

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STEVE LARSON, and WALLOWA LAKE)
5 LODGE, INC., an Oregon corporation,)

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FINAL OPINION
AND ORDER

vs.

WALLOWA COUNTY,

Respondent,

and

DAN GILE AND ASSOCIATES, INC.,
LAKESIDE DEVELOPMENT CO., dba JOSEPH
POINT DEVELOPMENTS, and OREGONIANS
IN ACTION,

Intervenors-Respondent.

LUBA No. 92-008

BEN BOSWELL, DAVID S. JACKMAN,
ROBERT PERRY, M. KENNETH ROBERTS,
and STEVE A. ZOLLMAN,

Petitioners,

vs.

WALLOWA COUNTY,

Respondent,

and

DAN GILE AND ASSOCIATES, INC.,
LAKESIDE DEVELOPMENT CO., dba JOSEPH
POINT DEVELOPMENTS, and OREGONIANS
IN ACTION,

Intervenors-Respondent.

LUBA No. 92-009

1)
2 1000 FRIENDS OF OREGON, NEZ PERCE)
3 TRIBE, CONFEDERATED TRIBES OF THE)
4 UMATILLA INDIAN RESERVATION, JEAN)
5 PEKAREK, PATTY GOEBEL, ANNETTE)
6 ASCHENBRENNER, EDNA ASCHENBRENNER,)
7 ANNE BELL, DARREN CHITWOOD, FRANK)
8 CONLEY, SUSAN CONLEY, STANLYNN)
9 DAUGHERTY, PATRICE DONOVAN, MILDRED)
10 FRASER, BENNIE J. GOCKLEY, MARLENE)
11 GOCKLEY, MARILYN GOEBEL, SALLY)
12 GOEBEL, KARLA HOLME, MAC HUFF,)
13 ROBERT H. JACKSON, DAVID A. JENSEN,)
14 CARLENE JOHNSON, MARGARET KRICHBAUM,)
15 RANDY KRICHBAUM, DUNCAN LAGOE,)
16 MIRIAM E. LAGOE, INEZ MEYERS,)
17 CELINDA MILLER, LARRY MILLER, SARA)
18 MILLER, JEFF MOORE, MARV RITTER, DAN)
19 STANEK, LESLIE THIES, RON THIES,)
20 RICH WANDSCHNEIDER, JEAN WIGGINS,)
21 DEBBIE WILLIAMSON, GENE WILLIAMSON,)
22 SHARON ZOLLMAN, and DELWYN ZOLLMAN,)
23)
24 Petitioners,) LUBA No. 92-011
25)
26 vs.)
27)
28 WALLOWA COUNTY,)
29)
30 Respondent,)
31)
32 and)
33)
34 DAN GILE AND ASSOCIATES, INC.,)
35 LAKESIDE DEVELOPMENT CO., dba JOSEPH)
36 POINT DEVELOPMENTS, and OREGONIANS)
37 IN ACTION,)
38)
39 Intervenors-Respondent.)
40 _____)
41)
42 DEPARTMENT OF LAND CONSERVATION)
43 AND DEVELOPMENT,)
44)
45 Petitioner,)
46)

1 vs.)
2)
3 WALLOWA COUNTY,) LUBA No. 92-013
4)
5 Respondent,)
6)
7 and)
8)
9 DAN GILE AND ASSOCIATES, INC.,)
10 LAKESIDE DEVELOPMENT CO., dba JOSEPH)

1 POINT DEVELOPMENTS, and OREGONIANS)
2 IN ACTION,)
3)
4 Intervenor-Respondent.)
5
6

7 On remand from the Court of Appeals.
8

9 Marc Zwerling, Portland, filed a brief on remand on
10 behalf of petitioners Larson, et al. With him on the brief
11 was Winfree, Fearey & Zwerling.
12

13 Steven H. Corey, Pendleton, filed a brief on remand on
14 behalf of petitioners Boswell, et al. With him on the brief
15 was Corey, Byler, Rew, Lorenzen & Hojem.
16

17 F. Blair Batson and Mary Kyle McCurdy, Portland, filed
18 a brief on remand on behalf of petitioners 1000 Friends of
19 Oregon, et al.
20

21 Jane Ard, Assistant Attorney General, Salem, filed a
22 brief on remand on behalf of petitioner Department of Land
23 Conservation and Development. With her on the brief was
24 Theodore R. Kulongoski, Attorney General; Thomas A. Balmer,
25 Deputy Attorney General; and Virginia L. Linder, Solicitor
26 General.
27

28 No appearance by respondent.
29

30 D. Rahn Hostetter, Enterprise, filed a brief on remand
31 on behalf of intervenors-respondent Dan Gile and Associates,
32 Inc., et al. With him on the brief was Mautz Hallman Baum &
33 Hostetter.
34

35 David B. Smith, Tigard, filed a brief on remand on
36 behalf of intervenor-respondent Oregonians In Action.
37

38 SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON,
39 Referee, participated in the decision.
40

41 REMANDED 07/01/93
42

43 You are entitled to judicial review of this Order.
44 Judicial review is governed by the provisions of ORS
45 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the Wallowa County
4 Court approving a zone change from Exclusive Farm Use (EFU)
5 to Recreation Residential (R-2) and a preliminary plat for a
6 26-lot subdivision.

7 **FACTS**

8 In our initial decision in this case, we set out the
9 relevant facts, as follows:

10 "The property that is the subject of the proposed
11 zone change from EFU to R-2 consists of 24
12 [undeveloped] acres located near the north end of
13 Wallowa Lake. Wallowa Lake occupies a trough
14 formed by an ice age glacier. It is adjoined by
15 glacial moraines to the west, east and north. The
16 subject property is located predominantly on the
17 south side of the northern moraine, facing the
18 lake, but extends over the crest of the moraine.
19 * * *

20 " * * * * *

21 "On September 6, 1991, intervenors Gile applied to
22 the county for approval of the proposed zone
23 change and of the preliminary plat for a 32-lot
24 subdivision on 28 acres, including the 24 acres
25 subject to the proposed zone change and an
26 adjacent four acre parcel to the southeast already
27 zoned R-2. The preliminary plat submitted with
28 the application, Record Map A-2 (dated
29 August 1991), shows 32 residential lots, ranging
30 in size from 0.5 to 1.2 acres, and a 1.5 acre lot
31 labeled 'Public Use Monument Site.' A revised
32 preliminary plat, Record Map A-3 (dated
33 October 29, 1991), shows the area north of the
34 crest of the moraine along the northern boundary
35 of the subject property as one large lot, 31
36 residential lots ranging in size from
37 approximately 0.3 acres to 1.2 acres, and the 1.5

1 acre monument site lot.

2 "[A]fter a public hearing, the county planning
3 commission adopted a recommendation to deny the
4 proposed zone change. Because it recommended
5 denial of the zone change, the planning commission
6 took no action on the subdivision application.

7 "[A]fter additional public hearings, the county
8 court adopted the challenged decision approving
9 both the zone change and a preliminary plat for
10 the proposed subdivision. However, the identity
11 of the preliminary plat approved by the county
12 court is unclear. The county court's decision
13 states it approves the preliminary plat for a
14 26-lot subdivision. We are not aware of any
15 preliminary plat in the record that fits this
16 description." (Emphasis in original; footnotes
17 and record citations omitted.) Larson v. Wallowa
18 County, 23 Or LUBA 527, 532-33 (1992) (Larson I).

19 Our decision in Larson I remanded the challenged county
20 decision on several grounds. Petitioners 1000 Friends of
21 Oregon et al appealed to the court of appeals, and
22 intervenors-respondent filed cross-petitions for review.
23 The court of appeals affirmed our decision on the petition
24 for review, but reversed and remanded our decision with
25 regard to three challenges made in the cross-petitions for
26 review. Larson v. Wallowa County, 116 Or App 96, 840 P2d
27 1350 (1992) (Larson II).

28 **DECISION**

29 In Larson II, the court determined a remand to this
30 Board is required to allow reconsideration of three rulings,
31 all involving interpretation and application of county
32 enactments, in light of Clark v. Jackson County, 313 Or 508,
33 836 P2d 710 (1992), and subsequent court decisions analyzing

1 and interpreting Clark. See Weeks v. City of Tillamook, 117
2 Or App 449, ___ P2d ___ (1992); Dept. of Land Conservation
3 v. Coos County, 115 Or App 145, 838 P2d 1080 (1992). The
4 court described the rulings in question as:

5 "* * * (1) that the county erred by allowing the
6 subdivision application through governing body
7 action without the planning commission having
8 first ruled on it, (2) that the subdivision
9 application violates the minimum lot standards in
10 the new zone and (3) that the county 'failed to
11 address whether the proposed zone change and
12 subdivision [are] consistent with Natural
13 Resources Policy No. 4 of the [Wallowa County
14 Comprehensive] Plan.'" Larson II, 116 Or App
15 at 104.

16 We address these three issues separately below.

17 **A. Requirement for Planning Commission Action on**
18 **Subdivision Application**

19 Petitioners Boswell et al and petitioner DLCD contend
20 the county court erred by approving the subject subdivision
21 preliminary plat application without it first having been
22 acted on by the county planning commission.

23 The challenged decision states:

24 "The County Court finds, concerning approval of
25 the subdivision preliminary plat, which was
26 considered but not voted upon by the Planning
27 Commission, that the County Court has now fully
28 reviewed the facts of both the zone change and the
29 preliminary plat applications and there is
30 therefore no need for additional review by the
31 Planning Commission. The County Court hereby
32 exercises its discretion to make the final
33 decision on the preliminary plat without
34 recommendation from the Planning Commission."
35 (Emphasis added.) Record 14.

36 In Larson I, 23 Or LUBA at 547-48, this Board

1 interpreted several provisions of the Wasco County Zoning
2 Ordinance (WCZO), and reached a conclusion that the county
3 court exceeded its authority by taking initial action on the
4 subdivision application, because "the county court has
5 delegated decision making authority on subdivision
6 applications to the planning commission and has reserved for
7 itself only the authority to hear and decide appeals of such
8 planning commission decisions."

9 In Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d
10 710 (1992), the Oregon Supreme Court decided this Board is
11 required to defer to a local government's interpretation of
12 its own ordinances, unless that interpretation is contrary
13 to the express words, policy or context of the local
14 enactment. This means we must defer to a local government's
15 interpretation of its own enactments, unless that
16 interpretation is "clearly wrong." Goose Hollow Foothills
17 League v. City of Portland, 117 Or App 211, 217, ___ P2d ___
18 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d
19 1354 (1992).

20 In Larson II, 116 Or App at 103, the court of appeals
21 explained a corollary of Clark is that this Board "may
22 insist that a local government make an interpretation, when
23 one is required, and that the interpretation be sufficiently
24 articulated to lend itself to review" under the Clark
25 standard. (Emphasis in original.) The court of appeals
26 elaborated:

1 "* * * If the local government's statement of its
2 interpretation in its decision omits necessary
3 findings, conclusions or analytical steps, or if
4 the local government failed to offer an
5 interpretation of a local enactment that is a
6 necessary precursor to or component of a
7 challenged decision, LUBA may remand to require
8 that the gaps be filled." Id.

9 In addition, in Weeks v. City of Tillamook, supra 117 Or App
10 at 453, the court of appeals said that Clark does not allow
11 this Board to interpret a local government's ordinances in
12 the first instance, but rather requires this Board to review
13 the local government's interpretation of its ordinances.

14 The above quoted portion of the challenged decision
15 simply expresses a conclusion that the county court has
16 "discretion" to act on a subdivision preliminary plat
17 application without that application having first been acted
18 on by the county planning commission. It does not explain
19 what the county court believes to be the source of that
20 discretion. It does not interpret the various WCZO
21 provisions discussed in Larson I that appear to be relevant
22 to a decision on this issue. Under Clark and Weeks, supra,
23 this Board should not interpret these WCZO provisions in the
24 first instance. We therefore conclude the basis for this
25 portion of the challenged decision is not sufficiently
26 articulated for review, and the challenged decision must be
27 remanded for a county interpretation on this issue.

28 **B. Minimum Lot Standards**

29 Petitioners Larson et al contend the majority of the

1 residential lots shown on the revised preliminary
2 subdivision plat are too small to be allowed in the R-2
3 zone.

4 WCZO 31.025.1.B establishes the following standard for
5 approval of a subdivision preliminary plat:

6 "All of the proposed lots conform to the minimum
7 standards for lot designs as set out in the
8 respective zones."

9 The challenged decision includes the following findings:

10 "All of the proposed lots conform to the minimum
11 standards for lot designs as set out in the
12 residential zones." Record 8.

13 "The slope of the land on the parcel is such that
14 lots of less than one acre in size would not be
15 permissible under the criteria of the R-2 zone."
16 Record 11.

17 There is no dispute that the approved subdivision
18 preliminary plat includes lots less than one acre in size.
19 Further, the challenged decision also imposes a condition
20 requiring that there be "no changes in the size of the lots
21 within the subdivision nor the density of the development
22 either before or after final plat approval." Record 16. In
23 view of this, the above quoted findings appear to be
24 contradictory. Neither in these findings, nor elsewhere in
25 the challenged decision, does the county interpret the
26 relevant "lot designs" standards of the R-2 zone. In
27 Larson I, 23 Or LUBA at 548-49, we interpreted those
28 provisions ourselves. However, under Clark and Weeks, we
29 cannot do so, but rather must remand the decision to the

1 county to interpret these provisions in the first instance
2 and articulate a reviewable basis for its decision on this
3 issue.

4 **C. Natural Resources Policy 4**

5 Wallowa County Comprehensive Plan (plan) Natural
6 Resources Policy 4 provides:

7 "[T]he Wallowa Lake Basin Moraines [shall] be
8 preserved as scientific natural areas, significant
9 to the County, State and nation."

10 In Larson I, we interpreted the above policy to require the
11 county to preserve the east moraine as a scientific natural
12 area. We agreed with petitioners that in view of the fact
13 the proposed development on the north moraine is within 1/4
14 mile of the east moraine, the county erred by "fail[ing] to
15 address whether the proposed zone change and development is
16 consistent with this requirement." Larson I, 23 Or LUBA
17 at 541.

18 The only finding in the challenged decision that
19 mentions Natural Resources Policy 4 is the following:

20 "The listing of the East Moraine on page No. 136
21 of the plan in the amendments to Appendix VA as a
22 scientific and scenic natural area clarified and
23 supersedes the general statement, [in Natural
24 Resources Policy 4], 'That the Wallowa Lake Basin
25 Moraines [shall] be preserved as scientific
26 natural areas, significant to the county, state
27 and nation.' The general statement was included
28 in the 1977 plan and did not comply with the
29 Goal 5 inventory requirement. The specific
30 provision on page 136 was added during the
31 periodic review process which resulted in adoption
32 of the 1988 plan." Record 7.

1 Based on the above quoted finding and the referenced
2 plan provisions, in Larson I we agreed with intervenors that
3 the above quoted county finding interprets "Wallowa Lake
4 Basin Moraines," as used in Natural Resources Policy 4, to
5 refer only to the east moraine, and affirmed that
6 interpretation. That determination is not affected by the
7 court of appeals ruling in Larson II. However, beyond this
8 single point, we cannot determine from the above quoted
9 finding or any thing else in the challenged decision how the
10 county interprets Natural Resources Policy 4 with regard to
11 its applicability to the subject zone change and subdivision
12 applications.¹ Therefore, under Clark and Weeks, we must
13 remand the decision to the county for it to interpret
14 Natural Resources Policy 4 in the first instance.²

15 **CONCLUSION**

16 Our decision in Larson I is modified as explained above
17 with regard to the three issues addressed in this opinion,
18 but otherwise remains unchanged

¹Specifically, although Natural Resources Policy 4 refers only to the east moraine, the county's interpretation of that policy must address its potential applicability to development occurring in proximity to the east moraine.

²Intervenors argue that certain interpretations of Natural Resources Policy 4 might be inconsistent with Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources), OAR 660-16-000 et seq (rules implementing Goal 5) and certain appellate court opinions regarding how the planning process required by Goal 5 may be carried out by local governments. However, until the county renders a reviewable interpretation of Natural Resources Policy 4, it would be premature to consider intervenors' arguments.

1 The county's decision is remanded.