

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

JUN 30 2 36 PM '81

3 CONCERNED PROPERTY OWNERS OF)
4 ROCKY POINT and JOYCE BALDWIN,)
5 Petitioners,)
6 v.)
7 KLAMATH COUNTY BOARD OF)
8 COMMISSIONERS AND GREG)
9 STOUT (Applicant),)
10 Respondents.)

LUBA NO. 81-026
FINAL OPINION
AND ORDER

Appeal from Klamath County.

Richard L. Garbutt, Klamath Falls, filed a petition for review and argued the cause for petitioners.

Steven Couch, Klamath Falls, filed a brief and John Shonkwiler argued the cause for Respondent/Applicant.

Remanded. 6/30/81

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 COX, Referee.

2 NATURE OF THE PROCEEDING

3 Petitioners contest Klamath County's grant of a conditional
4 use permit to keep two cougar cats in an area zoned
5 residential/recreational.

6 ALLEGATIONS OF ERROR

7 Petitioners set forth three assignments of error as follows:

8 (1) "The county erred in failing to address
9 statewide planning goals, specifically Goals 8, 9 and
10 10."

11 (2) "The County Board of Commissioners erred by
12 allowing the applicant to keep the cougars in
13 violation of state regulations."

14 (3) "The County Board of Commissioners erred by
15 announcing their hearing would involve no new
16 testimony and then allowing the applicant and the
17 applicant's attorney to submit new evidence."

18 FACTS

19 Due to complaints by neighbors it came to the Klamath
20 County Planning Department's attention that applicant Stout was
21 keeping two Cougar Cats at his Rocky Point, Oregon
22 residence.¹ To do so lawfully, applicant was required to
23 have a conditional use permit, which he lacked. The applicant,
24 after being contacted by the planning department, filed an
25 application for a conditional use permit. A hearing was held
26 before a hearings officer on October 8, 1980. Testimony both
for and against a conditional use permit application was
heard.

The hearings officer issued his order denying the

1 applicant's request on November 18, 1980. The hearings
2 officer's decision was appealed to the Board of Commissioners
3 which held an initial hearing on the matter on December 22,
4 1980. Due to a letter from the applicant's attorney
5 questioning the need for a conditional use permit, the hearing
6 was continued until January 14, 1981 for a legal opinion.
7 While awaiting the legal opinion as to whether a CUP was
8 required by county ordinance, the County Commissioners made an
9 unannounced site inspection of the applicant's property.
10 Neither the applicant nor the opponents were present at the
11 time of the inspection. At the January 14, 1981 hearing one
12 commissioner only briefly mentioned the visit to the
13 applicant's residence, but his comments did not reveal what
14 factual information the Commissioners gained as a result of the
15 visit. On that date, January 14, 1981, the Klamath County
16 Board of Commissioners reversed the decision of the hearings
17 officer and approved the conditional use permit with
18 conditions.² Respondent Klamath County issued its final
19 order on February 18, 1981.

20 DECISION

21 In their first assignment of error Petitioners allege the
22 county erred in failing to address the Statewide Planning
23 Goals, specifically Goals 8, 9 and 10. Petitioners argue that
24 the record is void of any required reference to the impact the
25 decision will have on the statewide goals. Petitioners do not,
26 however, state how those goals have been violated.

1 Respondent/Applicant argues in his brief that the county
2 addressed Statewide Planning Goals 8, 9 and 10. He points to a
3 staff report which is in the record and claims the report is
4 sufficient in and of itself to address the goals. In addition,
5 applicant argues that the petitioners were given an opportunity
6 to request that the hearings officer and the county board
7 consider those goals and they presented testimony regarding
8 them to the hearings officer and the county commissioners. It
9 is assumed from this statement that the applicant is arguing
10 that the petitioners did not request direct consideration of
11 the goals.

12 It is clear from reviewing the findings of fact the Board
13 of County Commissioners did not make specific findings
14 addressing statewide goals. Applicant's argument that it is
15 sufficient that the record show staff consideration of the goal
16 is wholly incorrect. This Board will not assume that
17 materials in the record are the findings of a local government
18 without specifically being incorporated in the findings or by
19 specific recitation in the findings themselves. Our rejection
20 of applicant's argument, however, does not end our
21 consideration of petitioners' allegation of error.

22 The question the Board faces in this situation is whether
23 or not the local government was required to make findings
24 addressing the statewide goals. As the Supreme Court of Oregon
25 held in Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or
26 3, 569 P2d 1063 (1977), prior to acknowledgment of a local

1 government's comprehensive plan by the Land Conservation and
2 Development Commission, the local government's land use
3 decision must be made in conformance with the applicable
4 statewide goals (Klamath County's plan has not been
5 acknowledged). This is not the first time that a petitioner
6 has attacked the decision of a local government on the grounds
7 that it failed to make findings addressing the goals. When
8 faced with such an assertion, we look to the findings made by
9 the local government to determine whether it addressed the
10 applicable goals. If the local government does not address the
11 applicable goals, the findings which it does make must be
12 sufficient to enable this Board on review to determine that
13 potentially applicable goals were in fact not applicable after
14 all. Twin Rocks Water Dist. v. Rockaway, 2 Or LUBA 36, 44
15 (1980). Petitioners assert that Goals 8, 9 and 10 are
16 applicable. In light of petitioners' allegation of error, we
17 looked to Klamath County's findings to determine whether there
18 is sufficient information therein to enable this Board on
19 review to determine whether or not Statewide Goals 8, 9 and 10
20 are applicable. Based on our review, we determine that Klamath
21 County's findings are sufficient to indicate that Statewide
22 Goals 8, 9 and 10 are not applicable. Therefore, petitioners'
23 first assignment of error is denied.

24 Statewide Goal No. 8's (Recreational Needs)³ purpose is
25 to satisfy the recreational needs of the citizens of the state
26 and visitors. Petitioners do not indicate how they perceive

1 Goal 8 to be applicable in this situation. The findings of
2 Klamath County indicate that the applicant's property is about
3 1/2 acre in size; is residential in nature; and is in a
4 residential neighborhood. Based on these findings, this Board
5 holds that without a more specific allegation of error by
6 petitioners we do not deem Statewide Goal No. 8 to be
7 applicable to Klamath County's decision.

8 Statewide Goal No. 9 (Economy of the State)⁴ is "[t]o
9 diversify and improve the economy of the state." Petitioners'
10 argument does not indicate how the allowance of two cougar cats
11 in a residential neighborhood is an impact on the economy of
12 the state. The goal to improve the economy of the state refers
13 to a beneficial change in those business, industrial and
14 commercial activities which generate employment, products and
15 services consistent with the availability of long term human
16 and natural resource. Without more from the petitioners, it is
17 impossible for us to tell exactly how they consider the
18 approval of applicant's conditional use permit to be a
19 detriment to the economy of this State. The findings of the
20 local government indicate that the proposed use will have no
21 adverse effect on abutting property or the permitted use of
22 that property for residential purposes. The petitioners are
23 understandably concerned about desirability of keeping the
24 cougar cats in a residential neighborhood. However, it is this
25 Board's determination that Goal 9 is not applicable, given the
26 facts in the case, to respondent's decision.

1 Goal No. 10 (Housing) is "[t]o provide for the housing
2 needs of the citizens of the state."⁵ Once again petitioners
3 do not indicate how they believe respondent's action violates
4 Goal 10. Respondent's findings indicate that this is
5 residential property located in a residential neighborhood.
6 The findings indicate that the site for the proposed
7 conditional use is adequate in size and shape to accommodate
8 the use and that all yards, spaces, walls, fences, parking,
9 loading, landscaping and other features required to accommodate
10 the use in the neighborhood are or must be in existence by June
11 1, 1980. Based on those findings and the lack of petitioner's
12 more detailed assertions of how the goals are applicable in
13 this situation, this Board finds that Goal 10 is not applicable
14 to the granting of applicant's conditional use permit request.

15 SECOND ASSIGNMENT OF ERROR

16 In this assignment of error the County Board of
17 Commissioners is alleged to have erred by allowing the
18 applicant to keep the cougars in violation of state
19 regulations. Petitioners are arguing that the commissioners
20 had no jurisdiction under which it could allow the applicant to
21 maintain the cats in open violation of state regulations.

22 Petitioners, argue the applicant, did not have the required
23 permits and his cages were not up to state requirements.⁶

24 Petitioners argue that by failing to adequately address this
25 aspect, the county acted in an arbitrary and capricious manner.

26 Applicant counters by arguing it is the state which is

1 required to regulate the conditions for keeping animals of the
2 type involved in this case. Applicant argues that the granting
3 of a conditional use permit merely allows him to follow the
4 state regulations in keeping his animals and does not in any
5 way interfere with the state enforcing its laws. Applicant
6 argues that petitioners are in essence requesting the County to
7 enforce state regulations which it does not have the power or
8 authority to enforce.

9 The record indicates that applicant has been cited for
10 violation of state law governing the keeping of wild animals
11 and as of the date of Klamath County's decision, those
12 citations had not been complied with. The citations included
13 lack of importation permits and failure to meet cage
14 construction standards. The conditions placed on the granting
15 of the conditional use permit by Klamath County, however,
16 direct attention to the state requirements and make the
17 compliance therewith a condition of approval.

18 We do not agree with petitioners. The matter was before
19 the local government on a conditional use permit request. The
20 conditional use permit is directed only at the use of the
21 property. If the state government has been given the
22 responsibility of governing that use through state standards,
23 it is not error for a local government to condition its
24 granting of the permit upon compliance with those state
25 standards. Specifically the Klamath County order is based upon
26 a finding that the cages are subject to the inspection and

1 approval of the Oregon Department of Fish and Wildlife. In
2 addition, the conditional use permit was granted upon the
3 condition that the applicant get proper state certification.
4 See footnote 4.

5 It is clear that the County Board of Commissioners
6 considered the safety of the neighbors and determined that
7 given the citations and order by the Fish and Wildlife
8 Commission, the state was involved in enforcing its laws
9 governing the keeping of the two cougar cats. If this Board
10 accepted petitioners' argument we would be placing the local
11 government in a position of enforcement of Fish and Wildlife
12 rules and regulations. Petitioners cite us to no authority
13 which would require a local government to undertake such an
14 enforcement role and this Board knows of no such authority.
15 Therefore, petitioner's second assignment of error is denied.

16 THIRD ASSIGNMENT OF ERROR

17 Petitioners argue that the County Board of Commissioners
18 erred by announcing their hearing would involve no new
19 testimony and then allowing the applicant and the applicant's
20 attorney to submit new evidence. Petitioners claim all they
21 are asking for is that they be treated fairly in regards to the
22 commissioners' hearing on December 22, 1980. They claim they
23 were taken completely by surprise by the County Commission's
24 allowance of the proponents of the conditional use permit to
25 testify before the county commissioners. They claim they were
26 unprepared to respond to the applicant's testimony and that of

1 the applicant's two other witnesses. They argue that the
2 commissioners violated procedural due process by announcing
3 that they would be taking no new testimony and then proceeding
4 to do so.

5 A review of the record indicates that while Klamath County
6 Board of Commissioners allowed additional testimony from both
7 proponents and opponents of the application for a conditional
8 use, they did not allow the introduction of any evidence which
9 did not exist in the record made before the hearings officer.
10 By allowing additional testimony which is within the scope of
11 that presented to the hearings officer, the County
12 Commissioners were undoubtedly using oral presentations as a
13 means of helping them review the record. As long as they did
14 not allow the introduction of additional evidence, there is no
15 obligation for them to allow rebuttal.

16 Next, petitioners argue that the commissioners by making an
17 unannounced visit to the site denied them the right to rebut
18 the observations made at that visit. Parties to a contested
19 case must be provided a fair opportunity to refute any and all
20 facts which result from a personal inspection of a site. As
21 was held in the case of Hyman v. Coe, 102 F Supp 254, 257
22 (1952):

23 "If there be facts within the expert knowledge of the
24 members of the Board or acquired by personal
25 inspection of the premises, these should be revealed
at the hearing so that opportunity may be afforded to
meet them by evidence or argument."

26

1 See also Anderson, American Law of Zoning, 2d Ed, secs
2 20.37 and 20.38 (1977); Friends of Benton County v.
3 Benton, (LUBA No. 81-024) (Proposed Opinion, June 9,
4 1981). A review of the record in this case does not fully
5 reveal what, if any, factual information the commissioners
6 gained as a result of their visit.

7 If the Commissioners do not announce what facts they
8 gain from their view of a site the parties are denied the
9 required opportunity to meet those facts by evidence or
10 argument. The denial of that opportunity constitutes a
11 violation of due process protection which must be afforded
12 the parties. As such, it is incumbent upon this Board to
13 remand the decision to the Klamath County Board of
14 Commissioners for further consideration consistent with
15 this opinion.

16 Remanded.

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1 FOOTNOTES

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4 The Board of County Commissioners found from testimony that
5 the cougars have escaped the Stouts' (applicants) control on
6 two occasions, and that at least once a dog was attacked.

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8 The following conditions are necessary to protect the
9 public health, safety and welfare:

10 "CONDITIONS:

11 "1. Applicant constructs a closed fence all
12 around the property and have until June 1, 1981, to do
13 so.

14 "2. No more cougars will be permitted on the
15 site.

16 "3. If the cougars escape again, the Conditional
17 Use Permit shall be revoked.

18 "4. Applicant must get the proper State
19 Certification.

20 "5. If cougars are taken from the property for
21 any purpose, they shall be properly restrained in
22 accordance with the requirements of the Oregon
23 Department of Fish and Wildlife."

24 3
25 Goal 8 Recreational Needs:

26 GOAL: To satisfy the recreational needs of the
citizens of the state and visitors.

"The requirements for meeting such needs, now and in
the future shall be planned for by governmental
agencies having responsibility for recreation areas,
facilities and opportunities: (1) in coordination
with private enterprise, (2) in appropriate
proportions and (3) in such quantity, quality and
location as is consistent with the availability of the
resources to meet such requirements. State and
federal agency recreation plans shall be coordinated
with local and regional recreational needs and plans."

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2 Goal 9 Economy of the State:

3 "Goal: To diversify and improve the economy of the
4 state.

5 "Both state and federal economic plans and policies
6 shall be coordinated by the state with local and
7 regional needs. Plans and policies shall contribute
8 to a stable and healthy economy in all regions of the
9 state. Plans shall be based on inventories of areas
10 suitable for increased economic growth and activity
11 after taking into consideration the health of the
12 current economic base; materials and energy
13 availability; labor market factors; transportation;
14 current market forces; availability of renewable and
15 non-renewable resources; availability of land; and
16 pollution control requirements.

17 "Economic growth and activity in accordance with such
18 plans shall be encouraged in areas that have
19 underutilized human and natural resource capabilities
20 and want increased growth and activity. Alternative
21 sites suitable for economic growth and expansion shall
22 be designated in such plans."

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16 Goal 10 Housing:

17 "Goal: To provide for the housing needs of citizens
18 of the state.

19 "Buildable lands for residential use shall be
20 inventoried and plans shall encourage the availability
21 of adequate numbers of housing units at price ranges
22 and rent levels which are commensurate with the
23 financial capabilities of Oregon households and allow
24 for flexibility of housing location, type and density."

22 6

23 The State of Oregon, through an employee of the Oregon
24 Department of Fish and Wildlife, has been in contact with
25 the applicant and the applicant is under orders to bring
26 the holding cages up to state standards in order to be
allowed to keep the animals.

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

CONCERNED PROPERTY OWNERS OF)	
ROCKY POINT and JOYCE BALDWIN,)	
)	
Petitioners,)	LUBA NO. 81-026
)	
v.)	
)	PROPOSED OPINION
KLAMATH COUNTY BOARD OF)	AND ORDER
COMMISSIONERS AND GREG)	
STOUT (Applicant),)	
)	
Respondents.)	

Appeal from Klamath County.

Richard L. Garbutt, Klamath Falls, filed a petition for review and argued the cause for petitioners.

Steven Couch, Klamath Falls, filed a brief and John Shonkwiler argued the cause for Respondent/Applicant.

Remanded. 6/9/81

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).



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 6/9/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: CONCERNED PROPERTY OWNERS V. KLAMATH COUNTY
LUBA NO. 81-026

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

This case involves both goal and non-goal issues. We remand the decision on the basis of a non-goal issue. The LCDC need only review pages 1 through line 14 of page 7. Those pages answer petitioner's concerns about whether respondent erred in failing to address applicable statewide goals, specifically goals 8, 9 and 10.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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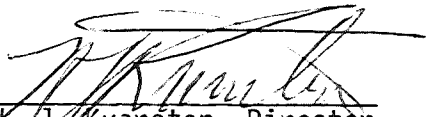
BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

CONCERNED PROPERTY OWNERS,)	
)	
Petitioner(s),)	
)	
v.)	LUBA 81-026
)	LCDC Determination
KLAMATH COUNTY,)	
)	
Respondent.)	

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA 81-026, concerning allegations of Statewide Goal violations.

DATED THIS 29th DAY OF June, 1981.

FOR THE COMMISSION:


W. J. Kvarsten, Director
Department of Land
Conservation and Development

WJK:ER:cp
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