

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF THE METOLIUS and
5 PETE SCHAY,
6 *Petitioners,*

7
8 vs.

9
10 JEFFERSON COUNTY,
11 *Respondent,*

12
13 and

14
15 DUTCH PACIFIC RESOURCES, LLC,
16 SHANE LUNDGREN, IRWIN B. HOLZMAN,
17 GORDON C. JONES and JEFFREY JONES,
18 *Intervenors-Respondents.*

19
20 LUBA Nos. 2008-181 and 2008-182

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from Jefferson County.

26
27 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.
28 With him on the brief was the Law Office of Bill Kloos PC.

29
30 David C. Allen, Madras, filed a joint response brief and argued on behalf of
31 respondent. With him on the brief were Roger A. Alfred, Steven L. Pfeiffer, Perkins Coie
32 LLP, Christopher P. Koback, Davis Wright Tremaine LLP, Corinne C. Sherton and Johnson
33 & Sherton PC.

34
35 Roger A. Alfred and Steven L. Pfeiffer, Portland, filed a joint response brief, and
36 Steven L. Pfeiffer argued on behalf of intervenors-respondents Dutch Pacific Resources,
37 LLC and Shane Lundgren. With them on the brief were Perkins Coie LLP, Christopher P.
38 Koback, Davis Wright Tremaine LLP, Corinne C. Sherton, Johnson & Sherton PC and David
39 C. Allen.

40
41 Christopher P. Koback, Portland, filed a joint response brief and argued on behalf of
42 intervenors-respondents Gordon C. Jones and Jeffrey Jones. With him on the brief were
43 Davis Wright Tremaine LLP, Roger A. Alfred, Steven L. Pfeiffer, Perkins Coie LLP,
44 Corinne C. Sherton, Johnson & Sherton PC and David C. Allen.

1 Corinne C. Sherton, Salem, filed a joint response brief and argued on behalf of
2 intervenor-respondent Irwin Holzman. With her on the brief were Johnson & Sherton PC,
3 Roger A. Alfred, Steven L. Pfeiffer, Perkins Coie LLP, Christopher P. Koback, Davis Wright
4 Tremaine LLP and David C. Allen.

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6 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

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8 RYAN, Board Member, did not participate in the decision.

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10 AFFIRMED

02/03/2009

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

NATURE OF THE DECISION

Petitioners appeal comprehensive plan and zoning ordinance amendments governing the Camp Sherman area of the county.

MOTIONS TO INTERVENE

Separate motions to intervene on the side of respondent have been filed by (1) Dutch Pacific Resources, LLC and Shane Lundgren, (2) Irwin B. Holzman, and (3) Gordon C. Jones and Jeffrey Jones. There is no opposition to the motions, and they are allowed.

MOTION TO TAKE OFFICIAL NOTICE

Attached to the petition for review are a county ordinance and documents that are or may be part of a Land Conservation and Development Commission (LCDC) periodic review of Jefferson County’s comprehensive plan and land use regulations. Petitioners request that we take official notice of the documents.

Although LUBA’s review of land use decisions is generally limited to the record that is filed by respondent, LUBA routinely takes official notice of applicable laws under OEC 202, including local ordinances. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005); *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995). Under OEC 202, LUBA may also take official notice of documents that make up LCDC periodic review of comprehensive plans and land use regulations. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 530 (1999), *aff’d* 165 Or App 1, 994 P2d 1205 (2000). We take official notice of Jefferson County Ordinance 0-44-97, which appears at App-21-23 of the petition for review, as applicable law. We also take notice of the documents that appear at App 17-20 of the petition for review, although it is not entirely clear that all of those documents are properly viewed as part of LCDC’s 1997 periodic review proceedings concerning Jefferson County. For purposes of this opinion, we will assume that they are.

1 **FACTS**

2 In an ordinance that took effect in 2007, the county amended its comprehensive plan
3 map to show the Camp Sherman area of Jefferson County as an “Unincorporated
4 Community.” The county also amended its development code regulations that applied within
5 Camp Sherman. That 2007 ordinance was appealed to LUBA. In a single assignment of
6 error, petitioners alleged that the comprehensive plan map and land use regulation
7 amendments violated several requirements of LCDC’s Unincorporated Communities
8 administrative rule. OAR chapter 660, division 22. We sustained one of petitioner’s four
9 sub-assignments of error and rejected the others. *Johnson v. Jefferson County*, 56 Or LUBA
10 25, 52-56 (2008), *aff’d* 221 Or App 190, 189 P3d 34 (2008). The subassignment of error that
11 we sustained concerned the mapping requirement of OAR 660-022-0020(2). *See* n 9. In our
12 decision in *Johnson*, we set out petitioners’ entire argument to LUBA concerning OAR 660-
13 022-0020(2)’s mapping requirement:

14 “As best Petitioners can determine, the plan fails to contain a delineation of
15 the boundaries of the community that meets the requirements of the rule. A
16 baseline requirement for adopting the subject regulations appears to be
17 missing. FOM Petition for Review 2-3.” *Johnson*, 56 Or LUBA at 52 n 14.

18 Our resolution of petitioners’ subassignment of error in *Johnson* is set out below:

19 “It is not clear from [petitioners’] subassignment of error whether [they are]
20 arguing that there is no map that shows the boundaries of the Camp Sherman
21 unincorporated community or whether there is such a map but the map is
22 inadequate. The record includes the county’s comprehensive plan map as one
23 of the oversize exhibits. Each unincorporated community is shown on the
24 comprehensive plan map in purple. The Camp Sherman unincorporated
25 community is shown on that map.

26 “Although the petition for review could certainly be clearer, we understand
27 [petitioners] to argue that the comprehensive plan map that shows the
28 unincorporated communities is not at a ‘scale sufficient’ to identify the
29 included properties. We agree with [petitioners]. The comprehensive plan
30 map is at a scale of 1:100,000. At that scale, one inch on the map represents
31 over a mile and a half on the ground. Unless the comprehensive plan map
32 delineation of the unincorporated communities operates in concert with other
33 larger scale official maps that more precisely delineate Camp Sherman, it

1 would be impossible to ‘determine accurately which properties are included’
2 in the boundaries of the Camp Sherman unincorporated community. No party
3 argues that there are larger scale maps that operate with the comprehensive
4 plan map to allow the properties that are included in the county’s
5 unincorporated communities to be ‘accurately’ determined, as required by
6 OAR 660-022-0020(2).” 56 Or LUBA at 52-53.

7 Following our remand, the county adopted a larger scale map, and petitioners now
8 appeal that decision.¹

9 **ASSIGNMENT OF ERROR**

10 **A. Petitioners’ Argument**

11 We set out below petitioners’ summary of their single assignment of error in this
12 appeal:

13 “The county’s obligation on remand was to provide a map of the
14 unincorporated community of Camp Sherman that is of sufficient scale to
15 determine accurately what properties are included. On remand the county
16 added a map of Camp Sherman to the plan that is at a larger scale. However,
17 the county has not tied that map to any ordinance designating the footprint of
18 an unincorporated community. It appears, based on the findings supporting
19 the decision, that the map was taken from an ordinance determining the
20 developed and committed lands status of certain properties in Camp Sherman.
21 A map of developed and committed lands in Camp Sherman is not the same
22 as, and is not the fungible equivalent of, a map of land determined to be in an
23 unincorporated community. Whether in defending this appeal, or in the
24 context of further local proceedings, the county will need to dig deeper than it
25 has for the required map.” Petition for Review 3.

26 From the arguments that petitioners present in support of their assignment of error, it is
27 reasonably clear that petitioners believe that the county believes, mistakenly, that it
28 designated Camp Sherman as an unincorporated community in a 1997 ordinance. The 1997
29 ordinance, Ordinance 0-44-97, adopted amendments to the county comprehensive plan and
30 land use regulations to comply with Statewide Planning Goal 14 (Urbanization) following
31 the Oregon Supreme Court’s decision in *1000 Friends of Oregon v. LCDC (Curry County)*,

¹ A “larger” scale map shows more detail. The map that we found defective in *Johnson* was a “smaller” scale map that showed very little detail.

1 301 Or 447, 724 P2d 268 (1986). According to petitioners, Ordinance 0-44-97 and the map
2 that was an exhibit to Ordinance 0-44-97 were adopted only to support an exception to Goal
3 14, not to delineate the boundaries of Camp Sherman as an unincorporated community under
4 OAR chapter 660, division 22. Therefore, petitioners argue, even if it could be assumed that
5 the map that the county adopted on remand accurately reflects the 1997 map, the county
6 erred by relying on that map to delineate the boundaries of the Camp Sherman
7 unincorporated community.²

8 The county findings that petitioners apparently rely on in making the above
9 arguments are set out below:

10 “On April 9, 1997, the County adopted Ordinance No. 0-44-97 which
11 amended the County’s Comprehensive Plan and Map in accordance with the
12 Periodic Review Process which began in 1995. Exhibits to the ordinance
13 include an inventory of tax lots and maps for Camp Sherman. A large map,
14 created by David Evans and Associates dated April 1997, resides in the
15 Community Development Department and depicts those same areas adopted
16 by the Ordinance No. 0-44-97.” Record 33.³

17 From the above findings we understand that in 1997 the county prepared a map of Camp
18 Sherman and an inventory of properties that are included in Camp Sherman and the map and

² Petitioners also argue it cannot be assumed that the larger scale map the county adopted on remand accurately reflects the 1997 map, because that 1997 map is not in the record.

³ Petitioners’ “prior delineation” theory may also have been obliquely reflected in the subassignment of error that we sustained in *Johnson*:

“The plan and code amendments fail to comply with the standards in the LCDC’s unincorporated communities rule, OAR 660, Division 22. Specifically, the plan and code amendments for the Camp Sherman Vacation Rental Zone, JCZO 342, are premised on the assumption that the land is *in an acknowledged unincorporated resort community*. The delineation of a ‘resort’ community is premised upon the mapping of the boundaries of the community in the plan. The plan does not contain a map of the unincorporated community.” Petition for Review 4 (emphasis added).

As respondents correctly point out, LUBA’s decision in *Johnson* did not understand petitioners to take the position that Camp Sherman had been designated as an unincorporated community under OAR chapter 660, division 22 in a decision that preceded the 2007 ordinance and LUBA did not address that question. LUBA treated petitioners’ subassignment of error in *Johnson* as simply challenging the scale of the comprehensive plan map that had been adopted in 2007 to show the Camp Sherman unincorporated area in compliance with OAR 660-022-0020(2).

1 inventory were adopted as exhibits to Ordinance No. 0-44-97. From that 1997 map and
2 inventory, David Evans and Associates prepared a large map, which is dated April 1997 and
3 displays Camp Sherman.

4 **B. Respondent's and Intervenor-Respondents' Arguments**

5 We understand respondent and intervenors-respondents (respondents) to argue in
6 their brief that the county did not designate Camp Sherman as an unincorporated community
7 under OAR chapter 660, division 22 in 1997. On that point, petitioners and respondents
8 appear to be in agreement. But we also understand respondents to argue that petitioners are
9 simply wrong about two other important assumptions that are critical to petitioners' legal
10 theory in this appeal. First, respondents contend that the first time the county delineated
11 Camp Sherman as an unincorporated community under OAR chapter 660, division 22 was
12 when the county adopted the 2007 amendments that were appealed to LUBA and remanded.
13 Respondents' Brief 3.⁴ We understand respondents to dispute petitioners' suggestion that the
14 county was operating in 2007 and 2008 under a mistaken belief that Camp Sherman had been
15 designated as an unincorporated community under OAR chapter 660, division 22 in 1997.
16 Second, respondents contend that the county did not rely on the 1997 David Evans and
17 Associates map to delineate Camp Sherman as an unincorporated community in 2007 and it
18 did not rely on the Ordinance No. 0-44-97 map or the 1997 David Evans and Associates map
19 in adopting a larger scale map on remand. Rather, respondents argue, the county relied on its
20 GIS mapping database to generate both the 2007 map that LUBA found to be inadequate in
21 2007 (because the scale was too small) and the map it adopted in 2008 on remand (which is a
22 larger scale map, but generated by the same GIS mapping database).

⁴ There is no dispute among the parties that Camp Sherman has existed as a small community on the banks of the Metolius River for many years. There is also no dispute that Camp Sherman is unincorporated. The parties' dispute when the county first designated Camp Sherman as an unincorporated community under LCDC's unincorporated communities administrative rule.

1 **C. Conclusion**

2 It may be, as petitioners argue, that the county mistakenly believed in 2007 and in
3 2008 that the 0-44-97 map had been adopted in 1997 to establish Camp Sherman as an
4 unincorporated community under OAR chapter 660, division 22, or that some other action by
5 the county before 2007 had that legal effect.⁵ But the critical question is not what the county
6 may or may not have believed in 2007 and 2008 and whether that belief was erroneous in
7 some way; the critical question is whether the comprehensive plan and land use regulation
8 amendments that were adopted in 2007 and 2008 complied with relevant land use standards,
9 including OAR chapter 660, division 22 and the OAR 660-022-0020(2) mapping
10 requirements in particular.

11 Turning to the maps, it seems highly likely to us that the 0-44-97 map and property
12 inventory could easily have played a role in the county’s preparation of the comprehensive
13 plan map amendments to show the Camp Sherman unincorporated community in 2007 and
14 again following our remand in 2008. Although the county took the position at oral argument
15 that both the 2007 map and the 2008 map were produced from the county’s GIS database,
16 albeit at different scales, it seems entirely possible that the 1997 map and inventory may have

⁵ The challenged decision adds a discussion of “Unincorporated Communities” to the comprehensive plan. That discussion includes the following:

“OAR 660-022-0070 requires that planning for unincorporated communities be completed by January 1, 1998 or a date specified in a Periodic Review work program. Information from DLCD approving completion of the County’s last Periodic Review indicates that the County had not completed the planning process for unincorporated communities in regards to Ashwood, Gateway, Chinook Airport and High Chaparral. In 2003 High Chaparral and Chinook Village were rezoned from Rural Service Center to Rural Residential. Thus these two areas are no longer considered to be unincorporated communities. Although the planning process may not have been completed for Ashwood and Gateway, they will continue to be zoned Service Community and classified as unincorporated communities. When time allows, the County will consult with DLCD about completing planning requirements for these areas. *Camp Sherman will continue to be recognized as an unincorporated resort community and Crooked River Ranch will continue to be recognized as an unincorporated rural community.*” Record 125 (emphasis added).

The final sentence, emphasized above, can be read to suggest the county believed in 2008 that Camp Sherman had previously been recognized as an unincorporated community.

1 been used in conjunction with the GIS database to produce those maps. As petitioners
2 accurately point out, the county's findings about the role the 1997 map and inventory may
3 have played in producing the 2007 map and the 2008 map are at best unclear. Those findings
4 do not mention to the county's GIS database, and while the findings need not be read to say
5 the county relied on the 1997 map and inventory, that inference is certainly possible.⁶

6 We conclude that it is exceedingly unclear but ultimately unimportant what role the
7 1997 map or the 1997 inventories may have played in producing the 2008 map that is before
8 us in this appeal. What is important is that in 2007 and again in 2008 the county adopted an
9 amended comprehensive plan map that designated Camp Sherman as an unincorporated
10 community. OAR 660-022-0010(10).⁷ There are four types of unincorporated communities,

⁶ The minutes of the board of commissioner's September 24, 2008 hearing in this matter do little to clarify how the 2007 map and 2008 map were produced and what role the 1997 map and a 1997 inventory may have played, if any, in producing those maps. :

“* * * Testimony was received that objected to the adoption of the new Comprehensive Plan Map, and more specifically, Map A-Detail of Camp Sherman. The argument states that the scale of the map was not changed. The scale, indeed, was changed just by the fact of enlargement. Additionally, the argument continues that the County did not include detailed metes and bounds of the included, or excluded, properties. Details of the tax lots included in the map were prepared when the Camp Sherman map was adopted, by Ordinance No. 0-44-97. The map has not changed since that ordinance was adopted and the full, large map is available to the public for viewing at the Community Development Department. * * *

“* * * * *

“* * * The Camp Sherman map is dialed in now. In 1997 there was a large scale map that did not have the lots but there was an inventory done that included the lots. The County used that inventory that was adopted in 1997 to create the new Camp Sherman map. As far as the map, the lots in the boundary now are what were in when the original map was created that defined the boundaries. Nothing was changed. The 1997 map was approved through the periodic review process and has been acknowledged, it is all being brought forward now just as it was approved in 1997. * * *” Record 151-52.

⁷ OAR 660-022-0010(10) provides:

“‘Unincorporated Community’ means a settlement with all of the following characteristics:

- “(a) It is made up primarily of lands subject to an exception to Statewide Planning Goal 3, Goal 4 or both;

1 and Camp Sherman was designated as a Resort Community in both 2007 and 2008. OAR
2 660-022-0010(6).⁸ OAR 660-022-0020 sets out the requirements for designating and
3 identifying unincorporated communities, including the mapping requirements.⁹ If petitioners

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- “(b) It was either identified in a county’s acknowledged comprehensive plan as a ‘rural community’, ‘service center’, ‘rural center’, ‘resort community’, or similar term before this division was adopted (October 28, 1994), or it is listed in the Department of Land Conservation and Development’s January 30, 1997 ‘Survey of Oregon’s Unincorporated Communities’;
 - “(c) It lies outside the urban growth boundary of any city;
 - “(d) It is not incorporated as a city; and
 - “(e) It met the definition of one of the four types of unincorporated communities in sections (6) through (9) of this rule, and included the uses described in those definitions, prior to the adoption of this division (October 28, 1994).”

⁸ OAR 660-022-0010(6) provides:

“‘Resort Community’ is an unincorporated community that was established primarily for and continues to be used primarily for recreation or resort purposes: and

- “(a) Includes residential and commercial uses; and
- “(b) Provides for both temporary and permanent residential occupancy, including overnight lodging and accommodations.”

⁹ OAR 660-022-0020 provides:

- “(1) Except as provided in OAR 660-022-0070, county comprehensive plans shall designate and identify unincorporated communities in accordance with the definitions in OAR 660-022-0010. Counties may amend these designations as circumstances change over time.
- “(2) Counties shall establish boundaries of unincorporated communities in order to distinguish lands within the community from exception areas, resource lands and other rural lands. The boundaries of unincorporated communities shall be shown on the county comprehensive plan map at a scale sufficient to determine accurately which properties are included.
- “(3) Only land meeting the following criteria may be included within an unincorporated community boundary:
 - “(a) Land which has been acknowledged as a Goal 3 or 4 exception area and historically considered to be part of the community provided the land only includes existing, contiguous concentrations of:
 - “(A) Commercial, industrial, or public uses; and/or

1 believed Camp Sherman does not qualify as a resort unincorporated community, as defined
2 by OAR 660-022-0010(6) and (10), or that the county's designation of Camp Sherman
3 included lands that should not have been included or omitted lands that should have been
4 included they could have made those arguments in their appeal of the 2007 ordinance. Of
5 course the small scale of the 2007 map might well have made such arguments difficult or
6 impossible in the 2007 appeal. But the 2008 map is a different story. The included and
7 excluded lots and parcels are clearly discernable. Record 35.¹⁰ Petitioners do not argue in
8 this appeal that the county's delineation of Camp Sherman violates the map specificity
9 requirement of OAR 660-022-0020(2) or the OAR 660-022-0020(3)-(4) criteria that must be

“(B) Dwelling units and associated residential lots at a greater density than exception lands outside rural communities.

“(b) Land planned and zoned for farm or forest use provided such land meets the criteria in section (4) of this rule.

“(4) Community boundaries may include land that is designated for farm or forest use pursuant to Goals 3 and 4 if all the following criteria is met:

“(a) The land is contiguous to Goal 3 or 4 exception lands included in the community boundary;

“(b) The land was occupied on the date of this division (October 28, 1994) by one or more of the following uses considered to be part of the community: Church, cemetery, school, park, playground, community center, fire station, museum, golf course, or utility facility;

“(c) Only the portion of the lot or parcel that is occupied by the use(s) in subsection (b) of this section is included within the boundary; and

“(d) The land remains planned and zoned under Goals 3 or 4.

“(5) Site specific unincorporated community boundaries that are shown on an acknowledged plan map on October 28, 1994, are deemed to comply with subsections (2) and (3) of this rule unless the boundary includes land designated for farm or forest use that does not meet the criteria in section (4) of this rule.

“(6) Communities which meet the definitions in both OAR 660-022-0010(6) and (9) shall be classified and planned as either resort communities or urban unincorporated communities.”

¹⁰ The map that appears at Record 35 is a black and white photocopy of the original map. Respondents attach a color copy of that map that clearly shows individual lots and parcels. Respondents' Brief App-6.

1 satisfied to include property within an unincorporated community. Petitioners' entire
2 argument in this appeal is founded on their position that the county proceeded in 2007 and on
3 remand in 2008 on the mistaken assumption that Camp Sherman had been designated as an
4 unincorporated community in 1997. We cannot tell for sure whether the county was
5 operating under that assumption or some other mistaken assumption. Whatever the case,
6 petitioners' challenge to the larger scale map that the county adopted on remand offers no
7 argument that we can understand that would provide a basis for reversal or remand.

8 The county's decision is affirmed.