

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

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MURIEL W. HILLIARD,
Petitioner,

vs.

LANE COUNTY COMMISSIONERS,
Respondent

and

JERRY STRASHEIM,
Respondent.

LUBA No. 79-012

FINAL OPINION
AND ORDER

On Remand from the Court of Appeals, 51 Or App 587.

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Pro Per

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

Affirmed. 2/09/82

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 This matter is before the Board on remand from the Court of
4 Appeals, Hilliard v Lane County Commissioners, 51 Or App 587
5 (1981). The Court of Appeals in its ruling decided that this
6 Board had erred by not applying the LCDC "Umatilla Policy" to
7 the Goal 18 question presented by this case. The Umatilla
8 Policy allows LCDC, according to the Court of Appeals, to "go
9 behind" a goal decision by a local government which is based on
10 an exception. The court cited its companion decision of
11 Woodcock v LCDC, 51 Or App 577 (1981) as authority. The
12 Umatilla Policy states:

13 "Once an exception is taken * * * a city or
14 county is entitled to rely upon that exception prior
15 to the acknowledgment of the comprehensive plan for
16 purposes of making a decision within the area [for]
17 which the exception has been taken. However, if a
18 decision within the area is challenged on the basis
19 that no valid exception has been taken, then the city
20 or county, or LCDC on review, must examine the
21 exception taken and determine whether the findings are
22 adequate to support the exception." Woodcock v LCDC,
23 supra at 581.

19 In remanding the case before us to this Board the Court of
20 Appeals stated:

21 "We conclude that LUBA erred in not applying to
22 the facts of this case the policy expressed in LCDC's
23 determination. That was an error in procedure to the
24 detriment of substantial rights of the petitioner, who
25 was entitled to have her allegations of violation of
26 statewide goals reviewed on the merits by LCDC.
Accordingly, we remand the matter to LUBA for it to
submit a recommendation on the alleged goal violations
to LCDC." 51 Or App at 596

1 ALLEGATIONS OF ERROR

2 As above indicated, this Board is under instruction from
3 the Court of Appeals to apply the Umatilla Policy to the
4 facts. The Umatilla Policy as stated by the Land Conservation
5 and Development Commission presupposes that the Lane County
6 Commissioners took a Goal 2 exception to Goal 18. Therefore
7 this Board is faced with basically three questions:

8 1. Was a Goal 2 exception to Goal 18 taken at
9 the partitioning stage?

10 2. If a Goal 2 exception was taken to Goal 18 at
11 the partitioning stage, was that exception relied upon
12 at a subsequent site review proceeding?

13 3. If the answer to question 2 is yes, were the
14 findings in support of the exception adequate?

15 FACTS

16 The subject property is located contiguous to the beach at
17 Heceta Beach in Lane County. It is directly north of and
18 adjacent to the Driftwood Shores Condominium development and
19 directly south of and adjacent to a small Lane County park.
20 There is a beach access-way that separates the Lane County park
21 from the subject property. The Driftwood Shores complex was
22 developed about 1970. It was converted to condominiums by the
23 applicant, Jerry Strasheim, in 1977. In August, 1978, Mr.
24 Strasheim approached Lane County for county site review
25 approval of a proposed four unit condominium on the subject
26 property. He had retained the property after conversion of the
27 Driftwood Shores complex to condominiums. When Mr. Strasheim
28 applied for site review in 1978, a question was raised whether

1 or not the condominium conversion and reservation of ownership
2 of the northern portion of the Driftwood Shores' property
3 (subject lot) had created a legally recognizable lot. In order
4 to clarify this question, the Lane County staff required Mr.
5 Strasheim to obtain a minor partition of the property prior to
6 the county's making a determination on the site review
7 application. Mr. Strasheim applied for and was granted a minor
8 partition by the Lane County Land Development Review Committee
9 on November 9, 1978. Petitioner Hilliard appealed that
10 partitioning decision to the Lane County Board of
11 Commissioners. Lane County approved the partitioning and
12 denied Ms. Hilliard's appeal on February 21, 1979. Lane
13 County's order approving the partitioning included ten pages of
14 findings addressing applicable provisions of the Lane County
15 Code, the applicable comprehensive plan and statewide planning
16 goals. The county concluded that it had complied with the
17 goals, including Goal 18. It went one step further and
18 determined that if a reviewing body somehow disagreed with its
19 determination regarding Goal 18, then an exception to the goal
20 was warranted. In that event, it made findings to support an
21 exception.

22 Following the decision by the Lane County Board of
23 Commissioners, petitioner attempted to appeal the county's
24 grant of partitioning to LCDC (LCDC No. 79-021). After Lane
25 County's approval of the partitioning but before LCDC's final
26 determination, Respondent Strasheim's site review application

1 again came before the Lane County Planning Director. The site
2 review application was approved on March 14, 1979, subject to
3 conditions regarding the height of the structure. The planning
4 director's site review decision was appealed by Ms. Hilliard as
5 well as the applicant, Mr. Strasheim. The applicant appealed
6 on the basis of his disagreement with the height conditions.

7 On August 10, 1979, LCDC dismissed Ms. Hilliard's petition
8 for review of the partitioning decision for lack of
9 jurisdiction.

10 After a public hearing on the merits, Lane County Board of
11 Commissioners approved the site review application by Order No.
12 79-010-3-3 dated October 3, 1979. During the site review
13 appeal hearing Lane County allowed petitioner Hilliard to
14 introduce evidence relating primarily to the question of
15 whether or not this property was a dune, a foredune, or a
16 conditionally stable dune upon which building would be
17 controlled by statewide Goals 7 and 18. Although all statewide
18 planning goals had been considered during the partitioning
19 decision and specific findings and conclusions made thereon,
20 Lane County nevertheless allowed additional evidence to be
21 introduced. The record indicates the decision to allow the
22 introduction of additional evidence was based upon Lane
23 County's insecurity about the exact state of the law regarding
24 how many times the statewide goals needed to be applied to a
25 specific piece of property.

26

1 DECISION

2 Scope of Review

3 The scope of this Board's review on remand has been brought
4 into question because of the Court's general wording in the
5 above quoted instructions. Petitioner argues that all goal
6 violations which she alleged in her original petition for
7 review must be addressed by this Board. We do not agree with
8 the petitioner's position. The entire thrust of the Court of
9 Appeals' decision on remand was directed at Goal 18. In
10 addition, the Goal 18 problem was the only one addressed by
11 LCDC in its instructions to us after review of the petitioner's
12 case. The LCDC determination stated:

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

19 Based on the initial LCDC determination on which the Court
20 of Appeals relied heavily in its decision, we deny petitioner's
21 assertion that on remand we must review all the goal issues.
22 The LCDC determination was limited strictly to a Goal 2
23 exception to Goal 18; and the Court of Appeals, even though its
24 summary paragraph was general in nature, limited its discussion
25 of statewide goals to Goal 18 and LCDC's above quoted
26 determination. Therefore the scope of our review on remand

1 will be limited to whether Lane County took an exception to
2 Goal 18 when it granted Strasheim's minor partition request and
3 if so, whether it relied upon that exception when it approved
4 Strasheim's site review request.

5 Merits

6 The first question presented to this Board is (a) whether a
7 Goal 2, Part II exception to Goal 18 was taken by Lane County
8 when on February 21, 1979, it approved Strasheim's minor
9 partitioning request,¹ and (b) whether that exception, if
10 taken, was relied upon by Lane County in granting the
11 subsequent site review approval. If an exception was taken at
12 the partitioning stage and was relied upon by Lane County in
13 its site review approval, then the "Umatilla Policy" enables
14 petitioner to raise the validity of that exception in her
15 appeal of the site review decision.

16 The relevant portions of Goal 18 are as follows:

17 "OVERALL STATEMENT

18 "To conserve, protect, where appropriate develop
19 and where appropriate restore the resources and
benefits of coastal beach and dune areas; and

20 To reduce the hazard to human life and property
21 from nature or man-induced actions associated with
these areas.

22 ***

23 "Identification

24 "Coastal areas subject to this goal shall include
25 beaches, active dune forms, recently stabilized dune
forms, older stabilized dune forms and interdune forms.

26 "IMPLEMENTATION REQUIREMENTS

1 (1) Local governments and state and federal
2 agencies shall base decisions on plans,
3 ordinances and land use actions in beach and dune
4 areas, other than older stabilized dunes, on
5 specific findings that shall include at least:

- 6 (a) the type of use proposed and the adverse
7 effects it might have on the site and
8 adjacent areas;
9 (b) temporary and permanent stabilization
10 programs and the planned maintenance of new
11 and existing vegetation;
12 (c) methods for protecting the surrounding area
13 from any adverse effects of the development;
14 and
15 (d) hazards to life, public and private
16 property, and the natural environment which
17 may be caused by the proposed use.

18 (2) Local governments and state and federal
19 agencies shall prohibit residential developments
20 and commercial and industrial buildings on active
21 fordunes, [sic] on other fordunes [sic] which are
22 conditionally stable and that are subject to
23 ocean undercutting or wave overtopping, and on
24 interdune areas (deflation plains) that are
25 subject to ocean bleeding [sic]. Other
26 development in these areas shall be permitted
only if findings required in (1) above are
presented and it is demonstrated that the
proposed development:

- (a) is adequately protected from any geologic
hazards, wind erosion, undercutting ocean
flooding and storm waves; or is of minimal
value and
(b) is designed to minimize adverse
environmental effects." (Emphasis added).

21 In Order No. 79-2-21-2 dated February 21, 1979, the county
22 stated in relation to Goal 18 the following:

23 "This goal also recognizes the need, where
24 appropriate, to develop beaches and dunes, based on
25 the capabilities and limitations of beach and dune
26 areas to sustain different levels of use. The type of
use proposed will have an impact on the site which
will be consistent with site capabilities and
development of adjacent areas. As demonstrated by

1 adjacent and surrounding development, the property can
2 be safely developed. There is no indication that
3 development will endanger critical vegetation. The
4 building permit process will be available to examine
5 the need for any methods of protecting the surrounding
6 area from adverse effects of development. Division of
7 the land does not appear to present undue hazard to
8 life, public or private property or the natural
9 environment.

6 "Because the development site is manmade fill,
7 the site is probably not a dune. Furthermore, there
8 is no indication of regular wave overtopping or
9 undercutting of the site. Development will not
adversely affect the beaches, dunes, vegetation or
other development."

10 It also determined that:

11 "The development site is primarily manmade with
12 riprap retainers, shaping and filling by man. There
13 is no indication of growth or diminishing of the
14 property from wind, water erosion, or supply of sand.
15 During the normal range of coastal weather conditions,
16 including severe winter storms, there has been no
17 evidence of wave undercutting or overtopping of the
property. No erosion problems or detriment to ground
water supplies are anticipated from the proposed
structure. There is no creditable evidence of unusual
hazards to people or property arising from the
partitioning or development of this site as proposed."

18 The county then went on to make findings regarding an exception
19 to the strict and literal application of Goal 18 as a
20 precautionary measure under the theory that if on appeal the
21 site were considered to be a dune or foredune then the county
22 would have covered itself.

23 We view the foregoing as a determination by the Lane County
24 Board of Commissioners that no exception to statewide Goal 18
25 was necessary. The county addressed Goal 18, and
26 Implementation Requirement No. 2, supra. The findings indicate

1 that the subject property is not an "unstable barrier ridge of
2 sand paralleling the beach and subject to wind erosion, water
3 erosion, and growth from new sand deposits."² In addition,
4 the above quoted findings indicate that the property is not
5 "other fordunes [sic] which are conditionally stable and are
6 subject to ocean undercutting and wave overtopping and
7 interdune areas that are subject to ocean bleeding [sic]."

8 We will not, as requested by petitioner, enter into an
9 analysis of the record supporting the county's determination
10 that an exception was not necessary . The scope of this review
11 is one limited to the application of LCDC's "Umatilla Policy."
12 The "Umatilla Policy" is only to be applied to cases where an
13 exception to a statewide goal has been taken and relied upon in
14 a subsequent decision. Here, the county found that it was not
15 necessary to take an exception. It only took steps to indicate
16 what its belief would be if, in the alternative, an exception
17 was necessary. It did not rely on that alternative exception
18 at the site review stage. We do not determine that the
19 precautions taken by the county to assure it had properly
20 applied the goals somehow forces us to evaluate the county's
21 decision as if it had taken an exception and thereafter relied
22 upon it. As the Court of Appeals stated in Woodcock v LCDC,
23 supra, in answer to Woodcock's claim that the "Umatilla Policy"
24 results in all land use planning changes since 1973 being
25 subject to reversal for goal violations, regardless of how much
26 time had passed since the local land use planning decision

1 occurred:

2 "That is not an accurate paraphrase of LCDC's
3 Umatilla Policy. That policy does not permit a
4 belated collateral attack on 'any' and every prior
5 land use decision; it limits that possibility to
6 situations where the earlier land use decision
7 involved the taking of a Goal 2, Part II, Exception."

8 By arguing that this Board should "go behind" the county's
9 determination that an exception was unnecessary, the petitioner
10 is requesting us to "permit a belated collateral attack." The
11 "Umatilla Policy" was not designed for that purpose.

12 We conclude the partitioning decision was not based on the
13 taking of a Goal 2, Part II, exception. Furthermore, Lane
14 County's precautionary exception at the partitioning stage was
15 not subsequently relied upon at the site review stage within
16 the meaning of the Umatilla Policy. Therefore, the site review
17 decision is not subject to attack based on the "Umatilla
18 Policy." To hold otherwise would be tantamount to stating
19 there is no finality to land use decisions in the State of
20 Oregon.

21 Affirmed.
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FOOTNOTES

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3 1

Part II of Statewide Goal 2 entitled "Exceptions" states:

4 "When during the application of the statewide
5 goals to plans, it appears that it is not possible to
6 apply the appropriate goal to specific properties or
7 situations, then each proposed exception to a goal
8 shall be set forth during the plan preparation phases
and also specifically noted in the notices of public
hearing. Notices of public hearing shall summarize
the issues in an understandable and meaningful manner.

9 "If the exception to the goal is adopted then the
10 compelling reasons and facts for that conclusion shall
be completely set forth in the plan and shall include:

11 "(a) Why these other uses should be provided for;

12 "(b) What alternative locations within the area
could be used for the proposed uses;

13 "(c) What are the long term environmental,
14 economic, social and energy consequences to
the locality, the region or the state from
not applying the goal or permitting the
alterntive use;

15 "(d) A finding that the proposed uses will be
16 compatible with other adjacent uses."

17 2

The key words which govern the necessity to apply Goal
18 18 to the property in question are defined by the Land
Conservation and Development Commission as follows:

19 "Dune: A hill or ridge of sand built up by
20 the wind along sandy coasts.

21 "Dune, Active: A dune that migrates, grows
22 and diminishes from the face of wind and
supply of sand. Active dunes include all
23 open sand dunes, active hummocks, and active
foredunes.

24 "Dune, Conditional Stable: A dune presently
25 in a stable condition, but vulnerable to
becoming active due to fragile vegetative
26 cover.

1 "Dune, Older Stabilized: A dune that is
2 stable from wind erosion, and that has
3 significant soil development and that may
4 include diverse forest cover. They include
5 older foredunes.

6 "Dune, Open Sand: A collective term for
7 active, unvegetative dune landforms.

8 "Dune, Recently Stabilized: A dune with
9 sufficient vegetation to be stabilized from
10 wind erosion, but with little, if any,
11 development of soil or cohesion of the sand
12 under the vegetation. Recently stabilized
13 dunes include conditionally stable
14 foredunes, conditionally stable dunes, dune
15 complexes and younger stabilized dunes.

16 "Dune, Younger Stabilized: A wind stable
17 dune with weakly developed soils and
18 vegetation.

19 "Foredune, Active: An unstable barrier
20 ridge of sand paralleling the beach and
21 subject to wind erosion, water erosion and
22 growth from new sand deposits. Active
23 foredunes may include areas with beach
24 grass, and occur in sand spits and at river
25 mouths as well as elsewhere.

26 "Foredune, Conditionally Stable: An active
foredune that has ceased in growing in
height and that has been conditionally
stable with regard to wind erosion.

"Foredune, Older: A conditionally stable
foredune that has become wind stabilized by
diverse vegetation and soil development."