

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

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DOLORES NICHOLSON,)
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Petitioner,)
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and)
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MARTHA LYNN GRAY,)
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Intervenor-Petitioner,)
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vs.)
)
CLATSOP COUNTY,)
)
Respondent,)
)
and)
)
RICHARD T. SCHROEDER,)
)
Intervenor-Respondent.)

LUBA No. 96-033

)
FINAL OPINION
AND ORDER

_____)
)
)
GENE KEEVER, NORMA KEEVER, LEROY)
GROSHONG, and BONNIE GROSHONG,)
)
Petitioners,)
)
and)
)
MARTHA LYNN GRAY,)
)
Intervenor-Petitioner,)
)
vs.)
)
CLATSOP COUNTY,)
)
Respondent,)
)
and)

)
LUBA No. 96-035

1)
2 RICHARD T. SCHROEDER,)
3)
4 Intervenor-Respondent.)

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6
7 Appeal from Clatsop County.

8
9 Dolores M. Nicholson, Warrenton, filed a petition for
10 review and argued on her own behalf.

11
12 Gregory S. Hathaway, Portland, filed a petition for
13 review and argued on behalf of petitioners Keever and
14 Groshong. With him on the brief was Davis Wright Tremaine.

15
16 Martha Lynn Gray, Seaside, represented herself.

17
18 No appearance by respondent or by intervenor-
19 petitioner.

20
21 Steven L. Pfeiffer and Michael C. Robinson, Portland,
22 filed the response brief and argued on behalf of intervenor-
23 respondent. With them on the brief was Stoel Rives LLP.

24
25 GUSTAFSON, Referee; LIVINGSTON, Referee, participated
26 in the decision.

27
28 REMANDED 02/12/97

29
30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner Dolores Nicholson (petitioner Nicholson)
4 and petitioners Gene and Norma Keever and LeRoy and Bonnie
5 Groshong (petitioners Keever/Groshong) appeal the county's
6 approval of a subdivision.

7 **MOTIONS TO INTERVENE**

8 Richard T. Schroeder (intervenor), the applicant below,
9 moves to intervene on the side of respondent. The motion is
10 unopposed, and is allowed.

11 Martha Lynn Gray moves to intervene on the side of
12 petitioners. Her motion to intervene is also unopposed and
13 is allowed; however, she did not file a petition for review
14 or appear for oral argument.

15 **FACTS**

16 Intervenor seeks approval of a cluster subdivision and
17 related conditional uses for 51 single-family residential
18 lots and recreational development on 197 acres (Pinehurst
19 Estates). The property lies along the Pacific Ocean at Del
20 Rey Beach, north of the Gearhart urban growth boundary.
21 Most of the property for which development is proposed,
22 including residential lots 1-47, is zoned Residential-
23 Agriculture-5 (RA-5). Approximately 30 acres, including
24 residential lots 48-51, is zoned Coastal Beach Residential
25 (CBR). The balance of the property is zoned either Open
26 Space, Parks and Recreation (OPR) or Lake and Wetlands (LW).

1 In addition to the four base zones, there are various
2 overlay districts, including the Active Dune Overlay (ADO)
3 district by which the county implements statewide Goal 18.¹

4 North of the Pinehurst Estates property is the Surf
5 Pines neighborhood, a residential area that began developing
6 in the 1940s. All petitioners reside in Surf Pines
7 Addition, a subdivision in the southernmost part of the Surf
8 Pines neighborhood adjoining the Pinehurst Estates
9 property.² South of Pinehurst Estates is Del Rey Beach
10 wayside and the access road thereto, and south of that is
11 the Highlands at Gearhart subdivision, which was approved in
12 1986.

13 The implementation of Goal 18 for all three properties
14 began in 1978 with adoption of the Beaches and Dunes Element
15 of the comprehensive plan, based on a study of area beach
16 and dune structure known as the Palmer study. This element
17 established an active dune line and active dune overlay, and
18 the Beaches and Dunes element generally required that there
19 be no structures west of the active dune line. Record 98.

¹Goal 18 is:

"To conserve, protect, where appropriate develop, and where
appropriate restore the resources and benefits of coastal beach
and dune areas; and

"To reduce the hazard to human life and property from natural
or man-induced actions associated with these areas."

² A portion of the Pinehurst Estates property, the thirty acres zoned
CBR, is actually within the Surf Pines Addition, but lies east of
petitioners' properties.

1 Also in 1978, an exception to Goal 18 was taken for a
2 portion of the Surf Pines property west of this active dune
3 line, due to the level of existing development and
4 commitment to residential use. The Beaches and Dunes
5 Element and Surf Pines Goal 18 exception area were adopted
6 by Ordinance 78-25, and a Structures Allowed-Active Dunes
7 Overlay zoning district was applied to the Surf Pines
8 exception area. Record 98. The portion of Ordinance 78-25
9 submitted into the record includes a general map of the
10 exception area, but no metes and bounds or similar textual
11 description of the precise location and dimensions of the
12 1978 exception area for the Surf Pines neighborhood. Record
13 Supplement 614-16. Construction in the Surf Pines Addition
14 subdivision adjacent to the subject property is also limited
15 by a private deed restriction, established in 1949, limiting
16 building locations. Record 98.

17 In 1986, the county adopted a revision of the ADO for
18 the Highlands at Gearhart property, which located the
19 construction setback line and ADO for that property
20 approximately 300 feet west of the active dune line
21 established by the 1978 Palmer study. Supplemental Record
22 606-07.

23 In 1992, the county adopted Ordinance 92-20, which
24 established an amended active dune line/construction setback
25 line and ADO district for the Pinehurst Estates property.
26 The ordinance includes a pair of exhibits, marked 10A and

1 10B, described as "Revised Resource Inventory Map." Exhibit
2 10A shows the amended line connecting on the south with the
3 Highlands at Gearhart line adopted in 1986. Exhibit 10B
4 shows the amended line connecting on the north with "Surf
5 Pines Building Line (Goal 18 Committed Exception)." Record
6 104. The parties agree that Ordinance 92-20 establishes the
7 applicable active dune line/construction setback line for
8 the Pinehurst Estates property, but disagree where that line
9 is located.

10 Intervenor applied for preliminary plat approval of the
11 Pinehurst Estates subdivision in January of 1995. The
12 revised preliminary plat/development concept plan
13 ("preliminary plat") proposed by intervenor shows
14 residential lots 1-22 located on the western edge of the
15 residential development. Record 303. A "Proposed
16 Construction Setback Line" is marked on the preliminary
17 plat, running north and south through lots 1-22,
18 establishing the western edge of the "building envelope" for
19 each of these lots. Record 371. At its northern end, the
20 proposed construction setback line, according to the scale
21 of the revised preliminary plat, is 200 feet west of the
22 right of way of Ocean Avenue; a notation on the preliminary
23 plat states that the Pinehurst construction setback line is
24 "to align with Surf Pines to the north." Record 371.

25 The county planning commission approved the application
26 with conditions. Condition 16 of that decision provides:

1 There shall be a construction setback line for
2 those properties that front on and abut Tract A
3 [lots 1-22]. This line is as shown on the
4 preliminary plat and shall be indicated on the
5 final plat." Record 164.

6 There were appeals to the board of county commissioners
7 by petitioners Keever/Groshong and petitioner Nicholson, and
8 an appeal by the intervenor of a condition concerning
9 building height. Record 89-93.

10 Petitioners Keever/Groshong limited their appeal to the
11 location of the construction setback line. Their appeal
12 states that the planning commission improperly interpreted
13 Ordinance 92-20 regarding the location of the construction
14 setback line approved for the subdivision by the planning
15 commission. Record 124. They requested partial de novo
16 review to submit "additional evidence which will assist the
17 Board in properly interpreting Ordinance No. 92-20," and
18 asked that the board impose a condition of approval
19 requiring the construction setback line be in a line with
20 the "existing building line for the Surf Pines Development,
21 as depicted on Exhibits 10A and 10B of Clatsop County
22 Ordinance No. 92-20." Record 125-126.

23 The request for partial de novo review was denied, and
24 a notice for the board of commissioners appeal hearing was
25 mailed that includes the following statement:

26 "The Board of Commissioners has determined that
27 all of the appeals above will be heard On-the-
28 Record (Ordinance 92-20 and all other adopted
29 County Ordinances are considered to be part of the
30 record). All testimony received at these appeals

1 hearings must address information included in the
2 record." (Emphasis in original) Record 120.

3 The county staff report for the board of commissioners
4 appeals hearing, transmitted November 28, 1995, discusses
5 the adoption of the Goal 18 exception by Ordinance 78-25,
6 but does not discuss any ordinances adopted between 1978 and
7 1992. The staff report provides the following
8 characterization of the issue:

9 "The Appellants believe that references in
10 Ordinance 92-20 of the 'existing building line' or
11 'existing construction setback line' [refer] to
12 the Surf Pines Beach Addition subdivision building
13 line established by private deed restriction when
14 the subdivision was created in 1949.

15 "The County building line (the Goal 18 exception
16 line) is located approximately 65 feet further
17 west than the subdivision deed restriction
18 building line at the south end of Surf Pines Beach
19 Addition.

20 "* * * * *

21 "The Planning Department and County Counsel have
22 reviewed Ordinance 92-20 and believe that
23 Ordinance 92-20 refers to the County Building
24 Line, the Goal 18 committed exception line."
25 Record 98-99

26 At the appeal hearing before the board of
27 commissioners, county staff began to discuss the location of
28 the construction setback line and the Surf Pines building
29 line shown on Exhibits 10A and 10B of Ordinance 92-20 by
30 referring to "a chronology of the ordinances people have
31 been referring to." Transcript of audio tape,
32 Keever/Groshong Petition for Review 9. Ordinance 83-17 was

1 then mentioned by staff, apparently for the first time in
2 the proceedings. The following colloquy then occurred:

3 "[Petitioners' counsel]:

4 "What I'm concerned about, Mr. Chairman, is
5 that [staff] just a second ago said he
6 disagreed with everything I had said with
7 regard to where the line was supposed to be
8 and what I have asked the board to do tonight
9 in terms of making a straight line and why it
10 should be a straight line and then he is now
11 producing this document referring to
12 information that we have not seen before and
13 referring to an ordinance that was never
14 referred to in the staff report presumably in
15 response to a question that also perhaps in
16 rebuttal to my presentation, and I am very
17 concerned that I haven't seen it before, we
18 haven't heard about this before and I think
19 that puts my clients and me in a very, very
20 significantly bad light.

21 "[Intervenor's counsel]:

22 "Mr. Chairman, for the record, we have no
23 objection to letting [petitioners' counsel]
24 rebut whatever he wants to.

25 "[Petitioners' counsel]:

26 "That's a very kind offer, but I think there
27 is a lot more that goes into that such as
28 having an ample opportunity for review of
29 this new material and perhaps a new position
30 taken by staff rather than having to
31 adequately respond to it right now.

32 "[County counsel]:

33 "Mr. Chairman, I think I would take the
34 position that this not be in the record and
35 ought not be referred to and ought not be
36 considered by the Commission.

37 "[Board chair]:

1 "Our question is where the line ought to be
2 located and I think we're trying to determine
3 that fact.

4 "[County counsel]:

5 "And I think it is appropriate that staff
6 advise you of its position and its response
7 to that testimony without the use of
8 documentary evidence not in the record."
9 Keever/Groshong Petition for Review 11-12.

10 Following this colloquy there was apparently no further
11 discussion of Ordinance 83-17 at the hearing. The board of
12 commissioners made a tentative decision to deny petitioners'
13 appeals and to allow intervenor's appeal concerning the
14 building height limitation. The board directed preparation
15 of findings and continued the matter for final action.

16 The county adopted the following findings as part of
17 its final decision on January 24, 1996.

18 "The construction setback line shown on the
19 preliminary plat (dated January 24, 1995 and
20 revised March 7, 1995) is labeled "Proposed
21 Construction Setback Line" and is a dashed line
22 extending from the south property line of the
23 subdivision to the north property line of the
24 subdivision. The setback line has a notation that
25 states "to align with Surf Pines to the north."
26 The appellants [petitioners Keever and Groshong]
27 believe that the construction setback line should
28 align with the construction setback line in the
29 Surf Pines Addition subdivision to the north. The
30 appellants believe that this setback line is the
31 same as the county's Goal 18 exception line
32 established pursuant to County Ordinance 78-25.

33 "Exhibit 3 delineates the appellant's proposed
34 setback line as the "Surf Pines Beach Addition
35 Deed Restriction Line." The appellants argue that
36 finding 57(g) on page 50 of Ordinance 92-20 is

1 controlling and states:

2 'The proposed construction setback line and
3 relocated active dune line would lie in an
4 approximately straight line with the
5 construction setback line for The Highlands
6 development and the existing building line
7 for the Surf Pines development.'" Record 49.

8 The findings then set forth three graphic exhibits,
9 labeled 2, 3 and 4. Record 50-52. Exhibit 3 was apparently
10 prepared in December, 1995 after the close of testimony, and
11 identifies various lines on the Surf Pines property, from
12 east to west, as follows: "Lower Surf Pines Road (Ocean
13 Ave.) 60 foot wide right-of-way"; "Surf Pines Beach Addition
14 Deed Restriction Line (Book 214 Page 314)"; "Surf Pines
15 construction setback line - Ordinance 83-17," with a
16 notation showing this line to be 200 feet from the western
17 edge of the Ocean Avenue right of way; and nearest the
18 ocean, "Goal 18 Exception Line - Ordinance 78-25." This
19 exhibit identifies a point B on the Pinehurst Estates
20 property as coterminous with the Ordinance 83-17 Surf Pines
21 construction setback line, that is, west of the deed
22 restriction line but east of the Ordinance 78-25 Goal 18
23 Exception Line.

24 The findings continue:

25 "The appellants argue that the setback line on the
26 subdivision would match the Surf Pines Beach
27 Addition deed line and not Point 'B'. The
28 appellants argue that it would not be appropriate
29 to have a building line west of the Surf Pines
30 Beach Addition deed restriction line because it
31 would allow development in an active dune area.

1 The question before the BCC in resolving this
2 issue is whether the Surf Pines building line is
3 the Surf Pines Beach Addition deed restriction
4 line (a line established by private covenants) or
5 the Surf Pines construction setback line adopted
6 by Ordinance 83-17.

7 "(a) These findings refer to the following
8 exhibits in the record and to Clatsop County
9 Ordinances:

10 "Ordinance 78-25: Goal 18 exception for the
11 Surf Pines area (1978).

12 "* * * * *

13 "Ordinance 83-17: adopting the combined plan
14 and zone map for the County, including the
15 200' building line in Surf Pines (1983).

16 "Ordinance 92-20: amending the construction
17 setback line on the Pinehurst Estates
18 property (December 1992).

19 "Surf Pines Beach Addition ocean front
20 building line (Clatsop County deed Records,
21 Book 214, Page 314; record page 141).

22 "(b) * * * * *

23 "The Active Dunes Overlay ('ADO') District
24 eastern line is the construction setback line on
25 the Pinehurst Estates property (this subdivision).
26 Ordinance 92-20 defined the construction setback
27 line on the Pinehurst Estates property. It is a
28 straight line connecting two points labeled as
29 point A (see exhibit 4) and Point B (see Exhibit
30 3) on the attached exhibits. Point A south of
31 Pinehurst Estates is, according to Ordinance 92-
32 20, the northern terminus of the building line for
33 the subdivision known as The Highlands at
34 Gearhart, which is also the active dune line. On
35 the north side of Pinehurst Estates, Ordinance 92-
36 20 indicates that point B is the southern terminus
37 of the Surf Pines Building Line. These two points
38 are more precisely described in the following two
39 findings, and are shown on the attached map

1 together with the resulting construction setback
2 line across the Pinehurst Estate property.

3 * * * * *

4 "(d) Surf Pines is a neighborhood immediately
5 north of the Pinehurst Estates property. Four
6 lots of Pinehurst Estates [are] within Surf Pines.
7 The Surf Pines neighborhood has a little more than
8 two miles of ocean frontage. The Surf Pines
9 construction setback line was established by
10 Ordinance 83-17 (Exhibit 2), which adopted the
11 current combined zoning and Comprehensive Plan map
12 for Clatsop County. On that map is a notation,
13 which was on the map when it was adopted,
14 indicating that the construction setback line
15 throughout the Surf Pines area is 200 feet of the
16 western right of way of Ocean Drive (also known as
17 Lower Surf Pines Road). The 200' distance is the
18 Surf Pines construction setback line. Ordinance
19 83-17 created this construction setback line to
20 provide a uniform ocean front building line
21 throughout the Surf Pines neighborhood. The
22 intersection of this line with the northern
23 property line of the Pinehurst Estates ocean front
24 property is point B, shown on the attached map
25 (Exhibit 2).

26 "(e) According to the BCC record (page 141), the
27 appellants represented that a building line
28 recorded as a deed restriction in 1951 (Clatsop
29 County Deed Records, Book 214, page 314) affects
30 several lots in the Surf Pines Beach Addition
31 subdivision. Surf Pines Beach Addition is a
32 subdivision within the Surf Pines neighborhood,
33 encompassing about 20 acres and less than 2,000
34 feet of ocean frontage at the south end of the
35 Surf Pines neighborhood. The BCC finds that this
36 private deed restriction line is not the
37 construction setback line referred to in Ordinance
38 92-20 because:

39 "the deed restriction line is a privately
40 created line and only affects a small subset
41 of the Surf Pines area ocean front lots;

42 "the private deed restriction line is not the

1 same as the County's construction setback
2 line created by Ordinance 83-17;

3 "nowhere in Ordinance 92-20 is the private
4 deed restriction mentioned.

5 "(f) An exception to Statewide Planning Goal 18
6 was adopted by the county as Ordinance 78-25. It
7 created a construction setback line slightly to
8 the west of the Surf Pines construction setback
9 line. The Goal 18 exception line was the
10 effective construction setback line for about five
11 years, starting in 1978 when it was adopted, and
12 ending in 1983, when Ordinance 83-17 adopted the
13 Surf Pines construction setback line. The Goal 18
14 exception line established by Ordinance 78-25 is
15 not the construction setback line referenced in
16 Ordinance 92-20, because it was no longer the
17 effective construction setback line in 1992, when
18 Ordinance 92-20 was adopted. The Goal 18
19 exception line still exists, but it has not been
20 the construction setback line since Ordinance 83-
21 17 adopted a more restrictive construction setback
22 line.

23 "(g) Ordinance 92-20 includes two exhibits,
24 marked 10-A and 10-B. These exhibits are aerial
25 photographs purporting to show a construction
26 setback line across the Pinehurst Estates property
27 as it connects with the Highlands at Gearhart to
28 the south and with the Surf Pines neighborhood to
29 the north. Opponents argue that a close
30 examination of exhibit 10-B shows the Surf Pines
31 neighborhood construction setback line just
32 touching the western sides of four houses visible
33 in the exhibit. Opponents also suggest that the
34 actual construction setback line across the
35 Pinehurst property would line up with these four
36 houses. This imaginary line described by
37 opponents is not the construction setback line
38 referenced in Ordinance 92-20 because:

39 "Precise measurements are not possible using
40 exhibit 10B because the scale is marked
41 'Approx.'.

42 "The line drawn on exhibit 10-B representing

1 the Surf Pines construction setback line is
2 about 1/16 inch wide. At the scale of
3 exhibit 10B (1" = somewhere between 290 and
4 350'), a line this broad covers between 18
5 and 22 feet.

6 "The building line in Surf Pines is clearly
7 marked on Exhibit 10-B as "Surf Pines
8 Building Line (Goal 18 Committed Exception)".

9 "Given the ambiguity of exhibit 10-B, as
10 contrasted with the clarity of the exhibit's text
11 labels, the BCC finds that an imaginary line
12 across the western edges of a few homes in Surf
13 Pines Beach Addition is not the construction
14 setback line referenced in Ordinance 92-20.

15 "(h) The labels on exhibit 10-B of Ordinance 92-
16 20 do not distinguish between the Surf Pines
17 construction setback line and the Goal 18
18 exception line. As mentioned above, the Surf
19 Pines construction setback line was established by
20 Ordinance 83-17. The Goal 18 exception line was
21 established by Ordinance 78-25. Based on the
22 Exhibit 10B text labels it is clear that the
23 intent of Ordinance 92-20 was to connect the
24 construction setback line across the subject
25 property with the Surf Pines construction setback
26 line created by Ordinance 83-17. We find that
27 the construction setback line established across
28 the Pinehurst Estates oceanfront property by
29 Ordinance 92-20 was intended to match the Surf
30 Pines construction setback line established by
31 Ordinance 83-17. These two lines meet at the
32 point labeled as point B on Exhibits 2 and 3.

33 "(i) Based on Findings (a)-(h) above, the BCC
34 finds that the building setback line for the
35 subdivision extends from point B on the north
36 which is the Surf Pines construction setback line
37 adopted by Ordinance 83-17 to point A on the south
38 adjacent to The Highlands subdivision. The BCC
39 expressly rejects an argument that a proper
40 reading of Ordinance 92-20 would require the
41 setback line to extend from and be aligned with
42 the Surf Pines Addition deed restriction line."
43 Record 53-58.

1 Petitioners brought these appeals of the county's
2 approval.

3 **FIRST ASSIGNMENT OF ERROR (KEEVER/GROSHONG - NICHOLSON)**

4 Petitioners Keever/Groshong's first assignment of error
5 challenges the county's decision on two grounds.³ First,
6 they argue that there is not substantial evidence in the
7 record to support the location of the Pinehurst Estates
8 construction setback line as it is described in Exhibits 2,
9 3, and 4 of the findings. Keever/Groshong Petition for
10 Review 12, 20; Nicholson Petition for Review 3. Second,
11 they argue that a proper interpretation of Ordinance 92-20
12 requires, as a matter of law, that the Pinehurst Estates
13 construction setback line terminate at the Goal 18 exception
14 line established by Ordinance 78-20, not at a line
15 established by Ordinance 83-17. Keever/Groshong Petition
16 for Review 12. For the reasons we describe below, we agree
17 with the first argument and reject the second.

18 Intervenor argues that the county has simply
19 interpreted Ordinance 92-20, that the interpretation is
20 subject to deference, and that the county properly relied on
21 a prior enactment in making its findings. Intervenor
22 asserts that the exhibits in the findings represent

³Petitioner Nicholson raises a similar challenge in her first assignment of error. She fails to develop other issues in her first assignment of error sufficiently for us to address them independently. To the extent her first assignment of error contends the county's decision must be remanded due to procedural errors, that issue is addressed in our analysis of petitioners Keever/Groshong's second assignment of error.

1 information that is contained in the record. Intervenor
2 expands on this point in response to petitioners
3 Keever/Groshong's second assignment of error, referring to
4 several points in the record in support of that proposition.
5 However, nothing that intervenor points to in the record
6 establishes that Ordinance 83-17 adopted a different line
7 than Ordinance 78-25, nor does the record establish the
8 relationship of any line that was adopted by Ordinance 83-17
9 to the Ordinance 78-25 building line. Indeed, none of the
10 record references identified by intervenor even mentions
11 Ordinance 83-17. Intervenor states, "The reference to the
12 Ordinance 83-17 line is shown at Rec. 354 and 490."
13 Response Brief 21. However, Record 354 is an exhibit
14 submitted by petitioner Nicholson, apparently from the
15 comprehensive plan/zoning map atlas, showing a "building
16 line" in the Surf Pines area without any reference to
17 Ordinance 83-17. Record 490 is Exhibit 10B from Ordinance
18 92-20, again showing the new construction setback
19 line/active dune line for the Pinehurst Estates property;
20 the exhibit does not refer to Ordinance 83-17, but instead
21 simply identifies the "Surf Pines Building Line (Goal 18
22 Committed Exception)." Intervenor has identified no
23 evidence in the record transmitted by the county that
24 supports the county's findings concerning the relationship
25 of a line enacted by Ordinance 83-17 to the Ordinance 78-25
26 line on the Surf Pines property, or that otherwise explains

1 how Ordinance 83-17 has any part in the interpretation of
2 Ordinance 92-20.

3 Intervenor asks that we take official notice of
4 Ordinance 83-17, apparently contending that the ordinance
5 itself supports the county's findings. Intervenor has
6 appended what appears to be a portion of Ordinance 83-17 to
7 its brief, but fails to identify where in the ordinance
8 there is any language or map that supports the findings set
9 forth above. In particular, intervenor identifies no
10 language in Ordinance 83-17 that specifically refers to the
11 relationship between the 1978 exception and the 1983
12 amendments. Nor is there anything identifying the
13 construction setback line purportedly established by
14 Ordinance 83-17, or showing that it is located 200 feet west
15 of the Ocean Avenue right-of-way, as asserted in findings
16 "(a)" and "(d)." Intervenor was unable to identify any
17 relevant language or map in Ordinance 83-17 when
18 specifically asked to do so at oral argument. We therefore
19 reject the contention that the text of Ordinance 83-17, at
20 least as presented to us, provides grounds to affirm the
21 county's decision.⁴

⁴The record transmitted by the county does not appear to include any portion of Ordinance 83-17. Both petitioner Nicholson and intervenor append identical portions of Ordinance 83-17 to their respective briefs. The material submitted includes a "cover ordinance," with recitals including the short title "1983 LCDC In Order to Comply Statement." The cover ordinance adopts ordinance text and maps as an "Exhibit A," incorporating them by reference. Immediately following the cover ordinance is an "Index of Exhibit A," which lists the planning documents that are

1 We turn to petitioners' argument that the county's
2 interpretation of Ordinance 92-20 is wrong as a matter of
3 law, and that Ordinance 92-20 requires that the construction
4 setback line for the Pinehurst Estates property must align
5 with the Goal 18 exception line enacted by Ordinance 78-25.
6 We find nothing in the text or maps of Ordinance 92-20 (at
7 least the portions included in the record) that
8 unambiguously states that the "Surf Pines Building Line
9 (Goal 18 Exception Line)" in Exhibit 10B of Ordinance 92-20
10 is the Goal 18 exception line enacted by Ordinance 78-25.
11 Nor are we able to say, as a matter of law, that Ordinance
12 83-17 is irrelevant to the county's interpretation of
13 Ordinance 92-20. The Ordinance 83-17 cover ordinance
14 suggests that there may have been amendments to the county
15 exceptions document for Goal 18 in response to LCDC

adopted and amended. Most of the submitted material consists of changes to the Goal 2 exceptions document background reports, but there are also textual changes to various area plans and other planning documents that comprise the comprehensive plan. The material submitted to us appears to stop part way through the Goal 2 exceptions analysis, and does not appear to include any Goal 18 analysis. The only references to the Surf Pines property exceptions we were able to locate in our search of the 300-plus pages submitted to us concerned Goal 17. The index lists amendments to the Goal 18 Background Report and Countywide Element, but these were apparently not included in the portion of the ordinance submitted to us. In particular, there is no statement that Ordinance 83-17 establishes a new "construction setback line" for the Surf Pines area or that that line is either more restrictive (further east) or less restrictive (further west) than the Goal 18 exception line established by Ordinance 78-25. Perhaps more important for the county's findings, no party has proffered any map adopted by Ordinance 83-17 that could arguably be the basis for locating the "Surf Pines Building Line (Goal 18 Exception)" identified in Ordinance 92-20 at a point 200 feet west of the Ocean Avenue right-of-way. Again, such a map may exist as an enactment that could be judicially noticed, but we have not seen it.

1 requirements. The index of Exhibit A also indicates the
2 adoption of maps that are not included in the material
3 submitted to us. If the exception area was amended in 1983,
4 the reference in Ordinance 92-20 may reasonably be, as the
5 county's findings assert, to that Goal 18 exception and
6 building line, not to the original, preacknowledgment Goal
7 18 exception and building line. Based on the text of
8 Ordinance 92-20, we cannot conclude either that the county's
9 decision concerning the relation between the Ordinance 92-20
10 line and the Ordinance 83-17 line is wrong as a matter of
11 law, or that the "Surf Pines Building Line (Goal 18
12 Exception)" in Exhibit 10B of Ordinance 92-20 refers, as a
13 matter of law, to the line established by Ordinance 78-25.
14 Accordingly, we decline to reverse the county's decision.

15 Because there is nothing in the record to support the
16 county's decision concerning the location of the
17 construction setback line, and nothing in any enactment of
18 which we may take notice that independently supports the
19 decision, this assignment of error is sustained. On remand,
20 the county may adopt findings based on Ordinance 83-17, but
21 only if the ordinance supports such findings, and only if
22 the pertinent portions of that ordinance are available for
23 our review in the event of a subsequent appeal.

24 Petitioners Keever/Groshong's first assignment of error
25 and petitioner Nicholson's first assignment of error are
26 sustained.

1 **SECOND ASSIGNMENT OF ERROR (KEEVER/GROSHONG)**

2 Petitioners Keever/Groshong argue that, by adopting
3 findings based on Ordinance 83-17 without providing them an
4 opportunity to address that ordinance, the county failed to
5 follow applicable procedures in a manner that prejudiced
6 their substantial rights. Petitioners rely both on case law
7 concerning the right to rebut evidence and on the procedural
8 requirements of ORS 197.763.

9 As intervenor points out, the cases cited by
10 petitioners on the right to rebut evidence concern just that
11 -- evidence. Intervenor contends that Ordinance 83-17 is
12 subject to judicial notice pursuant to Oregon Evidence Code
13 202(7), and is therefore not evidence but law. Intervenor
14 also contends that, if Ordinance 83-17 is evidence,
15 petitioners waived the issue of procedural error concerning
16 the county's consideration of Ordinance 83-17 when they
17 "rejected an opportunity to rebut the evidence." Response
18 Brief 20.

19 Based on the colloquy between the board chair and
20 county counsel transcribed in the petition for review, we
21 conclude that petitioners did not have an opportunity to
22 address or rebut the applicability of Ordinance 83-17, and
23 that under the circumstances petitioners did not waive their
24 right to address Ordinance 83-17. If Ordinance 83-17 is
25 wholly extrinsic to the "applicable criteria" required to be
26 identified in the hearing notice pursuant to ORS

1 197.763(3)(b), then it constitutes "evidence" as defined by
2 ORS 197.763(9)(b), as a document offered to demonstrate
3 compliance with Ordinance 92-20.⁵ If, on the other hand,
4 Ordinance 83-17 is an applicable criterion or standard in
5 determining the location of the construction setback line
6 established by 92-20, ORS 197.763(3)(b) requires that it be
7 identified in the hearing notice with greater specificity
8 than "Ordinance 92-20 and all other adopted County
9 Ordinances." Record 120. See ONRC v. City of Oregon City,
10 29 OR LUBA 90, 97-98 (1995) (failure to list criteria in
11 initial hearing notice not cured by subsequent appeal
12 hearing notice that lists generically chapters of code that
13 apply to numerous application types). In either case,
14 because the effect of the colloquy was to terminate
15 discussion of Ordinance 83-17, the county could not then
16 rely on the ordinance in its findings without committing

⁵ORS 197.763(3)(b) requires that the notice of hearing shall:

"List the applicable criteria from the ordinance and the plan that apply to the application at issue."

ORS 197.763(9) provides:

"For purposes of this section,

"(a) 'Argument' means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. 'Argument' does not include facts.

"(b) 'Evidence means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

1 procedural error. Under the circumstances, that error
2 prejudiced petitioners' substantial right to prepare and
3 present their case. Ordinance 83-17 is so central to the
4 county's decision, and its applicability and meaning so
5 unclear to us on appeal, that we cannot say the error was
6 harmless.

7 Petitioners Keever/Groshong's second assignment of
8 error is sustained.

9 **SECOND ASSIGNMENT OF ERROR (NICHOLSON)**

10 Petitioner Nicholson's second assignment of error is
11 that the 26-foot building height limit on lots 1-22 "is
12 contrary to the county's comprehensive Goals, plans and
13 policies enacted and adopted after approval by the LCDC."
14 Nicholson Petition for Review 6. Petitioner Nicholson
15 contends that the county erred in not limiting building
16 height on lots 1-22 to 18 feet. Her arguments are difficult
17 to make out, in part because her petition for review often
18 simply refers to record exhibits in which she made an
19 argument below, without any further discussion or
20 explication of the argument in the petition for review
21 itself. However, she does identify "Section S3.150 and
22 Section 3.220" in the text of her petition for review, and
23 attaches copies of Land and Water Development/Use Ordinance
24 (LWDUO) 3.220 and LWDUO 3.150 as exhibits. Nicholson
25 Petition for Review 7.

26 LWDUO 3.220 is the title section for the provisions

1 governing the RA-5 zone where lots 1-22 are located. LWDUO
2 3.224, on the same page of the LWDUO, lists development and
3 use permitted in the RA-5 zone; subsection 11 of that
4 section is "Cluster developments subject to the provisions
5 of Section S3.150." Petitioner's argument apparently
6 confuses section 3.150 of the LWDUO, which concerns
7 development standards (including a height limit of 18 feet)
8 in the Coastal Residential zone, with section S3.150 of the
9 Standards Document portion of the LWDUO, which concerns
10 standards for cluster developments. The "S" prefix
11 identifies provisions of the Standards Document in the
12 county's ordinance and findings. We find no error in the
13 county's failure to apply the 18-foot height limit of LWDUO
14 3.150, a standard from a zone that has no relevance to this
15 application.

16 With respect to other comprehensive plan provisions
17 identified in petitioner Nicholson's petition for review,
18 the county adopted specific findings explaining that height
19 limitations are implemented by the development standards of
20 the zone, and that the scenic areas plan policy is
21 implemented by the application of base zones other than RA-
22 5. Record 26. Petitioner Nicholson does not dispute the
23 county's finding that the subject property is outside the
24 Clatsop Plains Community Plan scenic area. Record 23. She
25 does not explain why height limitations other than those of
26 the RA-5 zone should apply or otherwise demonstrate why the

1 county's interpretation of its plan and land use regulations
2 should not be affirmed pursuant to ORS 197.829. We are
3 required to affirm the county's interpretation of its
4 comprehensive plan and land use regulations unless it is
5 clearly wrong. ORS 197.829; Gage v. City of Portland, 319
6 Or 308, 316, 877 P2d 1187 (1994); Clark v. Jackson County,
7 313 Or 508, 514, 836 P2d 710 (1992).

8 Petitioner Nicholson's remaining arguments under this
9 assignment of error are unrelated to specific plan policies
10 or applicable provisions of the LWDUO, and thus exceed the
11 scope of the assignment of error; moreover, they are not
12 presented with sufficient clarity to allow our review. OAR
13 661-10-030(2)(d); Richards v. Marion County, 22 Or LUBA 613,
14 614 (1992). To the extent that petitioner Nicholson alleges
15 procedural error in conjunction with this assignment, she
16 does not establish prejudice to her substantial rights. ORS
17 197.835(9)(a)(B).

18 Petitioner Nicholson's second assignment of error is
19 denied.

20 **THIRD ASSIGNMENT OF ERROR (NICHOLSON)**

21 Petitioner Nicholson contends the county improperly
22 interpreted applicable law in determining that a requirement
23 for emergency vehicle access from a private road in the
24 adjoining Surf Pines Addition subdivision does not violate
25 LWDUO S6.160. That provision states in relevant part,
26 "Under no circumstances shall a private road serve other

1 roads or areas."

2 The county adopted findings, based on the definition of
3 "private road" in the LWDUO, interpreting the prohibition in
4 LWDUO S6.160 to apply only if there is "daily and routine
5 access to a lot." The county concluded that emergency
6 vehicle access does not constitute a "private road" under
7 its interpretation. Petitioner establishes no basis under
8 ORS 197.829 for us to reject that interpretation.

9 Petitioner also appears to challenge approval of a
10 curve radius variance. That approval was set forth in a
11 separate decision that was not appealed to this board.
12 Record 78-79.

13 Petitioner Nicholson's third assignment of error is
14 denied.

15 **FOURTH ASSIGNMENT OF ERROR (NICHOLSON)**

16 Petitioner Nicholson contends that the decision does
17 not demonstrate compliance with LWDUO 5.226(22)(b), which
18 requires documentation addressing "[a]n acceptable and
19 approved method of water supply." The county found that
20 this standard was satisfied by evidence that the RA-5 area
21 will be served by the City of Warrenton, and that the CBR
22 area (which is within the Surf Pines Addition subdivision)
23 will be served by the Surf Pines Water Association.
24 Petitioner Nicholson argues that "method of water supply"
25 means evidence that a delivery system is available or in
26 place, and that there is no evidence that such a system is

1 in place for delivery from the City of Warrenton. Nicholson
2 Petition for Review 11.

3 There is substantial evidence to support the county's
4 finding that the RA-5 area will be served by the City of
5 Warrenton. The city manager submitted a letter stating "I
6 am not aware of any reason the City of Warrenton would not
7 be able to service your development from our water main
8 situated along the former SP&S railroad right of way."
9 Record 510. That evidence of the method of water supply is
10 adequate to demonstrate compliance with LWDUO 5.226(22)(b).

11 Petitioner Nicholson's fourth assignment of error is
12 denied.

13 The county's decision is remanded.