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

CRAIG ALAN DeSHAZER and )  
COLLEEN MARIE DeSHAZER, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
COLUMBIA COUNTY, )  
 )  
Respondent. )

LUBA No. 98-154

FINAL OPINION  
AND ORDER

Appeal from Columbia County.

Craig Alan DeShazer and Colleen Marie DeShazer, Scappoose, represented themselves. Colleen Marie DeShazer filed a petition for review on her own behalf.

Anne Corcoran Briggs, Assistant County Counsel, St. Helens, represented respondent.

GUSTAFSON, Board Member; HOLSTUN, Board Chair; HANNA, Board Member, participated in the decision.

AFFIRMED 02/25/99

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a subdivision.

4 **FACTS**

5 This is the third time the county's approval of a land division on the subject property  
6 has been before us. In DeShazer v. Columbia County, 31 Or LUBA 300 (1996) (DeShazer  
7 I), we reversed the county's approval of a partition, finding that the requested partition  
8 violated Statewide Planning Goal 11, which provides, in relevant part:

9 "For land that is outside urban growth boundaries and unincorporated  
10 community boundaries, county land regulations shall not rely upon the  
11 establishment or extension of a water system to authorize a higher residential  
12 density than would be authorized without a water system."

13 We determined that the requested partition would require "the establishment or extension of  
14 a water system" in violation of Goal 11.

15 Following our reversal in DeShazer I, the Court of Appeals reversed this Board's  
16 decision in DLCD v. Lincoln County, 31 Or LUBA 240 (1996), which was decided shortly  
17 before DeShazer I. There, this Board held that Goal 11 prohibited local governments from  
18 relying on extensions of an established, existing water system to authorize increased  
19 residential density, and that the term "extension" as used in Goal 11 could refer to connection  
20 of a water system to individual properties within district boundaries as well as extension of a  
21 water system outside a water district's boundaries. Id. at 246. The Court of Appeals  
22 determined, essentially, that the phrase "establishment or extension" in Goal 11 "is  
23 systematic in scope, and that contemplates the new or expanded presence of water systems in  
24 areas where none was present before. The corollary is that [Goal 11] does not proscribe local  
25 legislation or decisions \* \* \* that base higher densities on existing water systems or new  
26 connections to such systems within their existing service areas." Dept. of Land Conservation  
27 v. Lincoln County, 144 Or App 9, 17, 925 P2d 135 (1996), rev den 324 Or 560 (1997).

1           Following our reversal in DeShazer I, the applicant submitted a new application for a  
2 subdivision on the subject property. Petitioners again appealed the county's approval,  
3 arguing again that the county's approval violated Goal 11. In DeShazer v. Columbia County,  
4 \_\_ Or LUBA \_\_ (LUBA No. 97-174, April 30, 1998), we remanded the county's subdivision  
5 approval on the basis that the county had not made adequate findings establishing that the  
6 proposed subdivision complies with Goal 11. In that opinion we expressed our reservation  
7 that it was not clear to us that the subject property was, in fact, within the boundaries of a  
8 water district, or that the existing system would not have to be extended to serve the  
9 proposed subdivision. Id., slip op 9.

10           In response to our remand order, the board of county commissioners held a public  
11 hearing on May 20, 1998. The hearing notice specified that

12           "Only the applicant, Keith Settle, or the appellants at LUBA, Craig and  
13 Colleen DeShazer, may present evidence at the hearing. Evidence may be  
14 presented orally or in writing. Others may attend the hearing, but will not be  
15 permitted to submit evidence." Record 92, 94.

16           During the public hearing, the applicant presented testimony and exhibits to support  
17 his position that the water supply proposed for the subdivision complies with Goal 11. One  
18 of the exhibits he submitted was a letter provided by a member of the McNulty Water  
19 Association (the Association), in whose boundaries the proposed subdivision lies. In  
20 response to the applicant's testimony and exhibits, petitioners testified that the letter  
21 submitted by the Association member was factually incorrect. Petitioners submitted a letter  
22 written earlier by the Association president to dispute the contents of the letter submitted by  
23 the applicant. At the close of the hearing, one commissioner requested "a statement from  
24 McNulty Water Assn addressing the issues." Record 70. Accordingly, the minutes reflect  
25 that "the Board left the record open until June 10, 1998 to receive any additional  
26 information." Id.

1           During the June 10, 1998 continued hearing, the applicant called upon the engineer  
2 for the Association to respond to the water issues. Petitioners objected to the testimony, on  
3 the basis that the engineer was not a party to the case. The board of county commissioners  
4 allowed the testimony. Petitioners also presented additional written evidence at the hearing,  
5 but the minutes do not reflect that petitioners requested the opportunity to submit additional  
6 testimony or to respond to the testimony presented by the engineer. At the close of the  
7 hearing, the board of county commissioners again voted to approve the application. The  
8 board of county commissioners adopted findings supporting its decision on August 19, 1998.

9           This appeal followed.

10       **FIRST ASSIGNMENT OF ERROR**

11           Petitioners contend that the county

12           "failed to comply with applicable law and the explicit instructions of its own  
13 NOTICE OF HEARING \* \* \* therefore resulting in substantial prejudice to  
14 Petitioner by the denial of a meaningful opportunity to have experts testify on  
15 their behalf to substantiate their arguments." Petition for Review 6.

16           Petitioners argue that by the board of county commissioner's "changing of the rules and  
17 procedures midstream," the applicant had an "unfair advantage." Petition for Review 7.

18       1           Petitioners have not established that the county violated any statutory or local  
19 procedural requirement through the procedures by which the county conducted its remand  
20 hearing. In response to written evidence from representatives of the Association submitted  
21 by both the applicant and petitioners, the board of county commissioners specifically  
22 requested additional evidence from the Association. The board of county commissioners  
23 then continued the hearing in order to receive that additional evidence. Petitioners were  
24 present and had adequate notice of the board of county commissioner's request. The  
25 testimony from the Association engineer, on behalf of the applicant, was in response to that  
26 request. We find no statutory or local procedural error in the challenged process.

1           Moreover, petitioners do not contend, and neither the minutes of the May 20, 1998  
2 hearing nor June 10, 1998 hearing indicate, that petitioners requested the opportunity to  
3 present additional testimony or evidence in response to the information from the Association  
4 that the commission requested and the applicant provided. Thus, even if the county's  
5 decision to allow testimony from the Association deviated from its written notice, and even if  
6 that deviation constituted a procedural error, petitioners have not established that the county's  
7 process resulted in any prejudice to their substantial rights. Therefore, petitioners establish  
8 no basis for relief. ORS 197.835(9)(a)(B); see, e.g., Simonds v. Hood River County, 31 Or  
9 LUBA 305 (1996). (Under ORS 197.835(9)(c) (1995), a procedural violation is a basis for  
10 reversal or remand only if petitioners demonstrate that their substantial rights were  
11 prejudiced as a result of the violation.)

12           The first assignment of error is denied.

13           **SECOND THROUGH SIXTH ASSIGNMENTS OF ERROR**

14           In their remaining assignments of error, petitioners argue the county's decision  
15 misconstrues the applicable law and is not supported by substantial evidence. The essence of  
16 petitioners' argument is that the water system proposed for the subdivision requires an  
17 "extension of a water system" in violation of Goal 11.

18           We find that the county has adopted findings, supported by substantial evidence, to  
19 establish that the proposed subdivision does "not rely upon the establishment or extension of  
20 a water system" within the meaning of Goal 11.<sup>1</sup> That petitioners' disagree with the county's

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<sup>1</sup>The county's findings state, in part:

"The applicant provided uncontroverted information and testimony from the McNulty Water Association that the subject property is located within its present service area.

"The applicant provided information to show that properties to the north, east and southeast of the subject parcel are presently being supplied by water from McNulty Water Association, and that supply lines for two parcels to the north run through the subject property. While Colleen DeShazer testified that she believed that those lines could not be used to connect the lots in the subdivision to the water tank, \* \* \* [the] [e]ngineer for the McNulty Water

1 evaluation of the evidence and its application of the law to the facts, does not constitute a  
2 basis for relief. None of petitioners' assignments of error warrants remand or reversal. ORS  
3 197.835(16).<sup>2</sup>

4 Assignments of error two through six are denied.

5 The county's decision is affirmed.

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Association testified that the 6 inch water line which runs through the subject property can be  
tapped into by the applicant to provide water to the proposed subdivision. \* \* \*

\* \* \* \* \*

"Information from the McNulty Water Association shows that there is adequate water  
quantity, reservoir and line capacity for the proposed development. The lines within the  
subdivision will merely allow the dwellings to hook-up to existing feeder lines. \* \* \* Record  
11-12-3.

<sup>2</sup> ORS 197.835(16) allows this Board to resolve appeals without reaching each of the issues raised as  
follows:

"The board may decide cases before it by means of memorandum decisions and shall prepare  
full opinions only in such cases as it deems proper."