comprehensive plan and zoning ordinance is to provide stability  
16 in land use planning. Petitioner characterizes the county  
17 board's action as arbitrary in that it deviates from prior  
18 decisions, contrary to the county's plan and zoning  
19 designations and not based on substantial evidence in the  
20 record.

21 We have discussed compliance with the county's plan and  
22 zoning regulations and petitioner's complaints about  
23 substantial evidence under the previous assignments of error.  
24 Petitioner's allegations that the decision is arbitrary is not  
25 convincing. The county's decision clearly identifies the  
26 applicable criteria and discusses the compliance of the  
27 proposed zone change and PUD with those criteria.

28 The texts of earlier decisions cited by petitioner are not  
29 part of the record before us on appeal. The fact the county  
30 may have decided earlier cases differently does not mean that  
31 the county's present decision is in error. Again, LUBA

1 measures the county's decision against applicable criteria, not  
2 against prior actions. We note further that petitioner's  
3 assertions of different treatment in prior decisions do not  
4 demonstrate the facts in the earlier decisions are sufficiently  
5 similar to those in the present case to raise any suspicion as  
6 to whether the county complied with its ordinance or somehow  
7 treated petitioner unfairly.

8 The Seventh Assignment of Error is denied.

9 The county's decision is affirmed.<sup>8</sup>

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FOOTNOTES

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4 The Lincoln County Comprehensive Plan and Zoning Ordinance  
5 have been acknowledged as being in compliance with statewide  
6 planning goals by the Land Conservation and Development  
7 Commission.

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10 LCC 1.1235 of the Lincoln County Code provides as follows:

11 "(1) That the change is in accord with the Comprehensive  
12 Plan goals and policies or the Statewide Planning  
13 Goals; and

14 "(2) That there has been a substantial change in the  
15 character of the area since zoning was adopted and  
16 which warrants changing the zone; or

17 "(3) That zoning previously adopted for the area was in  
18 error; or

19 "(4) That there is a public need for the change being  
20 sought." (emphasis added.) (Rec. 13)"

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23 We note Oregon law specifically provides that communications  
24 between governing bodies and their staffs are not "ex parte  
25 contacts" subject to disclosure under ORS 215.422(4).  
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29 Petitioner's reference to "Curry County" is to 1000 Friends  
30 v. LCDC, 301 Or 447, 724 P2d 268 (1986).  
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34 The county also found petitioner made no attempt to comply  
35 with OAR 660-04-018(2)(d) allowing changes in use based on a  
36 "reasons" exception to the goal.

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39 The county notes that this concentration does not comply  
40 with the planned unit development standards at LCC 1.1380.  
41 While not clearly stated, we believe the county's reference to  
42 be to the requirement of LCC 1.1380(B)(4) that the density be  
43 guided "by the standards of the zone in which the planned  
44

1 development is proposed." The proposal is in two phases.  
2 Phase I consists of 39 single family lots ranging from 5500 to  
3 9700 square feet in size and Phase II consists of 32  
4 condominium lots ranging from 1500 to 2500 square feet in  
5 size. See Record 207, 208. The overall density of the  
6 development is a little less than one unit per acre.

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9 We add that petitioner has not demonstrated or argued that  
10 there are specific policies in the acknowledged comprehensive  
11 plan which authorize the proposed PUD. Petitioner thus did  
12 not attempt to justify the proposed zone change on the basis of  
13 specific related plan policies under OAR 660-04-018(2)(c) or a  
14 "reasons" exception under OAR 660-04-018(2)(d).

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16  
17 We note that the county found the development does not  
18 comply with LCC 1.3230(c) requiring planned unit developments  
19 to use 40% of the land area as open space. The county also  
20 found noncompliance with LCC 1.1380. The county found "the  
21 development does not accomplish substantially the same  
22 objectives as are proposed by the dispersed residential  
23 comprehensive plan designation for this area." Record 18.  
24 Petitioner does not challenge these findings. A finding of  
25 noncompliance with one of several applicable criteria is  
26 sufficient to support a denial. See Morley v. Marion County,  
(LUBA No. 87-095; February 3, 1988). Notwithstanding  
petitioner's arguments in this case, we are therefore bound to  
sustain the county's decision.