

LAND USE
BOARD OF APPEALS

APR 29 2 32 PM '80

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MURIEL W. HILLIARD,

Petitioner,

vs.

LANE COUNTY COMMISSIONERS,

Respondents,

JERRY STRASHEIM,

Respondent.

LUBA NO. 79-012

FINAL OPINION AND ORDER

Appeal from Lane County.

Muriel W. Hilliard, Florence, argued the cause and filed the petition for review on her own behalf.

Margie Hendricksen, Lane County Counsel, and Cheyenne Chapman, Certified Law Student, argued the cause and filed the brief for Respondent Lane County.

David B. Williams, Eugene, argued the cause and filed the brief on behalf of Respondent-Intervenor Jerry Strasheim.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Affirmed.

4/29/80

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, § 6(a).

1 COX, Referee

2 STANDING

3 Respondent Lane County does not contest the standing of
4 Petitioner Muriel Hilliard before this Board. However, both
5 Respondent Lane County and Intervenor Jerry Strasheim have
6 contested the standing of Kent Hickam by objecting to his
7 Motion to Intervene. This Board has determined under a
8 separate order that Kent Hickam does not have standing to
9 appear before this Board as an Intervenor.

10
11 NATURE OF THE DECISION TO BE REVIEWED

12 This is an appeal of a site review permit issued
13 by Lane County to Jerry Strasheim for the construction of a
14 two-story, four unit structure on property located in Lane
15 County, Oregon, adjacent to the beach at Heceta Beach.

16
17 ISSUES WHICH PETITIONER SEEKS TO HAVE REVIEWED

18 Petitioner seeks to reverse Respondent Lane County's site
19 review decision on the grounds that it violates statewide
20 goals 7, 8, 17, and 18. In addition, petitioner seeks to
21 have this Board review Lane County's November 7, 1979,
22 corrected order regarding the height limitation placed on
23 applicants' structure. More specifically, petitioner's alle-
24 gations of error are as follows:

- 25 1. "Respondent, Lane County's decision misapplies
26 Goal 7 and is not supported by substantial
evidence."

- 1 2. "Respondent, Lane County's decision misapplies
2 Goal 18 and is not supported by substantial
3 evidence."
- 4 3. "Respondent, Lane County's decision misapplies
5 Goal 8, and is not supported by substantial
6 evidence."
- 7 4. "Respondent, Lane County's decision misapplies
8 Goal 17, and is not supported by substantial
9 evidence."
- 10 5. "Respondent, Lane County's Corrected Order of
11 Nov. 7, 1979, was in error with regard to the
12 height limitation."
- 13 6. "Respondent, Lane County erred in refusing to
14 apply the Zoning Ordinance, Lane Code 10.020,
15 regarding sun exposure plane."

16 FACTS

17 The subject property is located contiguous to the
18 beach at Heceta Beach in Lane County, Oregon. It is
19 directly north of and adjacent to the Driftwood Shores
20 Condominium development and directly south of and adjacent to
21 a Lane County park. There is a beach access way that separates
22 the Lane County park from the subject property. The Driftwood
23 Shores complex was developed about 1970. It was converted to
24 condominiums by the applicant, Jerry Strasheim, in 1977. In
25 August, 1978, Mr. Strasheim approached Lane County for county
26 site review approval of a proposed four unit condominium on the
 property he had retained (the subject property). When Mr.
 Strasheim applied for site review in 1978, a question was
 raised whether or not the condominium conversion and reser-
 vation of ownership of the northern portion of the property had

1 created a legally recognizable lot. In order to clarify this
2 question, the Lane County staff required Mr. Strasheim to
3 obtain a minor partition of the property prior to the county's
4 making a determination on the site review application. Mr.
5 Strasheim applied for and was granted a partition by the
6 Lane County Land Development Review Committee on November 9,
7 1978. Petitioner herein appealed that partitioning decision
8 to the Lane County Board of Commissioners. Lane County approved
9 the partition on February 21, 1979, after hearing petitioner's
10 appeal. Lane County's order approving the partition included
11 ten pages of findings addressing applicable provisions of the
12 Lane County Code, the applicable comprehensive plan and state-
13 wide planning goals.

14 Following the decision by the Lane County Board of
15 Commissioners, petitioner appealed the county's grant of
16 partitioning to LCDC (LCDC No. 79-021). After Lane County's
17 approval of the partition but before LCDC's final determination,
18 the site review application again came before the planning
19 director of Lane County for consideration. The application
20 was approved on March 14, 1979, subject to conditions regarding
21 the height of the structure. The Planning Director's decision
22 was appealed by petitioner as well as applicant. The applicant
23 appealed on the basis of his disagreement with the height
24 conditions.

25 On August 10, 1979, LCDC dismissed the petition for review
26 of the partitioning decision for lack of jurisdiction.

1 After a public hearing on the merits, Lane County approved
2 the site review application by order no. 79-010-3-3 dated October
3 3, 1979. That order contained various conditions of approval,
4 one of which stated:

5 "a. Building height should not exceed two
6 stories as shown on the plans submitted, but with
7 a flat roof having an overhang of no more than
8 one foot per side."

9 Petitioner subsequently brought to the attention of
10 the county that the order did not state a specific height
11 limitation in feet. On November 7, 1979, with an effective
12 date of October 3, 1979, Lane County corrected its order
13 by stating:

14 "The order approving a site review and
15 adopting findings of fact, Order No. 79-10-3-3,
16 is hereby corrected, effective October 3, 1979,
17 to clarify that the building height shall not
18 exceed 22.5 feet above the first floor elevation
19 shown on the plans submitted."

20 During the site review appeal hearing, Respondent Lane
21 County allowed petitioner to introduce evidence relating prim-
22 arily to the question of whether or not this property was
23 dune, foredune, or conditionally stable dune upon which
24 building would be controlled by statewide goals 7 and 18.
25 Although all statewide planning goals had been considered
26 during the partitioning decision and specific findings and
conclusions made thereon, Respondent Lane County nevertheless
allowed additional evidence to be introduced. The record
indicates the decision to allow additional evidence was based

1 upon Respondent Lane County's insecurity as to the exact state
2 of the law regarding how many times the statewide goals
3 need be applied to a specific piece of property. Respondent
4 Lane County then made findings regarding the site review
5 hearing and specifically stated on page 3 of the appendix
6 to its October 3, 1979, Order that:

7 "(1) The goals were also addressed in the
8 partitioning proceedings. Those issues need
9 not be reconsidered in these proceedings. 1000
10 Friends v. Clackamas Co., 40 Or App 529 (1979).
If a reviewing body determines that the goals
must be addressed, we add the following to our
earlier findings."

11 Lane County then proceeded to address goals 7, 8, 17 and 18.

12
13 JURISDICTION

14 Both Respondent Lane County and Intervenor Jerry Strasheim
15 argue that this Board is without jurisdiction to hear this matter.
16 Their argument centers around a question of whether the site re-
17 view decision being appealed is a land use decision as defined in
18 Oregon Laws 1979, ch 772, § 3 which states:

19 "'Land use decision' means:

20 "(a) A final decision or determination made
21 by a city, county or special district governing
22 body that concerns the adoption, amendment or
application of:

23 "(A) The state-wide planning goals;

24 "(B) A comprehensive plan provision; or

25 "(C) A zoning, subdivision or other
26 ordinance that implements a comprehensive plan;
or

1 "(b) A final decision or determination of
2 a state agency other than the Land Conservation
3 and Development Commission, with respect to
4 which the agency is required to apply the state-
5 wide planning goals."

6 As a general matter, this Board has jurisdiction of site
7 review decisions. At a minimum site review ordinances imple-
8 ment comprehensive plans. Therefore, we disagree with
9 respondents' assertion that we lack jurisdiction to review
10 site review decisions.

11 In the alternative, respondents argue that if this Board
12 accepts jurisdiction, we should limit the scope of our review
13 to non-statewide goal related issues since the goals were
14 applied to the subject property during the partitioning
15 decision process. With this alternative argument, we agree.
16 Therefore, we dismiss petitioners allegations of error 1
17 through 4.

18 Prior to acknowledgment of its comprehensive plan, a city,
19 county, or special district governing body must apply the
20 statewide planning goals at the earliest possible stage
21 prior to the actual development or use of property. cf:
22 Petersen v. Klamath Falls, 279 Or 249 (1977); 1000 Friends
23 of Oregon v. Benton County, 32 Or App 413 (1977); Jurgenson
24 v. Union County, 42 Or App 505 (1979); City of Scappoose
25 et al v. Columbia County, et al, LCDC 79-043 (1980). Once
26 the goals have been applied to the property, with proper
due process safeguards being afforded, the local jurisdiction
does not need to reapply the goals to that property unless a

1 change in circumstances has occurred.¹

2 In the present case, Respondent Lane County applied
3 statewide planning goals at the partitioning decision stage.
4 During the partitioning hearings, petitioner was afforded her
5 due process safeguards. She appeared and introduced evidence
6 and contested the proposed use to be made of the property
7 resulting from the partition. She alleged violation of
8 the same statewide goals that are the subject of her first
9 four allegations of error. The county disagreed with her
10 allegations and made specific findings of fact and conclusions
11 of law regarding the application of statewide planning goals.

12. It was not necessary for Respondent Lane County to reapply
13 the goals at its site review stage. The mere fact that it
14 accepted additional testimony during the site review process
15 regarding matters which were finally decided at the parti-
16 tioning proceeding does not confer jurisdiction upon this
17 Board to rehear those matters. The partitioning decision
18 was not appealed to a receptive forum and this is not the
19 proper proceeding to relitigate allegations of goal violations
20 which respondent found unconvincing at an earlier stage. 1000
21 Friends v. Clackamas County, 40 Or App 529 (1979). The county
22 might well be accused of an error in judgment analgous to the
23 proverbial "one too many questions on cross examination" by
24 adding a discussion of statewide goals in its site review
25 decision. However, for this Board to accept jurisdiction to
26 review Lane County's action as a result of such a decision,

1 would be to condemn Lane County for being too cautious in
2 making decisions regarding statewide goals.

3 Therefore, as regards petitioner's first four allegations
4 of error, this Board finds it does not have jurisdiction to
5 review the site review decision made by Respondent Lane
6 County. Allegations of error 1 through 4 contained in the
7 petition for review are dismissed.²

8 NON-GOAL RELATED ALLEGATIONS OF ERROR

9 In her fifth assignment of error, petitioner argues that
10 Lane County's corrected order of November 7, 1979, was in error
11 with regard to the height limitation to be placed on
12 applicant's structure.

13 Respondent's corrected order of November 7, 1979, states:

14 "The order approving a site review and adopting
15 findings of fact, Order No. 79-10-3-3, is hereby
16 corrected, effective October 3, 1979, to clarify that
17 the building height shall not exceed 22.5 feet above
18 the first floor elevation shown on the plans
19 submitted."

20 The record presented this Board does not include the "plans
21 submitted." Therefore, we cannot determine the total height
22 limitation placed on applicants' structure. There is no
23 specific building height limitation for the governing zone.
24 According to Lane County Code 10.335-20, § 1 and 4
25 respectively, a structure in the governing zone need merely be
26 "in scale and compatible with the surroundings" and "have no
undue adverse effect on existing or contemplated abutting land
use." By placing a limit on height based upon elevation plans

1 submitted plus 22.5 feet, a reviewable standard seems to
2 exist. It is presumed that Lane County will monitor the
3 development to assure compliance with its own ordinances.
4 Bienz v. City of Dayton, 29 Or App 761, 566 P2d 904 (1977).
5 Therefore, petitioner's fifth assignment of error is denied.

6 PETITIONER'S SIXTH ASSIGNMENT OF ERROR

7 Petitioner alleges that Lane County erred in refusing to
8 apply Lane Code 10.020 regarding sun exposure plane. Lane
9 County's Ordinance 10.020 is merely a definitional code which
10 does nothing more than define a sun exposure plane. It does
11 not require its application to the subject property.

12 Respondent addresses this issue in item 9A(2) of its October 3,
13 1979, findings of fact when it states:

14 "The Planning Director's conditional approval
15 suggested use of the sun plane standard for height.
16 The sun plane has not been adopted as a height
17 standard for the zone and without prior adoption will
18 not be applied here. Furthermore, application of the
19 sun plane might allow a structure height of 39 feet at
20 the highest point."
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FOOTNOTES

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This general rule has been qualified by LCDC policy relating to situations involving Statewide Goal 2 exceptions to Statewide Goal 18. Specifically this Board received the following determination from LCDC regarding this appeal:

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"The Land Conservation and Development Commission hereby finds that when a jurisdiction takes a Goal 2 exception to Goal 18, and a subsequent decision based on that exception is challenged on the basis of an inadequate exception, the findings of the exception must be examined to determine whether they are adequate to support the exception. The Land Conservation and Development Commission therefore returns the recommendation of the Land Use Board of Appeals in LUBA 79-012 for review consistent with the above determination."

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Upon receipt of LCDC's determination as set out supra at footnote 1, this Board reviewed the appeal with three questions in mind:

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1. Did the petitioner base the challenge of respondent's subsequent decision (site review herein) on the ground that respondent had taken an inadequate exception to Goal 18 in arriving at its original decision (partitioning herein)?

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2. If the answer to question 1 is yes, then is the challenge asserted in the form of an attack on the findings relating to the exceptions process?

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3. If the answers to questions 1 and 2 are both yes, then are the findings of the exception adequate to support the exception?

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A review of the petition for review herein indicates that the answer to the first question is no. Petitioner's only allegation of error regarding Statewide Goal 18 is stated as follows:

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"Respondent Lane County's decision misapplies Goal 18 and is not supported by substantial evidence."

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The entire thrust of petitioner's allegation regarding application of Goal 18 was that respondent erred in deciding the subject property was not a foredune to which Goal 18

1 applied. Petitioner's brief mention of the Goal 2 exceptions
2 process is stated as an argument that no exception could be or
was taken. As is stated at page 10 of the petition for review:

3 "Any application of the exceptions process could
4 not be applied to Goal 18 in this case. Goal 18
5 clearly provides that exceptions to Goal 18 may be
6 taken only if the proposed development is not
7 residential, commercial or industrial. The record
8 does not indicate that Lane County has attempted to
take an exception in this case because: 1) No notice
of exception was made as required in Notices of
Hearings as required by Goal 2; and 2) Findings do
not justify a goal exception."

9 Petitioner did not base the challenge of respondent's site
10 review decision on the ground that Lane County had taken an
11 inadequate exception to Goal 18 in arriving at its partitioning
12 decision. The issue raised as a result of LCDC's determination
13 as set forth in footnote 1 above was not asserted by petitioner
14 and this Board will not raise it on its own motion.
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