

LAND USE
BOARD OF APPEALS

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

FEB 4 3 10 PM '81

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MATTHEW GRUBER and ALICE)	
GRUBER,)	
)	
Petitioners,)	LUBA NO. 80-088
)	
vs.)	
)	FINAL OPINION
LINCOLN COUNTY,)	AND ORDER
)	
Respondent.)	

Appeal from Lincoln County.

Matthew Gruber and Alice Gruber, Salem, filed a petition for review and argued the cause on their own behalf.

Frederick J. Ronnau, Newport, filed a brief and argued the cause for Respondent Lincoln County.

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

Remanded.

2/04/81

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

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 This case is a review of Lincoln County Ordinance No. 138,
4 enacting the Lincoln County land use plan and ordinance no.
5 139, amending the Lincoln County zoning ordinance. The
6 ordinances establish and apply land use designations and
7 regulations in Lincoln County. Petitioners seek reversal of
8 land use designations of their property and surrounding
9 properties within an area called the Olalla Valley.

10 STANDING

11 Petitioners base their claim for standing on ownership of
12 lands in the Olalla Valley and their appearances before the
13 Lincoln County Board of Commissioners (the record shows the
14 appearances to have been before the Planning Commission) during
15 the "public hearings portion of the adoption process of the
16 Lincoln County Comprehensive Land Use Plan * * * *"
17 Petitioners' Brief, page 1. Petitioners urged adoption of land
18 use designations favoring residential development of their
19 property and other nearby properties in the Olalla Valley.

20 Respondent challenges petitioners' standing to appeal any
21 land use designations on property other than petitioners' own.
22 Respondent alleges petitioners have set forth no facts showing
23 standing to contest the zoning for other properties.
24 Respondent further says there are no facts showing how it is
25 that petitioners' interests have been adversely affected or
26 aggrieved.

1 The Board finds petitioners have standing to challenge the
2 land use designations on the property they have identified as
3 the East 1/2 of Section 32, Township 10 South, Range 10 West of
4 the Willamette Meridian. Petitioners have claimed a long term
5 interest in the development of that area for residential
6 purposes. The zoning of a portion of that area for timber
7 conservation and not for development is a sufficient
8 aggravation to give petitioners standing to challenge the
9 designations. The Board does not believe standing need be
10 limited to petitioners' own property where petitioners'
11 property interest within an identifiable geographical area can
12 be seen to be influenced by surrounding zonings. Persons
13 desiring development on their own and nearby lands have at
14 least an arguable claim that their economic interests are
15 adversely affected by restrictive land use designations.

16 SCOPE OF REVIEW

17 In petitioners' brief, the land area included in
18 petitioners' assignments of error and their discussion is
19 limited to the Olalla Valley. Petitioners state:

20 "[T]he property to which this appeal specifically
21 pertains consists of the East 1/2 of Section 32 of
22 which the Petitioners' property is a part and which
23 has been designated RR-5 under the 1980 Lincoln
County Land Use Plan and which section is contained
in Township 10 South, Range 10 West, Willamette
Meridian (Record page 104)." Petitioners' Brief at 3.

24 Nowhere in petitioners' brief can one find a statement
25 suggesting that the petitioners seek reversal of the entirety
26 of the Lincoln County Plan or any portion of it affecting

1 property outside the described area. The Board's opinion will
2 consider and affect only the property described in the quote
3 from petitioners' brief above.¹

4 FACTS

5 The forest site class map appearing at page 348 of the
6 record shows the area of this appeal to be comprised of forest
7 site class II and II plus lands. There is testimony in the
8 record that further residential development in the area would
9 be possible if "people acknowledged forest management."
10 (Record 303). The average parcel size for the lots in the area
11 exclusive of those owned by timber companies is 16 acres
12 (Record 103), and there are 27 ownerships in the valley
13 comprising a total of 445 acres. (Ibid). A ridge line exists
14 on the western side of the valley which some testimony
15 indicated would be a "good buffer" between residential and
16 forest uses. (Record 303).

17 This area is outside the urban growth boundary for the City
18 of Toledo. That urban growth boundary has not been
19 acknowledged as in compliance with the goals by the Land
20 Conservation and Development Commission, but is a jointly
21 adopted urban growth boundary established by Lincoln County and
22 the City of Toledo. The urban growth boundary includes in
23 excess of 850 acres for residential development. (Record 98).
24 There is some dispute as to what municipal services are
25 available to the area. One portion of the record shows that
26 all municipal services exist except sewer (including a

1 waterline that goes "right down [the] valley at 90 pounds of
2 pressure" (Record 302) and another portion of the record
3 showing only "on site" water service (Record 103).

4 The county took an exception to allow residential
5 development in the Olalla Valley. That exception showed an
6 estimated rural population growth for the Yaquina River System
7 of 1,532 persons. (Record 94). It also showed a supply of
8 3,417 acres for dispersed residential development in the areas
9 of Elk City, Newport South, Toledo to Elk City, Newport to
10 Toledo, Toledo to Siletz and the Olalla Valley. (Record
11 99-103). The county found the existing family size to consist
12 of 2.25 persons; and dividing the population growth by that
13 average family size, the county arrived at an overall projected
14 need for some 680 rural lots. Dividing that total into the
15 3,417 acres available, the county concludes an average parcel
16 size of some five acres is available for "dispersed
17 residential" development. "Dispersed residential" development
18 is defined in the record before us "as areas heaving a historic
19 land use pattern of low density settlement * * * *" (Record
20 50). The term is not tied to a particular lot size.

21 ASSIGNMENT OF ERROR NO. 1

22 Assignment of error no. 1 alleges the county's designation
23 of the Olalla Valley for rural residential use (RR-5) and
24 timber conservation (T-C) is not based on substantial evidence
25 in the record and is "contrary to criteria and definitions
26 relating to forest and dispersed residential plan

1 designations." Petitioners point to a distinction in lot size
2 designation between coastal rural areas and inland rural
3 areas. Apparently, the county chose to give coastal areas a 1
4 to 2 acre minimum lot size and to give inland areas a 5 acre
5 minimum lot size. Petitioners assert there is no evidence to
6 support this distinction and claim further that the distinction
7 "seems to have been made arbitrarily by the Lincoln County
8 Planning Staff members." This distinction was applied to the
9 Olalla Valley with no supporting facts or justification,
10 according to petitioners. Petitioner's Brief at 5. Petitioners
11 view the property in the Olalla Valley as suitable for more
12 intensive development because of the existence of the
13 improvements that already exist in the valley including the
14 golf course, a paved road, proximity to the City of Toledo,
15 essential public services, and "planned" rural sewer and water
16 systems. (Petitioners' Brief at 6).

17 As to the Timber Conservation zone enacted around the
18 areas, petitioners simply conclude that the property is not
19 suitable for timber conservation. Petitioners point to the
20 testimony of individuals employed in the forest products
21 industry showing that the area would allow residential use
22 providing timber management practices are recognized.
23 (Petitioners' Brief at 7, Record 302-303).

24 The county responds to the claim against 5 acre zoning by
25 directing the Board to the criteria for dispersed residential
26 development that appears in the comprehensive plan.

1 "(1) Dispersed residential areas are committed to
2 residential use and shall be defined on the basis
3 of population and as areas having a historic land
4 use pattern of low density settlement with few if
5 any public services and facilities either
6 existing or planned and which are outside the
7 natural resource areas.

8 "(2) Those public services and facilities considered
9 appropriate for dispersed residential areas shall
10 be limited to existing services and facilities
11 and those services and facility improvements that
12 are needed for the maintenance of the existing
13 low density residential uses.

14 "(3) Water systems shall be individual or approved
15 community water systems. Sewerage shall be by
16 means of on-site subsurface disposal, or
17 alternative waste disposal systems. Dispersed
18 residential areas shall be served by rural fire
19 protection districts where available. Where
20 rural fire protection districts are not
21 established, special performance standards shall
22 be applied to ensure adequate protection of the
23 surrounding natural resources." (Record 50-51)

24 Applying the above criteria to the description of the
25 Olalla Valley supplied in the county's exception paper, it
26 would appear that the Olalla Valley was properly designated for
27 dispersed residential use.² We are not shown facts in the
28 record that would suggest that the level of development and the
29 public facilities and services that exist in the area now
30 constitute "urban" development or "urban" services. Indeed,
31 the facts suggest nothing more intensive than the kind of
32 development described in the above paragraphs as "dispersed
33 residential." Even if one accepts all the facts about
34 development in the Olalla Valley asserted by petitioner, one is
35 not required to view the Olalla Valley as suitable for anything
36 more intensive than "dispersed residential" use.³

1 If petitioners are complaining that "dispersed residential"
2 means 1 to 2 acre lot sizes and not 5 acre lot sizes, we must
3 disagree. We are directed to nothing in the record from which
4 we can divine what lot size the county had in mind when it
5 defined "dispersed residential." However, common use of the
6 term "dispersed" lends itself better to a 5 acre zoning than a
7 1 or 2 acre zoning. Websters New Collegiate Dictionary, a
8 Merriam-Webster, (1979) defines "disperse" as follows:

9 "1 a: to cause to break up [the meeting was
10 dispersed] b: to cause to become spread widely
 * * * *"

11 With respect to the allegation that the timber conservation
12 designation is improper, we note Goal 4 requires the same kind
13 of protection of forest land as Goal 3 requires for farmland.
14 That is, lands designated for exclusive farm use zones under
15 Goal 3 and forest zones under Goal 4 need not be only those
16 lands upon which there are growing crops or growing trees.
17 Other lands that are needed to protect such producing farm and
18 forest lands may also have to be designated restrictively in
19 order to provide adequate protection under the goals. Sole v.
20 Lane Co., LUBA No. 80-023 (1980). The definition of "Forest
21 Lands" in Statewide Goal 4 states:

22 "Forest Lands -- are (1) lands composed of existing
23 and potential forest lands which are suitable for
24 commercial forest uses; (2) other forested lands
25 needed for watershed protection, wildlife and
26 fisheries habitat and recreation; (3) lands where
extreme conditions of climate, soil and topography
require the maintenance of vegetative cover
irrespective of use; (4) other forested lands in urban
and agricultural areas which provide urban buffers,

1 wind breaks, wildlife, and fisheries habitat,
2 livestock habitat, scenic corridors and recreational
use."

3 Apparently, the county has taken the position that the
4 above definition applies with respect to properties within the
5 Olalla Valley. The county views some lands in the valley to be
6 needed as "buffers" and has designated it as forest lands as
7 required by the goal. The property is forest site class II and
8 II plus. In order for it to take any other position, a broader
9 exception would need to have been taken. As such, if
10 development is to be allowed on the property at all, an
11 exception must be taken. We are aware of no requirement in the
12 goals that would force a jurisdiction such as Lincoln County to
13 designate an area for more intensive development than is
14 warranted by the facts, particularly when an exception is
15 required to do so. Here, the county's inventories suggest
16 plenty of land to support population needs in the vicinity.
17 (Record 99-103, Respondent's Brief at 5-6). The Board finds no
18 facts in the record which show a need for more intensive
19 development. Without such a showing, we do not find petitioner
20 has stated a case to justify forcing the county to adopt
21 designations allowing more intensive use. McIntyre-Cooper Co.
22 v. Washington Co., LUBA No. 80-099 (1980).

23 This assignment of error is denied.

24 ASSIGNMENT OF ERROR NO. 2

25 Assignment of error no. 2 alleges the county "erroneously
26 applied its own land use plan guidelines for designating rural

1 residential properties when considering the petitioners and
2 surrounding Olalla Valley properties." We read this assignment
3 of error to be a complaint that the plan lacks precise
4 "findings," or citation of specific plan policies and facts
5 that show justification for the designation given to
6 petitioners' and surrounding properties. Petitioners seem to
7 suggest that such findings are needed to show plan consistency
8 between its policies and specific land use designations. The
9 petitioners urged RR-1 and 2 (1 acre) residential designation,
10 and the county applied the more limited RR-5 (5-acre)
11 classification on the property "without any discussion of the
12 reasoning or the factual evidence upon which the decision was
13 based." Ibid. Petitioners feel that the decision was based on
14 a staff recommendation and nothing more.

15 Again, it appears to this Board that matching the
16 inventories of the Olalla Valley to the criteria for dispersed
17 residential development stated in the Plan's policy section
18 results in the property meeting the requirements for dispersed
19 residential development. The plan taken as a whole provides
20 the needed "findings" in that its policies and facts are
21 consistent when applied to the Olalla Valley.

22 We believe it important at this point to note again that
23 these plan and zone designation actions are legislative
24 actions. While we have said that "findings" are needed to show
25 compliance with applicable criteria whether the land use act be
26 legislative or quasi-judicial (1000 Friends of Oregon v. Marion

1 County, 1 Or LUBA 33 (1980)), we do not mean to say that a
2 broad legislative enactment must contain a list of
3 justifications for each and every property designation. We
4 view the need for "findings" in a plan adoption to be met when
5 the record shows facts and policies which, when read together,
6 show a factual base for particular land use designations.

7 Of course, there are occasions when detailed findings are
8 required as part of a broad legislative enactment. Detailed
9 findings are needed when an exception is taken for particular
10 properties in order to comply with goal 2's requirement that
11 "compelling reasons and facts" justifying the exception "be
12 completely set forth in the plan" Similarly, a plan
13 itself may require detailed findings to justify particular land
14 use designations. It is not uncommon to find a plan policy
15 allowing certain uses only upon "a finding that the use is
16 compatible with secondary uses, etc. etc."

17 We do not find these circumstances evident here. The
18 exception taken by the county is not challenged, no violation
19 of a goal requiring findings is alleged and no plan policy
20 requiring findings has been cited.

21 This assignment of error is denied.

22 THIRD ASSIGNMENT OF ERROR

23 The third assignment of error alleges the designations on
24 petitioners' property and surrounding properties within the
25 Olalla Valley to be in violation of Statewide Land Use Goals
26 Nos. 1, 2, 4, 8, and 10.

1 The Goal 1, Citizen Involvement, allegation is based on the
2 goals' requirement that the rationale used to reach land use
3 decisions must be available in the form of a written record.
4 See footnote 4 infra. Petitioners assert that there is nothing
5 in this written record that preserves the recommendations of
6 the Citizens Advisory Committees. The rationale for the
7 decisions, or the "feedback" mechanism required by Goal 1 has
8 not been made according to petitioners.⁴

9 Respondent points to the record in this case and advises
10 that the record does show a chain of Planning Commission and
11 Board of Commissioner hearings. Respondent has not pointed us
12 to any portion of the plan or the record that specifically men-
13 tions the petitioners concerns and explains the rationale for
14 rejecting those concerns in favor of the designations applied
15 in the Olalla Valley.

16 We don't believe that a concise statement in the form of
17 written findings as to why a particular designation was chosen
18 over another is always required in order to comply with goal
19 1. A document as large and inclusive as a comprehensive plan
20 is bound to excite the anger of persons in the community. The
21 Board does not believe it is possible for a jurisdiction to
22 answer specifically with written findings each concern raised
23 by a citizen or a group of citizens during the plan adoption
24 process. What is required, however, is a record which
25 demonstrates that citizens' concerns were heard and considered
26 and shows why those concerns were or were not ultimately

1 reflected in the comprehensive plan.

2 What is missing here is the record of the "rationale" used
3 to choose RR5 zoning over more intensive zoning. We do not
4 find a discussion in the plan or the record of the county's
5 belief that the RR5 zoning was needed as a buffer for adjacent
6 forest uses. We understand that "rationale" only from the
7 county counsel's brief. Where, as here, there is an articulate
8 challenge to a proposed designation and there is no plan policy
9 controlling the decision and eliminating competing choices for
10 land use designations, the "rationale" for the particular
11 decision must be evident someplace in the plan or in supporting
12 documents (i.e. the record).

13 We believe that kind of "feedback" is what is contemplated
14 in Goal 1.

15 Petitioners allege Goal 2 has been violated because a
16 review of the record does not show alternative courses of
17 action or any course of action "except the action ultimately
18 implemented by the plan itself." (Petitioners' Brief at 12).

19 Goal 2 requires that land use plans include, inter alia,

20 "evaluation of alternative courses of action and
21 ultimate policy choices * * * * The required
22 information shall be contained in the plan document or
23 in supporting documents."

24 Respondent has not pointed us to any portion of the plan
25 showing alternative courses of action for the Olalla Valley.

26 There were alternative courses of action available. For
example, as the property is generally sparsely settled, the

1 erroneously chose this property to serve that purpose. (Record
2 302-303). See generally our discussion under assignments of
3 error 1 and 2 supra.

4 Petitioners allege a violation of Goal 8. Goal 8 requires
5 a comprehensive plan provide for recreational needs of the
6 citizens. Petitioners argue that the inventory of recreational
7 lands fails to include private recreational lands. Petitioners
8 also argue the inventory factual base is old and not reliable.
9 Most importantly to petitioners, the designation of the golf
10 course within the Olalla Valley as an RR-5 residential area and
11 not a recreational area encourages the breakup of the golf
12 course into residential and non-recreational uses. In other
13 words, recreational uses are not properly identified or
14 protected.

15 Respondent notes that golf courses and other recreational
16 uses are conditional uses in many zones in the county including
17 the RR-5 zone. That allowance for recreational uses in most
18 all zones in the county assures the county can meet
19 recreational needs.

20 We find the difficulty with the county's method of
21 compliance with Goal 8 to be one of how the county intends to
22 protect property it has been identified for recreational
23 needs. We do not find that the errors alleged in the inventory
24 of the recreational properties and needs to be significant of
25 themselves, but we do find significant the fact that there is
26 no means evident in the plan to protect land identified for

1 county could have adopted an even less dense zoning for the
2 area in order to protect adjacent forest uses and maintain the
3 status quo. By adopting the RR-5 zoning designation, the
4 county may have in effect encouraged a certain kind and level
5 of development in the valley. There is no explanation as to
6 why even this development was chosen over no development.
7 Similarly, there is no explanation of why this lesser degree of
8 development was chosen over a greater degree as requested by
9 petitioners.

10 We do not suggest that alternative zonings for each area of
11 the county must be articulated in order to meet Goal 2. We do
12 believe, however, that goal 2 requires some explanation in the
13 record of how the county resolved to choose one zone over
14 another. The plan is replete with policies guiding the county,
15 but we are unable to find any provisions guiding the county in
16 case of conflict in specific zoning applications. Without that
17 mechanism, we cannot determine whether the county has reviewed
18 "alternative courses of action" as required by goal 2 and as
19 demanded by petitioners.

20 Petitioners allege a violation of Goal 4 on the ground that
21 the Olalla Valley is simply not suited for commercial forest
22 use. We note again, however, that the forest goal requires the
23 preservation of lands for forest use where those lands are
24 necessary as buffers to protect forested areas and agricultural
25 lands. There is evidence in the record that the land is
26 suitable as a buffer, and we cannot conclude that the county

1 recreational purposes. There appears nothing to keep a willing
2 seller of golf course land and a willing buyer of same from
3 carving up the golf course even against the county's wishes.
4 Residences are a permitted use in the RR5 zone, and a developer
5 would be quite within his rights to exercise the permitted use
6 provision to the destruction of the golf course. The plan has
7 no provision against such an eventuality.

8 We do not mean to say that a "recreational zone" is needed
9 in the Olalla Valley. Perhaps a site review process or some
10 other method could be imposed that would require review before
11 conversion of a recreational site would be allowed. Some
12 protection of this identified recreational site is needed
13 beyond zoning it as a residential use subject to conversion for
14 residential use at any time with no special review process
15 imposed.

16 Petitioners allege a violation of Goal 10, the State
17 Housing Goal. Petitioners claim that the comprehensive plan
18 map shows a "severe shortage of rural residential
19 designations." Petitioners Brief at 15. This shortage might
20 be alleviated by allowing a less restrictive zoning in the
21 Olalla Valley. No particular facts are cited to support the
22 conclusion that the county's need for rural residential housing
23 is not being met.

24 Respondent points to the record and says that there is more
25 than enough property available for rural residential use in the
26 county. Without more facts showing us how it is that the

1 county's figures and projections do not constitute substantial
2 evidence of housing need, we agree with the county.

3 Petitioners cite us to nothing in the record which would call
4 into question the county's apparent belief in its inventories.

5 The case is remanded to the county for further proceedings
6 consistent with this opinion.

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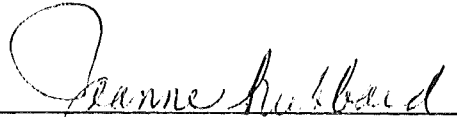
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 80-088, on February 4, 1981, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Matthew Gruber
Alice Gruber
560 Winter Steet, SE
Salem, OR 97301

Frederick J. Ronnau
Legal Counsel for Lincoln Co.
Lincoln County Courthouse
225 West Olive Street
Newport, OR 97365

Dated this 4th day of February, 1981.



Jeanne Hubbard
Secretary to the Board

FOOTNOTES

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3 1

At the hearing on the merits of this case, Mr. Gruber announced that he was appealing not only property in the Olalla Valley but also the "process" of adoption of the whole plan. In his discussion, Petitioner Gruber talked about a general failure in the plan to provide for recreational needs of the citizens. We believe the statements at the hearing to be an attempt to expand the scope of review, and we decline to do so. In the briefs and our understanding of the case has been limited geographically to the Olalla Valley, and the hearing on the merits is not an appropriate time to expand the scope of review.

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10 2

See pages 88-103 of the record, the county's exceptions document.

12 3

We do not pass here on the adequacy of the exception to goal 4 taken by the county. It is conceivable that a closer examination of the exception and the inventories might reveal that even the RR-5 plan designation is too intensive to provide adequate protection for the adjacent commercial forest properties.

16

17 4

"Feedback Mechanisms - To assure that citizens will receive a response from policymakers.

"Recommendations resulting from the citizen involvement program shall be retained and made available for public assessment. Citizens who have participated in this program shall receive a response from policymakers. The rationale used to reach land use policy decisions shall be available in the form of a written record."

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23 5

Conceivably, even minutes of the county commission meetings could provide this information.

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