

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

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CYNTHIA D. LORD)
)
Petitioner,)
)
vs.)
)
CURRY COUNTY BOARD OF)
COMMISSIONERS, ROBERT C.)
SHARP, and EDWARD BENNETT,)
)
Respondents.)

LUBA No. 80-046
FINAL OPINION
AND ORDER

Appeal from Curry County.

Cynthia D. Lord, Ashland, filed the Petition for Review and argued the cause on her own behalf.

Robert C. Sharp filed the brief and argued the cause on his own behalf. Richard K. Mickelson appeared at oral argument on behalf of Curry County.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

REMANDED 3/26/81

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 REYNOLDS, Chief Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioner appeals the rezoning of a 21 acre parcel near
4 her property from Forestry Grazing (F-G) to Residential 2
5 (R-2), 12,000 square foot minimum lot size. The property is
6 generally located between Highway 101 and the Old Coast
7 Highway, adjacent to the unincorporated community of Nesika
8 Beach in Curry County.

9 ASSIGNMENTS OF ERROR

10 Petitioner sets forth numerous assignments of error in her
11 Petition for Review, only one of which we address in this
12 opinion. That issue concerns petitioner's contention that the
13 county's decision violates Goal 4 and Goal 2 because the
14 county's decision rezones the property to a non-forest use
15 without a proper exception to Goal 2 having first been taken.¹

16 STATEMENT OF FACTS

17 In January of 1980 applicant Sharp submitted to the Curry
18 County Planning Commission an application for a comprehensive
19 plan and zone change for a 21 acre parcel of land located
20 between Highway 101 and the Old Coast Highway. The property is
21 just to the north of the south Nesika Beach exit on Highway
22 101. The property is approximately five miles north of the
23 proposed urban growth boundary for Gold Beach. Petitioner's
24 original request as submitted to the planning commission was to
25 have the property rezoned to commercial. This rezoning request
26 also required a comprehensive plan change because the property

1 was designated residential in the unacknowledged Curry County
2 Comprehensive Plan.

3 Petitioner owns 28 acres to the west of and across the Old
4 Coast Highway from applicant Sharp's property. Petitioner's
5 property extends from the Old Coast Highway to the ocean. Her
6 property is zoned F-G (Forestry-Grazing) as was the applicant's
7 property at the time the application for zone change was
8 filed. The Nature Conservancy owns 35 acres south of
9 petitioner's property and near the applicant's property to the
10 south and west. This property is also zoned F-G. Lands to the
11 east of the applicant's property, across Highway 101, are owned
12 by Champion International and zoned F-G. These lands are
13 currently in forest use.

14 With applicant Sharp's approval, the planning commission
15 rezoned his 21 acre parcel R-2 (Residential) which required no
16 change in the comprehensive plan. This zone has 12,000 square
17 foot minimum lot sizes and would allow up to three units per
18 acre to be built on the property. Petitioner appealed the
19 planning commission's decision to the Board of Commissioners.
20 After a hearing, the board issued its written order approving
21 the rezoning on March 28, 1980.

22 The county's findings concerning Goal 4 are as follows:

23 "1. The subject property has a forest index of 3
24 which makes LCDC Goal 4 applicable. Exhibit 2.

25 "2. A clear-cut near the residential community
26 of Nesika Beach would be unattractive. Exhibit 8.

"3. The prior owner, Champion International,

1 sold this land because it was not financially
2 profitable to manage it as forest lands.

3 "4. There are few marketable soft wood trees on
4 the property.

5 "5. There is no evidence of the trees supporting
6 significant wildlife or as a water shed.

7 "6. The one stream on the land is frequently dry
8 during the summer.

9 "7. The 'beaver dam' has been unoccupied for
10 many years.

11 "8. The area is immediately adjacent to a
12 residential community.

13 "9. Majority of land in this area is planned for
14 residential growth."

15 "CONCLUSION:"

16 "1. Goal 4 applies to the subject property.

17 "2. An exception is warranted because:

18 "(A) Area committed to residential growth

19 "(B) Timber not significant enough to be
20 utilized for a sustained yield.

21 "(C) Not serving as a water shed.

22 "(D) No significant wildlife dependant upon
23 on the trees.

24 "(E) Land would be clear-cut if not
25 rezoned."

26 It is conceded by applicant Sharp and implicit in finding
(2) above that his 21 acre parcel contains marketable timber of
some commercial value.

OPINION

The county and the applicant concede that the applicant's
property is forest land within the meaning of Goal 4. The

1 county, however, attempted to excuse itself from complying with
2 Goal 4 on the basis that the applicant's property is committed
3 to residential development and hence not available for forest
4 uses. The county's conclusion as to commitment is not
5 justified by its findings. The mere facts that a forested
6 tract of 21 acres is adjacent to a rural residential community,
7 that the county in its unacknowledged comprehensive plan has
8 planned the area for residential development and that
9 clear-cutting the land would be unattractive, do not compel a
10 reasonable person to conclude that it is impossible to apply
11 Goal 4 to the land. Cf Kerns v. City of Pendleton, 1 Or LUBA 1
12 (1980);² Wright v. Marion County, 1 Or LUBA 164 (1980);³
13 Statewide Planning Goal 2.

14 Respondent-applicant Sharp contends that while his property
15 contains commercial timber, in order to realize the commercial
16 value of the timber the land would have to be clear-cut. This,
17 according to the applicant, would be aesthetically
18 unattractive. Petitioner argues, however, and we agree, that
19 there is no evidence in the record that clear-cutting is the
20 only way the commercial value of respondent-applicant Sharp's
21 timber can be realized. Even if clear-cutting were the only
22 reasonable means of realizing the commercial value of the
23 timber on respondent-applicant Sharp's property, the fact that
24 the property may not be as attractive after cutting as before,
25 at least for a limited period of time, is not sufficient
26 justification for the county to avoid having to comply with

1 Goal 4. If it were, much of our forest land near populated
2 areas could give way to rural residential housing on the theory
3 that in doing so an eye-sore would be prevented.

4 Curry County's findings are inadequate to justify its
5 conclusion that respondent-applicant Sharp's property was
6 committed to non-forest uses. The rezoning of
7 respondent-applicant Sharp's property to a non-forest use
8 (residential) is invalid. This matter must be remanded to the
9 county for further proceedings consistent with this opinion.

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FOOTNOTES

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Petitioner's remaining assignments of error involve alleged violations of Goals 3, 5, 10, 17 and 18.

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Kerns involved the question of whether agricultural land bordered on two sides by residential development within the City of Pendleton was within an area physically developed for urban uses within the meaning of LCDC's Annexation Rule, OAR 660-01-315. In concluding that it was not, we said:

"Because city boundaries are not always drawn in straight lines but often consist of zigs and zags, many parcels of property outside city limits are bound on two sides by residential development within the city. We doubt that LCDC, in adopting the annexation rule, intended that all such parcels of property could be annexed to the city prior to acknowledgment of the comprehensive plan containing a Goal 14 urban growth boundary just because residential development exists on two sides and public facilities and services may abut the property. Certainly many such parcels of land could be productive, readily farmable agricultural land. Alternatively, such parcels may need to be left vacant as a buffer in order to allow agricultural activities to take place on adjacent lands, free from the interferences which urban development impose.³ (Footnote omitted)."

19 3

****Thus, by addressing the factors [in Goal 2] one does not satisfy the exceptions process, unless findings are made and those findings contain 'compelling reasons and facts' (Goal 2, Part II) which justify the conclusion that it is not possible to apply the goal involved." Wright v. Marion County, supra, 1 Or LUBA 164 at 173. Whether an exception is sought to be justified on the basis that the land is committed to a non-resource use or on the basis of the four factors set forth in Goal 2, Part II, Exceptions (i.e., need, alternatives, consequences and compatibility) compelling reasons and facts must justify the conclusion that it was not possible to apply the goals. Here, the county sought only to justify the exception to Goal 4 on the basis of commitment.

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion
3 and Order for LUBA No. 80-046, on March 26, 1981, by mailing to
4 said parties or their attorney a true copy thereof contained in
5 a sealed envelope with postage prepaid addressed to said
6 parties or their attorney as follows:

7 Robert E. Stacey, Jr.
8 400 Dekum Building
9 519 S.W. 3rd Avenue
10 Portland, OR 97204

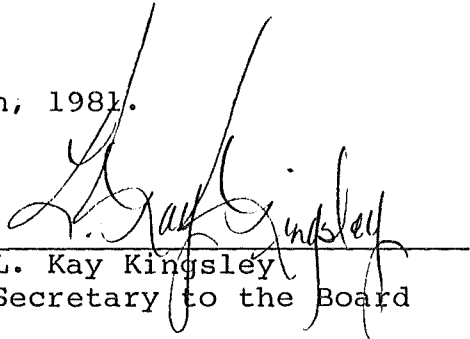
Richard K. Mickelson
Deputy District Attorney
P.O. Box 691
Gold Beach, OR 97444

11 Robert C. Sharp
12 Route 1 Box 754
13 Gold Beach, OR 97444

Alfred Edelman
The Nature Conservancy
1234 N.W. 25th Avenue
Portland, OR 97210

14 Edward Bennett
15 Rogue Sportsman's Realty
16 725 N. Ellensburg
17 Gold Beach, OR 97444

18 Dated this 26th day of March, 1981.

19 
20 L. Kay Kingsley
21 Secretary to the Board
22
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BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

LAND USE
BOARD OF APPEALS

MAR 24 4 03 PM '81

LORD,

Petitioner(s),

v.

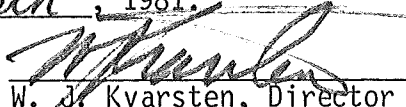
CURRY COUNTY,

Respondent.

LUBA 80-046
LCDC Determination

The Land Conservation and Development Commission hereby adopts
the recommendation of the Land Use Board of Appeals in Lord v.
Curry County, LUBA 80-046.

DATED THIS 24th DAY OF March, 1981.


W. J. Kvarsten, Director
For the Commission

WJK:DB:kb
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