

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)
7 Petitioner,)

8)
9 vs.)

10) LUBA No. 93-050

11 CROOK COUNTY,)

12) FINAL OPINION
13 Respondent,) AND ORDER

14)
15 and)

16)
17 OCHOCO CREEK RESORT, INC., and)

18 MARVIN HARRIS,)

19)
20 Intervenors-Respondent.)

21
22
23 Appeal from Crook County.

24
25 Larry Knudsen, Assistant Attorney General, Salem, filed
26 the petition for review. With him on the brief was Theodore
27 R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy
28 Attorney General; and Virginia L. Linder, Solicitor General.
29 Celeste Doyle, Assistant Attorney General, argued on behalf
30 of petitioner.

31
32 Alan Rappleyea, Crook County Counsel, Prineville, filed
33 a response brief and argued on behalf of respondent.

34
35 Daniel Kearns, Portland, filed a response brief and
36 argued on behalf of intervenors-respondent. With him on the
37 brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

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

41
42 AFFIRMED 07/19/93

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

1 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county court
4 approving a preliminary development plan for a 75 unit
5 planned unit development (PUD) and 9 hole golf course on a
6 parcel zoned Exclusive Farm Use (EFU-2).

7 **MOTIONS TO INTERVENE**

8 Ochoco Creek Resort, Inc. and Marvin Harris filed
9 motions to intervene on the side of respondent in this
10 appeal proceeding. There is no objection to the motions,
11 and they are allowed.

12 **FACTS**

13 This is the second time an appeal of a county decision
14 approving a PUD and golf course on the subject property has
15 been appealed to this Board. In DLCD v. Crook County, ____
16 Or LUBA ____ (LUBA No. 92-133, January 11, 1993), slip op 2
17 (Crook County I), we stated the following facts:

18 "The subject parcel is zoned EFU-2, consists of
19 215 acres, is bisected by a creek, and is located
20 outside of the urban growth boundary of the City
21 of Prineville.^[1] An abandoned gravel pit is
22 located at the center of the parcel. The subject
23 parcel is developed with a dwelling and
24 outbuildings. A portion of the parcel has been
25 used for the production of wheat and alfalfa and
26 the entire parcel is, for taxation purposes,
27 specially assessed at farm use value.

¹While the subject property consists of 215 acres, the project site itself consists of 96 acres, 84 of which are to be utilized by the proposed golf course.

1 "Property to the north of the subject parcel is in
2 agricultural use; a golf course is located to the
3 south and east; agricultural land and dwellings
4 lie to the west; and the land to the south is
5 'steeply sloped rim rock.'

6 "On June 13, 1991, the planning commission
7 approved an 'Outline Development Plan' [(Outline
8 Plan)] for a 9 hole golf course and a 100 unit PUD
9 on the subject parcel, to be served by a community
10 water system and 'separate community type septic
11 systems.'^[2] On April 24, 1992, the planning
12 commission gave 'Preliminary Development Plan'
13 [(Preliminary Plan)] approval for a 75 'lot' PUD
14 and a nine hole golf course. Petitioner appealed
15 the planning commission's decision to the county
16 court. On June 11, 1992, the county court
17 affirmed the planning commission's approval of the
18 [Preliminary Plan]. (Footnotes and original
19 record citations omitted.)

20 We remanded the decision challenged in Crook County I
21 for the county to interpret the land use regulations
22 governing its three stage PUD approval process. On remand,
23 the county held a hearing for the sole purpose of permitting
24 the parties to submit argument concerning the proper
25 interpretation of the three stage PUD approval process
26 established in the Crook County Land Development Ordinance
27 (CCLDO). No new evidence, and no new argument other than
28 that relating to this interpretative issue, was allowed.
29 After the public hearing on remand, the county adopted the
30 challenged decision interpreting the CCLDO with regard to

²The application for a PUD and golf course were consolidated for the outline plan approval decision. The outline plan approval decision approved both the PUD and golf course.

1 the three stage PUD approval process, and this appeal
2 followed.³

3 **FIRST ASSIGNMENT OF ERROR**

4 "The county improperly construed the applicable
5 law when it found DLCD's objections untimely and
6 refused to address issues concerning compliance
7 with the comprehensive plan provisions and land
8 use regulations implementing Goals 3, 11, and 14."

9 The challenged decision determines outline plan
10 approval is an optional approval stage for PUDs. However,
11 the challenged decision determines that if outline plan
12 approval is sought, as here, then it is the stage at which
13 all determinations of compliance with the county's
14 comprehensive plan and the Crook County Zoning Ordinance
15 (CCZO)⁴ as well as determinations of compliance with
16 CCLDO 6.040 and 6.160,⁵ are made. The challenged decision
17 determines that when outline plan approval is given, such
18 approval is a final, appealable land use decision, binding
19 on all parties with respect to a PUD's compliance with the

³The record in this appeal consists of the record from the local proceedings in Crook County I, which we refer to either as Original Record or Original Supplemental Record, and the record of local proceedings for this appeal, which we refer to as Remand Record.

⁴The CCZO is Crook County Ordinance No. 18, which establishes zoning requirements. CCLDO is Crook County Ordinance No. 19, which establishes requirements for land divisions and PUDs.

⁵As stated in the findings, CCLDO 6.040 and 6.160 require the county to find that the proposed PUD is consistent with the comprehensive plan, CCZO and CCLDO. CCLDO 6.040 and 6.160 also establish additional approval criteria for PUDs. However, neither CCLDO 6.040 nor 6.160 states at which stage of the PUD approval process it is to be applied.

1 plan, CCZO, and CCLDO 6.040 and 6.160. Finally, the
2 challenged decision determines that petitioner's failure to
3 appeal the county's earlier outline plan approval decision
4 precludes petitioner from raising any issue in an appeal of
5 the county's PUD preliminary plan approval, concerning the
6 proposal's plan, CCZO and CCLDO 6.040 and 6.160 compliance.

7 In the challenged decision, the county explains its
8 interpretation of the relevant CCLDO provisions as follows:

9 "[CCLDO] Article 6 is applicable and provides for
10 a [three] stage PUD application and review
11 process, the phases of which are Outline Plan,
12 Preliminary Plan and Final Plan. The first phase
13 of the process, the Outline Plan, is optional, but
14 [intervenor] has chosen to take advantage of that
15 stage. Consequently, the Preliminary Plan stage
16 is not redundant, and the Outline Plan review was
17 not an extraneous or otherwise meaningless stage
18 in the PUD approval process.

19 "This multi-stage review and approval process has
20 been established to, among other things, ensure
21 that all approval criteria are addressed and that
22 applicants are given a measure of surety and
23 predictability in the approval process. The basic
24 issues of comprehensive plan consistency and
25 zoning compliance must be addressed and
26 conclusively resolved at the first stage of the
27 process, the Outline Plan review stage.
28 Applicants must be able to submit a PUD or
29 subdivision development proposal, in at least
30 concept form, without detailed[,] expensive
31 engineering drawings and specifications, yet
32 sufficient to allow the County to verify
33 compliance with all basic land use legal
34 requirements. After a Development Proposal is
35 given provisional approval at the Outline Plan
36 stage, the developer should be entitled to rely on
37 that approval and proceed with detailed and
38 expensive engineering design work.

1 "At least to the extent a Development Proposal
2 does not change between review stages in the PUD
3 process, the applicant should be able to rely on
4 the fact that issues resolved at an earlier stage
5 cannot be readdressed subsequently. Persons who
6 were not parties to the Outline Plan proceeding,
7 cannot appear at the Preliminary Plan stage and
8 raise issues that were addressed previously.
9 Likewise, participants, such as DLCD in this
10 instance, shall not be permitted to raise
11 identical issues at both the Outline and
12 Preliminary Plan stages. The function of the
13 Outline Plan review is to address and resolve all
14 issues of compliance with the [comprehensive plan
15 and CCZO].

16 * * * * *

17 * * * A decision on an Outline Plan, a
18 Preliminary Plan and Final Plan are all separate,
19 distinct and appealable final land use decisions.

20 "Finally, the notion that all issues resolved at
21 one stage of the PUD review process shall not be
22 raised at a subsequent stage is critical to the
23 economic development of the County. The
24 importance of this policy means that even unfair
25 or harsh results in certain cases are an
26 acceptable cost of a systematic and predictable
27 development application, review and approval
28 process. [T]he need for certainty and reliability
29 in the review process justifies not readdressing
30 issues at the Preliminary Plan stage. This degree
31 of certainty for applicant[s] and for all
32 participating parties, including the
33 decision-maker, is critical to the land use
34 process in Crook County. [A]dversely affected and
35 aggrieved parties may appeal incorrect or
36 deficient Outline Plan decisions under [CCLDO]
37 Article 9 or Article 12, as applicable.^[6]

⁶CCLDO 9.110 (Appeals), provides as follows:

"Every land use decision relating to the provision of this ordinance made by the Commission, hearing[s] officer or other

1 "This policy is clearly reflected in CCLDO
2 Articles 3 and 6 in two (2) ways. CCLDO § 6.100
3 is applicable to this Development Proposal and
4 requires compliance with not only the PUD
5 procedures of CCLDO Article 9, but also the
6 subdivision procedural provisions, to the extent
7 they are consistent. The subdivision provisions
8 are those contained in CCLDO Article 3, and as
9 amended by ordinance August 12, 1980 (1980
10 Ordinance)[.] Article 3 provides explicitly that
11 the purpose of the Outline Plan is * * * to
12 determine whether a particular Development
13 Proposal complies with all applicable
14 comprehensive plan and zoning provisions. This
15 Article 3 provision is consistent with Article 9
16 procedures and[,] therefore[,] applies. According
17 to Article 3, as amended, the approval of an
18 Outline Plan by the Planning Commission is final
19 unless appealed to the County Court. Such an
20 approval is binding upon the County relative to
21 compliance with the Comprehensive Plan and
22 applicable zoning provisions. This provision is
23 also consistent with the Article 9 procedures
24 and[,] therefore[,] applies here.

25 "In addition to Article 3, CCLDO § 6.040 and 6.160
26 are applicable at the Outline Plan review stage
27 and both require a finding that the PUD
28 Development Proposal is consistent with the
29 comprehensive plan and satisfies all requirements
30 of the CCZO and CCLDO. The basic issues of
31 comprehensive plan and zoning ordinance
32 compliance, in fact, must be addressed at the
33 Outline Plan stage to the extent the particular
34 Development Proposal or Outline Plan at issue
35 allows their application.

36 "Based on Article 3, as amended, and Article 6,
37 all issues in this PUD Development Proposal which
38 are required by the CCLDO and CCZO to be addressed

official of Crook County is subject to review when appealed
within ten (10) calendar days of the date the decision was
final * * *.

"* * * * *"

1 and resolved during an Outline Plan review shall
2 be deemed to have been conclusively resolved at
3 that stage and shall not be readdressed at this
4 Preliminary Plan stage. This necessarily means
5 that a final decision on an Outline Plan is a
6 final, appealable decision. Consequently, Article
7 3, as amended, supports, but is not the sole basis
8 for, the preclusive effect we give to the Outline
9 Plan approval. At this Preliminary Plan review
10 stage, the Court will not readdress any of the
11 approval criteria which were or could have been
12 applied at the prior Outline Plan stage in this
13 matter." Remand Record 32-34. (Emphasis in
14 original.)

15 We are required to defer to a local government's
16 interpretation of its own enactments, if the local
17 interpretation is not clearly contrary to the express words,
18 policy, or context of those enactments. Clark v. Jackson
19 County, 313 Or 508, 515, 836 P2d 710 (1992). In other
20 words, the inquiry this Board must make is whether the
21 interpretation of the local code provisions, expressed in
22 the challenged decision, is "clearly wrong." West v.
23 Clackamas County, 116 Or App 89, 94, 840 P2d 1354 (1992).

24 Petitioner does not disagree that the county could
25 adopt a PUD approval process where outline plan approval is
26 a final, appealable land use decision on the issues of
27 compliance with the comprehensive plan, CCZO and certain
28 CCLDO standards, as articulated by the county in the above
29 quoted findings. However, according to petitioner, neither
30 the CCZO nor the CCLDO supports the determination in the
31 challenged decision that the county has adopted such a
32 scheme. Petitioner argues that under the CCLDO, outline

1 plan approval is optional and advisory, and the county is
2 free to change its mind concerning a proposed PUD's
3 compliance with any standard during the PUD preliminary plan
4 approval stage. In this regard, petitioner argues that
5 under CCLDO 6.130, the county retains significant authority
6 to change the approved PUD outline plan. CCLDO 6.130
7 provides:

8 "* * * * *

9 "The [County], having previously provisionally
10 approved the proposed planned unit development,
11 shall then either reapprove, disapprove or
12 reapprove with modifications the planned
13 development based on the preliminary development
14 plan."

15 Petitioner argues the county's authority to disapprove,
16 or reapprove with modifications, a PUD preliminary plan,
17 even if it is consistent with an approved outline plan, is
18 inconsistent with the idea that outline plan approval is a
19 final, binding and appealable land use decision. Petitioner
20 contrasts the county's authority under CCLDO 6.130, to the
21 county's authority under CCLDO 6.140 concerning final PUD
22 plan approval. Petitioner argues that under CCLDO 6.140,
23 there is no authority to approve a PUD final plan that is
24 different from the approved preliminary plan. Petitioner
25 contends this differing treatment of preliminary and final
26 plan approval in the CCLDO establishes that the first final,
27 appealable decision on a PUD occurs at the preliminary plan
28 approval stage.

1 Petitioner also points out that LUBA has interpreted
2 identical provisions in a previous Crook County ordinance
3 related to subdivisions. Petitioner cites Keller v. Crook
4 County, 1 Or LUBA 120, 122 (1980), in which LUBA determined
5 that subdivision outline plan approval was "something of a
6 discussion document only," and that such a decision is not
7 binding on the county. In Keller, LUBA held the decision on
8 subdivision outline plan approval was not a final land use
9 decision subject to its review authority, and dismissed the
10 appeal. LUBA based its decision, in part, on the fact that
11 the information required for subdivision outline plan
12 approval was not as detailed as was required for subdivision
13 tentative plan approval under ORS 92.090(1980). LUBA also
14 quoted the applicable CCLDO provision (prior CCLDO
15 3.030(3)), which then provided as follows:

16 "[R]eview of an [Outline Plan] is intended only as
17 a review relative to applicable Comprehensive Plan
18 and Zoning provisions and thereof (sic) is
19 intended more as a service to the developer than
20 as a commitment of approval. Pursuant thereto,
21 [Planning] Commission approval or general
22 acceptance of an [Outline Plan] for a subdivision
23 shall constitute only a provisional and conceptual
24 approval or acceptance of the proposed
25 subdivision."

26 LUBA held:

27 "It appears from our reading of the ordinance and
28 the comments made at oral argument on the merits,
29 that there is no bar to an appeal of a subsequent
30 tentative plan simply because the [Outline Plan]
31 has not been appealed. Also, the county is not
32 bound to find in favor of the tentative plan
33 simply because it may have found in favor of an

1 earlier Outline Plan. In short, there is simply
2 no finality to the [Outline Plan] and, therefore,
3 no actual effect on land use that we may review."
4 Keller, supra, 1 Or LUBA at 123.

5 Petitioner argues the county's approval of an outline
6 plan for the subject PUD should be given no different effect
7 from that stated above. Petitioner maintains the county's
8 interpretation in the challenged decision that outline plan
9 approval for a PUD is a final binding decision concerning
10 plan, CCZO and CCLDO 6.040 and 6.160 compliance of the
11 proposed PUD, is "clearly wrong."

12 As petitioner points out, there are provisions similar
13 to former CCLDO 3.030(3), interpreted in Keller, in the
14 county's current PUD regulations. Specifically,
15 CCLDO 6.110(3) provides as follows:

16 "[County] approval of the outline development plan
17 shall constitute only a provisional approval of
18 the planned unit development contingent upon
19 approval of the preliminary development plan."

20 However, as pointed out in the challenged decision,
21 CCLDO 6.100 provides:

22 "* * * Except as otherwise set forth in this
23 Article, the procedure for review and approval of
24 a [PUD] is the same as set forth for a standard
25 subdivision in this ordinance. * * *"

26 The challenged decision points out that the subdivision
27 regulations interpreted in Keller have since been amended.

28 CCLDO 3.030(3) and (4) now provide:

29 "(3) The purpose of the Outline Development Plan
30 is to make a determination that the
31 particular proposal complies with the

1 County's Comprehensive Plan and the
2 applicable zoning provisions. The review by
3 the [Planning] Commission shall determine
4 whether the proposed subdivision as submitted
5 will have detrimental impacts upon the
6 general area and that the particular site is
7 capable [of being] developed as proposed.

8 "(4) The approval or disapproval of the Outline
9 Development Plan by the [Planning] Commission
10 shall be final unless the decision is
11 appealed to the County Court. The approval
12 or disapproval shall be binding upon the
13 county relative to compliance with the
14 comprehensive plan and applicable zoning
15 provisions." (Emphasis supplied.)

16 Except as emphasized above, there is nothing in the CCLDO or
17 any other ordinance of which we are aware that specifies at
18 which stage of the PUD approval process comprehensive plan,
19 CCZO and CCLDO requirements are to be satisfied.

20 We see nothing necessarily inconsistent between the
21 statement in CCLDO 6.110(3) that outline plan approval is
22 provisional only and CCLDO 3.030(3) and (4).⁷ As the county
23 states, CCLDO 6.110(3) and 6.120 acknowledge the necessity
24 of preliminary plan approval, in which other requirements
25 for preliminary plans will be applied that could conceivably

⁷While we may prefer a different interpretation of the county's code, that is not a proper reason for this Board to reverse or remand the challenged decision. We note that in DLCD v. Crook County, _____ Or LUBA _____ (LUBA No. 92-132, March 22, 1993), after a prior PUD outline plan approval decision the county did address plan and zoning ordinance standards during the PUD preliminary plan approval stage, which it now claims it may not do under its ordinances. Petitioner does not cite the DLCD v. Crook County decision referred to in this note, does not allege that the county has engaged in arbitrary decision making, and we do not believe that arbitrary decision making is necessarily established simply by a single example of differing interpretations.

1 lead to denial of the proposal. Further, as stated above,
2 an applicant for PUD approval is not required to seek
3 outline plan approval. Rather, an applicant for PUD
4 approval may decide not to seek outline plan approval and
5 proceed directly to preliminary plan approval. If the
6 applicant chooses the latter course, then all of the
7 comprehensive plan, CCZO and CCLDO requirements will be
8 applied at the preliminary plan approval stage.

9 The decision also specifically acknowledges that if the
10 proposed PUD changes in a way that affects the proposal's
11 compliance with the comprehensive plan, CCZO or CCLDO
12 standards, then the county may apply those provisions during
13 the PUD preliminary plan approval stage. However, in this
14 regard, the challenged decision determines that the proposal
15 did not change between outline plan approval and preliminary
16 plan approval.⁸ While the proposal described in
17 intervenor's application requested 100 units, the outline

⁸The challenged decision states:

"The development proposed in [intervenors'] Preliminary Plan is identical to the development approved by the Planning Commission [in the outline plan approval decision]. The Outline Plan originally proposed 100 dwelling units, but the Planning Commission limited its approval to 60 to 75 units. [Intervenors'] plan is consistent with and identical to the plan submitted at the Outline Plan stage, except the number of housing units has been reduced to 75 pursuant to the Planning Commission's order. In all material respects, including the number of dwelling units, the Development Proposal reflected in the Preliminary Plan is identical to, and not significantly changed from, the Development Proposal approved in the Outline Plan * * *." (Record citations omitted.) Remand Record 37.

1 plan approval decision limited the number of units to 60 to
2 75 units. Original Supplemental Record 65. Pursuant to
3 this limitation in the outline plan approval decision,
4 intervenor requested preliminary plan approval for only 75
5 units. Nothing suggests the PUD proposal changed between
6 the outline plan approval and the preliminary plan approval,
7 so as to require the county to revisit issues concerning the
8 proposal's compliance with relevant plan, CCZO and CCLDO
9 6.040 and 6.160 requirements.

10 In sum, the county's interpretation of its ordinance is
11 not clearly wrong. Therefore, all relevant plan, CCZO and
12 CCLDO 6.040 and 6.160 compliance issues were determined at
13 the outline plan approval stage, and the county need not
14 revisit any of those issues in this appeal of its PUD
15 preliminary plan approval decision.

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 "The county failed to make adequate findings
19 supported by substantial evidence in the whole
20 record that the proposed development satisfies the
21 county's acknowledged comprehensive plan
22 provisions and zoning regulations for agricultural
23 lands."

24 **THIRD ASSIGNMENT OF ERROR**

25 "The county misconstrued the applicable law and
26 failed to make adequate findings supported by
27 substantial evidence that the proposed PUD
28 complies with CCLDO Section 6.040(2)."

29 We sustain the county's interpretation above that
30 compliance with relevant comprehensive plan, CCZO and CCLDO

1 provisions, including CCLDO 6.040(2), was properly
2 determined at the outline plan approval stage and,
3 therefore, issues related to such compliance may not be
4 determined in this appeal of the PUD preliminary plan
5 approval decision.

6 The second and third assignments of error are denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 "The county misconstrued the applicable law and
9 failed to make adequate findings supported by
10 substantial evidence in the whole record that the
11 proposed PUD is consistent with the comprehensive
12 plan provisions concerning urban uses on rural
13 lands. Because the proposed PUD authorizes an
14 urban use on rural lands planned and zoned for
15 agriculture, the decision violates the county's
16 comprehensive plan and Goal 14."

17 Crook County has an acknowledged comprehensive plan and
18 land use regulations. The challenged decision does not
19 approve an amendment to the county's plan and land use
20 regulations. The Statewide Planning Goals (goals) are only
21 applied directly to local decisions approving amendments to
22 an acknowledged comprehensive plan or land use regulation,
23 or in circumstances where the local government's plan or
24 land use regulations are not acknowledged to be in
25 compliance with the goals. Byrd v. Stringer, 295 Or 311,
26 666 P2d 1332 (1983); Oregon Worsted Company v. City of
27 Portland, 22 Or LUBA 452, 455 (1991). Therefore, that the
28 challenged decision fails to establish compliance with Goal
29 14 (Urbanization), provides no basis for reversal or remand

1 of the challenged decision.⁹

2 The fourth assignment of error is denied.

3 The county's decision is affirmed.

4

⁹This assignment of error also realleges that the challenged decision fails to establish compliance with the comprehensive plan. We determine above that issues concerning the proposed PUD's comprehensive plan compliance were resolved during the outline plan approval stage. We need not reexamine that issue here.