

MAR 18 8 59 AM '82

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

ELsie OSBORNE, VINCENT
ZAWODNY and ORENE SEAMAN,

Petitioners,

v.

THE BOARD OF COUNTY
COMMISSIONERS OF LANE
COUNTY, et al.

Respondents.

LUBA NO. 81-107

FINAL OPINION
AND ORDER

Appeal from Lane County.

Roxie A. Merrell, Eugene, filed a petition for review and argued the cause for petitioners.

Allen L. Johnson, Eugene, filed a brief and argued the cause for Respondent Robert E. Thurmond. With him on the brief were Lombard, Gardner, Honsowetz, Brewer & Schons.

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

Affirmed.

3/18/82

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 BAGG, Referee.

2 NATURE OF THE DECISION

3 The petitioners attack two Lane County land use decisions
4 affecting a 385 acre parcel of land east of the City of
5 Springfield. One decision applies a GR-1/PUD (General Rural
6 1/Planned Unit Development) Zoning to the property, and the
7 second grants preliminary approval of a planned unit
8 development called "McKenzie Ridge PUD" to the owner of the
9 property, Mr. R. E. Thurmond. In a GR-1/PUD Zone, there may be
10 .2 dwelling units per acre. Lane Code Section 10.700-315(1).
11 The planned unit development proposal would allow 77 dwelling
12 units to be built in various stages on the property.

13 FACTS

14 The property is undeveloped and lies about two miles
15 outside of the Eugene-Springfield urban growth boundary. The
16 land is above the McKenzie River on a southern-exposed hillside
17 and north of a roadway, Camp Creek Road. There are some stands
18 of oak and limited fir, and there are moderate to extreme
19 slopes of 15 to 45 percent on the property. Two Bonneville
20 Power Administration transmission line easements bisect the
21 property. The county found that the property is not suitable
22 for grazing because of severe erosion hazards. The property
23 was logged at one time, but it does not bear a Douglas Fir site
24 classification. Soils are of class VI or higher.

25 The area serves as a deer range, and the county found that
26 the property was a "peripheral" deer range as that term is

1 defined by the Fish and Wildlife Service.¹

2 To the south of the subject property are small lots, and
3 one of the lots houses a nursery and another a horse-breeding
4 farm. The county found that the property is bounded

5 "on the north by a high ridge and forest, on the east
6 and west by ridges and a mixture of forest and
7 nonresource scrub land, and on the south by a group of
8 rural residential homes on small acreages. (See soils
9 map, Ex. Q; aerial photo, Ex. O, and parcel map, Ex.
10 CC). The tangential contact with farm uses does not
11 put the land in an agricultural area, where the great
12 bulk of it is up on a hillside, across a major power
13 line, and in a separate watershed. See aerial photo,
14 landscape, and drainage maps. Exhibits Q, CC, 3, 5."
15 Findings at 31.

16 "The only farming going on adjacent to the property
17 consists of a nursery on a six-acre tract along Camp
18 Creek Road, minor truck farming on some of the other
19 small tracts along the road, and pasturage on the
20 Petersen and Howell tracts to the southeast."
21 Findings at 23.

22 The parcel is within the Waterville Fire District and
23 within the service area of the Eugene Water and Electric
24 Board. There is no mass transit system available serving Camp
25 Creek Road. Water for the area is provided by wells.

26 FIRST ASSIGNMENT OF ERROR

27 "A VIOLATION OF GOAL THREE OCCURRED BY AN OMISSION OF
28 FINDINGS SHOWING CONSIDERATION OF EFFECTS OF THIS
29 DEVELOPMENT ON ADJACENT AGRICULTURAL LANDS, FAILURE TO
30 ESTABLISH BUFFER ZONES TO PROTECT ADJACENT
31 AGRICULTURAL LANDS, AND FAILURE TO PRESERVE
32 AGRICULTURAL LANDS."

33 Petitioners concede that the property does not include
34 class I-IV soils, and they agree the duty of the governing body
35 was "to determine whether the land is nonetheless suitable for
36 farm uses or was necessary to permit farm practice to be

1 undertaken on adjacent or nearby lands." Petition at 8.²
2 Petitioners claim the county failed to make this needed
3 determination but instead made "conclusory" reference to
4 compatibility with adjacent farm uses. Petitioners draw
5 attention to the nursery adjoining applicant's property and to
6 testimony from the owners to the effect that placement of 77
7 families with children and pets on adjacent parcels will
8 increase the threat of vandalism. Petitioners also point to
9 testimony regarding the threat of a diminished water supply
10 upon which the nursery is dependent. Petitioners claim the
11 owners of the nursery chose the site because of its distance
12 from residential developments. Petitioners advise that there
13 is nothing in the record to show that the applicant intends to
14 create any buffer zone between the development and adjacent
15 farming uses.

16 Petitioners then turn their attention to the applicant's
17 argument that the land can not be economically used for
18 agricultural activities. Petitioners claim this conclusion is
19 based upon two reasons. The first reason is that the soil
20 classification dictates that the land is not suitable for
21 growing crops, and the second reason is that while the property
22 has been used for grazing, continuing this practice is not
23 economically feasible. Petitioners state that while the Board
24 of County Commissioners agreed with the conclusion that the
25 property could not be profitably farmed, there is no evidence
26 in the record to support this conclusion. The county board's

1 support for its conclusion comes in part from property owners
2 with similar land holdings who state that the property may not
3 be profitably used for grazing, and petitioners view this
4 testimony as insufficient and itself unsupported. Petitioners
5 claim there is no evidence as to why the property may not
6 profitably be used for grazing. Further, though testimony
7 exists as to the dryness of the property, there is no evidence
8 as to why the property could not be grazed if irrigated. There
9 is a county finding that there is no water available and that
10 the high cost of drilling wells makes wells unfeasible, but
11 petitioners say this finding is not supported. Petitioners
12 also take issue with the county's view that the erosion
13 problems on the property make irrigation for agricultural use
14 "a damaging management alternative."

15 Petitioners discuss the applicant's statement of his lease
16 income and taxes for the property, and argue that the figures
17 standing alone do not support the allegation that the use of
18 the land for agricultural grazing purposes is not profitable.
19 Petitioners conclude that there simply is not substantial
20 evidence in the record or findings to support the county's
21 conclusion that the land could not be utilized for farm
22 purposes "primarily for economic profit." Petition for Review
23 at 13.

24 Petitioners then claim the subject parcel may not be viewed
25 in isolation from other parcels owned by the applicant.
26 Petitioners cite Meyer v. Lord, 37 Or App 59, 586 P2d 367

1 (1978) for this proposition, and they point to an adjacent 40
2 acre parcel to the south of Camp Creek Road which was at one
3 time zoned exclusive farm use (EFU). Petitioners claim the
4 county board did not make the required finding that the entire
5 ownership was not and could not be operated profitably for farm
6 purposes.

7 Respondents begin their discussion of this first assignment
8 of error by pointing to the soil classification of the property
9 (class VI or higher) and state that there is no presumption
10 that the property is agricultural land within the meaning of
11 Goal 3. Respondents state that the petitioners have the burden
12 of persuading this Board and the Land Conservation and
13 Development Commission that the county's findings are not
14 adequate and are not supported by substantial evidence.
15 Respondents point to Oregon Laws 1981, ch 748, sec 10(1)
16 providing

17 "(1) A party appealing a land use decision made by a
18 local government to the board or commission has
the burden of persuasion.

19 "(2) A local government that claims an exception to a
20 goal adopted by the commission has the burden of
persuasion.

21 "(3) There shall be no burden of proof in
22 administrative proceedings under OPS 197.005 to
197.430."

23 Respondents note that there is no legislative history yet
24 available to help clarify the term "burden of persuasion," but
25 respondents conclude that the effect of this new provision "is
26 to require opponents of a local land use decision to create a

1 conviction in the minds of the majority of the reviewing body
2 that grounds for reversal or remand exist." Respondent's Brief
3 at 8.

4 Respondents proceed to discuss the residual definition of
5 "agricultural land" as "other land" and complain that the
6 definition is vague and must be construed in favor of the
7 applicant and Lane County. Part of respondent's argument
8 includes a claim that to broadly apply the "other lands"
9 categories in Goals 3 and 4 to respondent's property would
10 constitute a taking of his property in violation of Article I,
11 Section 18 of the Oregon Constitution and the Fifth and
12 Fourteenth Amendments of the United States Constitution.
13 Respondent complains further that the definition is not
14 sufficiently articulated in goal, rule or statute to be applied
15 as the basis of a denial in a case such as the one on review.
16 The definition needs further clarification that may not be
17 given during the course of this proceeding, according to
18 respondents, and the end result is for this Board to rule "as a
19 non-goal issue, that the peripheral 'other suitable lands' and
20 'necessary' lands element of Goal Three have not been
21 adequately defined to be enforceable to specific land use
22 decisions." Respondent's Brief at 19-20.³

23 Before discussing respondents' remaining defenses to
24 petitioners' specific changes, we must dispose of this first
25 defense. In this instance, the Board neither views it
26 necessary to address respondent's argument or recommends to the

1 commission that the "other lands" provisions of Goal 3 is
2 unenforceable, for constitutional or other reasons. The Board
3 will leave such considerations occasioned by this case to the
4 commission itself and to the courts.

5 Respondents attack directly petitioners' assertion that the
6 county's findings are inadequate and not based upon substantial
7 evidence. Respondents point to findings and to evidence in the
8 record showing that the grazing of livestock, even if
9 profitable, would be likely to damage the soil, eliminate
10 vegetation, compete with wildlife and pose a pollution hazard
11 to downhill residences. Respondents conclude the property can
12 not be farmed by a reasonable and prudent farmer for the
13 primary purpose of obtaining a profit in money. See ORS
14 215.203.

15 Below are some of the findings bearing on this issue and
16 the issue of whether this property is subject to the protection
17 of Goal 3 in order to protect adjacent farmlands. The findings
18 are taken from under various goal headings in the findings
19 document. See footnote, infra.

20 "The Philomath is a shallow, cobbly soil on slopes of
21 12-45%. Cobbles on the surface and slope make tillage
22 and use of equipment impractical. Although the land
23 may be used for pasture, it requires fertilizer for
24 optimum growth of grasses and legumes, and erosion
25 control is of major concern. * * * [Record/Findings 23]

26 "There is no water available for irrigation, and the
high cost of drilling wells render that prospect
infeasible for purposes of irrigation. The erosion
problems noted by SCS make irrigation a damaging
management alternative, likely to provoke erosion.
[Ibid]

1 "The 1980 national soils appraisal prepared by the U.
2 S. Department of Agriculture notes that 'any type of
3 grazing on hardwood forests, western riparian areas,
4 and steep or rocky slopes is generally detrimental' to
5 wildlife as well as the vegetation which holds the
6 soils in place. Appraisal, 1980, Review Draft, Par I
7 at 3/31 & 6-48 and Part II at 3-189. Exhibit II.
8 [Ibid]

9 "The only farming going on adjacent to the property
10 consists of a nursery on a six-acre tract along Camp
11 Creek Road, minor truck farming on some of the other
12 small tracts along the road, and pasturage on the
13 Petersen and Howell tracts to the southeast. The
14 conversion of the subject property would not impair
15 the viability of these operations because it adjoins
16 them only at the southeast corner, and has not been a
17 material part of either operation in the past. * * *
18 * [Record/Findings 23-24]

19 "Mr. Osborne's general reference to a history of
20 logging and grazing does not tend to establish that
21 the property is predominantly suitable for 'farm use'
22 because it provides no basis for an inference that
23 such logging or grazing was feasible on more than half
24 the subject property or that more than half the
25 property was capable of being used by a reasonable and
26 prudent farmer for the primary purpose of obtaining a
profit in money. It establishes only that someone
tried it. Other testimony establishes that all of
those tries failed and that those tries very likely
caused damage to the vegetation and soil profiles that
increased the erosion, flooding and pollution problems
that the neighbors complain of. See testimony of
Terry Rahe, 3/25 Tape # 7, at 185-265, SCS RCA report
excerpts, Exhibit II; SCS soils analyses, Exhibit Q,
and Soil Scientist's Report Exhibit P. See also
testimony of Mr. Renschler and other neighbors, noted
above, neighbor's letters submitted as Exhibit 12, and
owner's statement of lease income and taxes, Exhibit
GG, showing income on property far below taxes."
[Record/Findings 24a]

27 "The applicant has allowed a neighboring farmer to use
28 the less hilly portions of the property for pasture,
29 but the use has brought in a minimal return,
30 insufficient to allow use of the property for the
31 primary purpose of earning a profit in money by
32 pasturing animals or leasing the land for that
33 purpose." [Record/Findings 23]

1 ** * * farming such [marginal] land produces more
2 agricultural nonpoint source pollutants * * * * When
3 not properly managed, [unconfined animal operations]
4 can change the composition of the plan cover and the
5 physical properties of the soil. Such changes can
6 increase runoff and facilitate the movement of surface
7 pollutants to surface waters * * * * Inadequate
8 livestock management and poor site conditions can also
9 increase the levels of inorganic and organic sediments
10 and their associated nutrients and oxygen-demanding
11 materials. [Record/Findings 37]

12 ** * * *

13 "The proposed PUD, with its detention basins,
14 engineered drainage system, and careful control of
15 landscaping and vegetation, will significantly reduce
16 the erosion and runoff that would result from logging
17 off the property and running stock on it, for a
18 probable net gain in water quality. [Ibid]

19 " * * * * *

20 "There are no DEQ standards for cows and sheep, as
21 there are for human facilities. The Oregon Forest
22 Practices Act and the prevailing agricultural and
23 forest zones do not provide the degree of protection
24 from logging and pasturage that is provided by the
25 DEQ, LRAPA, and county land, air and water
26 regulations. Further, the drainageways, vegetation,
27 and land use on the property will be intensively
28 monitored and planned through the PUD approval and
29 implementation process, including architectural
30 review, County/DEQ approval, road and building codes,
31 fire safety standards, and the like. [Ibid]

32 ** * * *

33 "The SCS soils materials and the geologists
34 report demonstrate that the property consists of soils
35 that are free from landslide and weak foundation soil
36 hazards. Erosion will be controlled better than in
37 the past by the landscaping protections and
38 architectural review procedures and standards for the
39 P.U.D., as previously outlined. Ground water will be
40 protected by regulation of septic field construction
41 and location, by retaining vegetation, by eliminating
42 livestock wastes, and the other measures provided.
43 See engineer's report." [Record/Findings 45]

1 "Open Space

2 "a. Lands used for agricultural uses. The south
3 slope is not Goal Three agricultural land.
4 Cattle have been run on it in the past. The
5 cattle have competed with deer for browse and
6 have contributed to erosion problems. They have
7 used the site only during the spring months
8 because they soon exhausted the vegetation
9 available. They brought in only \$600 a year,
10 gross, in lease payments and the lessee does not
11 find it necessary to have the land available in
12 order to continue his farming operations on a
13 profitable basis. See Exhibit GG; testimony of
14 applicant. Conversion of the land to rural
15 residential use with a large open space area
16 through the central drainage and large lots left
17 mainly in existing vegetation would eliminate the
18 competition from cattle and enhance the habitat
19 for deer." [Record/Findings 35]

20 Respondents claim that these findings and others show the
21 property is not "suitable" for farm use (as the term is used in
22 Goal 3) as "'suitability' for farm use is more than 'ability'
23 to produce a profit in money." Respondent's Brief at 23.
24 Respondents conclude that the "findings make it clear that this
25 hillside would be no place to graze livestock even if it were
26 profitable * * * *" because of adverse conditions on the land.
27 Respondent's Brief at 23.

28 As to petitioners view that other property owned by
29 Respondent Thurmond must be considered together with the
30 subject parcel in determining the whole of the ownership is
31 suitable for farm use, respondents note that there is no
32 evidence in the record that the subject parcel has ever been
33 used for farming in conjunction with the lower parcel. Also,
34 respondent notes that the parcels are separated from each other

1 by a roadway and other ownerships.

2 As to the assertion that this property must be preserved in
3 order to permit farming practices to be carried out on adjacent
4 or nearby lands, respondents state that the findings and the
5 evidence clearly show that what neighboring farm uses exist
6 "face a greater risk from farm uses on the subject parcel than
7 from the proposed residential planned unit development."

8 Respondent's Brief at 24. Respondents point again to the fact
9 that the only farm use seriously proposed by the opponents was
10 grazing, and grazing poses major threats as noted by the county
11 in its findings. Respondents point out that the county's
12 findings set forth at pages 24b and c (in part quoted above)
13 address the nursery owners' concerns about erosion and flooding
14 and taxes and vandalism. Respondents point to the following
15 findings as further proof of the protection afforded the
16 environment of the surrounding properties by the development:

17 "The engineer's report and testimony demonstrate that
18 the applicant and homebuyers can install roads, homes,
19 and driveways while preventing increased flood and
20 erosion hazard by proper design and installation of
21 drainage pipes, detention basins, and other elements
22 of the drainage system. Final approval of each PUD
stage will be conditioned upon completion of these
elements for the stage in question or upon a
performance bond assuring their proper
completion. See Exhibit JJ, incorporated herein."
Record/Findings 29.

23 "The landscape architect's plan and testimony also
24 show that the cover will be maintained and protected
25 to the full extent necessitated by the conditions of
26 soil, topography, and climate described

1 in his testimony and the testimony and reports of the
2 engineer, geologist, and soil scientist."
Record/Findings 29.

3 Respondents draw attention to the conditions attached to
4 the approval. The conditions include a requirement of
5 submission of detailed plans for flood and erosion control,
6 establishment of a trust fund to assure continued proper
7 functioning of the flood and erosion control system, submission
8 of a hydrologist's report concerning ground water, assurance of
9 continued water supply to current users, submission of plans
10 and information establishing that all road work will be
11 constructed in such a way as to contain siltation and erosion
12 among others including Soil Conservation Service protective
13 measures for construction. At pages 117-119 of the findings,
14 the conditions are

15 "(1) Prior to final approval, the applicant must
16 submit detailed plans for a flood and erosion control
17 system supported by adequate data and a qualified
expert's testimony demonstrating that the system will,
based on a 25-year flood,

18 "(a) Assure that the rate of runoff from the site
19 is not increased or is so controlled as to
20 assure no increase in flood hazard to
downstream property owners over that
currently existing in any season.

21 "(b) Assure that the amount of sediment carried
22 off the property is not increased over that
23 which was carried off the property under
similar conditions during calendar year 1978.

24 "(c) Assure that any dams or other flood control
25 devices are safe and adequate and do not
create material new hazards.

26 "(2) Prior to final approval, the applicant must
establish a mechanism, whether it be a trust fund,

1 insurance policy, or assessment procedure, which is
2 adequate to assure adequate funding for any repairs
3 replacements, cleaning and alterations which may be
4 necessary to assure the continued proper functioning
5 of the flood and erosion control system.

6 "(3) Prior to final approval, the applicant must
7 submit a maintenance schedule and supporting data
8 establishing that the maintenance schedule is adequate
9 to assure continued proper functioning of the flood
10 and erosion control system.

11 "(4) Prior to final approval, the applicant must
12 submit a bond or insurance policy with Lane County as
13 beneficiary sufficient to assure the County that it
14 will have the funds to assure the continued proper
15 functioning of the flood and erosion control system if
16 the PUD association or the applicant fails to do so.
17 The amount of the bond shall be \$100,000.

18 "(5) Prior to final approval, the applicant must
19 submit a report by a qualified hydrologist/engineer
20 documenting the current status of the groundwater
21 supply as follows:

22 "(a) Identifying the depth of the aquifers tapped
23 or to be tapped by the applicant's principal
24 and back-up wells.

25 "(b) Identifying the cone of influence of
26 existing and proposed wells.

"(c) Showing the potential impact of water use by
the PUD on other users.

"(d) Proposing methods of mitigating that impact,
including consideration of bringing water
from the north side of the ridge, if
necessary.

"(6) Prior to final approval, the applicant must
submit a proposal assuring that surrounding water
users will have access to the PUD system if necessary
to maintain current flows, or, in the alternative,
that funds will be available to carry out necessary
additional drilling of affected property owners' wells.

"(7) Prior to final approval, the applicant must
obtain boundary commission approval of a community
water system to serve at least the first phase of the
PUD. No further stages will be approved unless and

1 until adequate water from an approved community water
2 system is available to serve the domestic and fire
suppression needs of those stages.

3 "(8) Prior to final approval, the applicant must
4 submit plans and data establishing that all roadwork
5 will be conducted in such a manner as to assure
6 containment of siltation and erosion caused by the
construction within the boundaries of the PUD (by
7 contain is meant that it will result in no increase),
8 and providing for reseedling and other measures
9 necessary to restore disturbed areas.

10 "(9) The recommendations of the SCS for siting,
11 construction, preservation of vegetation, and other
12 measures to counter erosion, slides, slumping,
13 shrink-swell, and flooding,* as set forth in the
14 narratives and in the materials entitled 'Subdivision
or Urban Development' shall be standards for approval
15 of building permits on the soils to which those
16 recommendations apply."

17 Respondents note that these protections are not available to
18 the neighboring nursery now, nor are they available under the
19 provisions of Goal 3.

20 We believe the findings demonstrate that the property is
21 not presumed to be agricultural land within the meaning of Goal
22 3 because it is not comprised predominantly of class I-IV
23 soils. We also conclude that the county's finding that the
24 property is not subject to Goal 3 under the "other lands"
25 definition included in the goal is adequate and supported by
26 substantial evidence in the record. The measure of whether
land is subject to Goal 3 under the "other lands" definition in
the goal is whether the land is suitable for "farm use" as that
term is defined in ORS 215.203.⁴ In determining whether the
land is "suitable for farm use." The county is required to
take:

1 "into consideration soil fertility, suitability for
2 grazing, climatic conditions, existing and future
3 availability of water for farm irrigation purposes,
4 existing land use patterns, technological and energy
5 inputs required, or accepted farming practices."

6 We find sufficient evidence in the record to support the
7 county's view that use of the subject parcel for agricultural
8 purposes, including grazing or the growing of crops requiring
9 irrigation could subject neighboring properties to damage. The
10 county has made additional findings addressing the availability
11 of water for irrigation and the farm history of the property.

12 We believe the county's findings adequately support the
13 conclusion inherent in its decision that a reasonably prudent
14 farmer would not undertake to farm this land for the primary
15 purpose of making a profit in money. ORS 215.203 (definition
16 of "farm use").

17 Further, the conditions of approval of the planned unit
18 development noted above support the county's view that the
19 development of this property in specifically the manner
20 proposed here may well protect neighboring farming operations
21 more effectively than placing the property in a farm zone as
22 would otherwise be required under the provisions of Goal 3.

23 In sum, we are not persuaded by petitioners that the
24 county's findings are erroneous or not supported by substantial
25 evidence in the record.

26 It should be noted here that the approval granted in this
land use decision is a preliminary approval and does not, under
the provisions of the Lane Code, allow construction to begin.

1 A final planned unit development must be applied for within 24
2 months after the granting of the preliminary PUD approval.
3 Lane Code Section 10.700-605. This final approval includes
4 details of the water, sewage, drainage, building, street and
5 other improvements. Changes may be made in this final
6 development application as may be necessary to assure
7 conformity with the preliminary PUD approval and all applicable
8 laws and ordinances. Once approval is secured, no construction
9 may begin until all provisions of applicable ordinances, laws
10 and regulations are complied with in full. The approval at
11 this stage, then, is subject to further revision based on more
12 detailed information that must be presented by the applicant
13 within two years or he may not proceed further. However, at
14 this stage, the Board views the county's findings and its
15 supporting evidence to be quite sufficient to show that not
16 only is this property not suitable for farm uses itself, but in
17 its present form it could be more dangerous to nearby
18 agricultural activities than when used as planned and as
19 conditioned by this land use decision.

20 Petitioners' first assignment of error is denied.

21 SECOND ASSIGNMENT OF ERROR

22 "A VIOLATION OF GOAL 4 OCCURRED BY FINDINGS THAT
23 DETERMINE THE LAND NEED NOT BE PRESERVED FOR FOREST
USES WHICH ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE."

24 Goal 4 defines forest lands as

- 25 (1) land composed of existing and potential forest
26 lands which are suitable for commercial forest uses;
(2) other forested lands needed for watershed

1 protection, wildlife and fisheries habitat and
2 recreation; (3) lands where extreme conditions of
3 climate, soil and topography require the maintenance
4 of vegetative cover irrespective of use; (4) other
5 forested lands in urban and agricultural areas which
6 provide urban buffers, wind breaks, wildlife, and
7 fisheries habitat, livestock habitat, scenic corridors
8 and recreational use."

9
10 Petitioners use this definition to claim that the property is
11 subject to Goal 4.

12
13 Petitioners cite evidence in the record showing that the
14 property is largely covered with trees. However, petitioners
15 do not appear to argue that this land fits within the first
16 definition of forest lands within the goal, as petitioners do
17 not argue that the land will support timber suitable for
18 commercial use. Petitioners view the county's findings to say
19 that the land is not predominantly forest land because there
20 are few trees on the property. The basis for the county's
21 findings, according to petitioners, is a forester's report.
22 Petitioners view the forester's report to be incomplete
23 evidence of the amount of timber on the property as the report
24 "does not state how large these groves are, what proportion of
25 the total land area they occupy, or what portion of the land is
26 occupied by scrub oak and maple trees." Petition for Review at
16. Petitioners then conclude that because the county board
erred in its conclusion that the land was not predominantly
forest land, the county Board erred because it failed to
consider whether these lands were needed for watershed
protection or wildlife and fisheries habitat under Goal 4.

1 Petitioners admit, however, that the county addressed these
2 issues under Goal 5.

3 The petitioners then say that even if the Goal 5 discussion
4 is incorporated by reference into Goal 4, there is still not
5 substantial evidence in the record to warrant the conclusion
6 that the parcel is not needed for watershed protection,
7 wildlife or fisheries habitat. Petitioners cite the
8 Mohawk-Camp Creek Subarea Plan for the proposition that
9 groundwater is limited in the Camp Creek area, and the area is
10 geologically unsuited for the development of large yields of
11 groundwater. Petitioners argue that there is no evidence to
12 show that development on the property of 77 homesites' with the
13 intended other improvements would not harm vegetation essential
14 to groundwater supplies and would not increase runoff.
15 Petitioners believe the county's findings that there would be a
16 "probable net gain in groundwater quality" are unsupported.
17 The drainage system utilizing basins relied upon by the county
18 has not yet been designed, for example.

19 Petitioners take particular exception to a county
20 conclusion that there would be a loss of deer habitat under
21 farm or forest use and only an "undocumented potential loss of
22 deer habitat under the PUD * * * *" Petitioners cite a letter
23 in the record from the Department of Fish and Wildlife stating
24 that "[t]he proposed development densities would cause
25 unacceptably high habitat losses in important deer range."

26 Petitioners turn their attention next to the third category

1 of "Forest Lands," i.e. "lands where extreme conditions of
2 climate, soil and topography require the maintenance of
3 vegetative cover irrespective of use and argue that there is
4 not substantial evidence in the record to support the county's
5 finding that soil conditions and topography "do not require the
6 maintenance of forest cover." Petition for Review at 20. By
7 "forest cover," we understand petitioners refer to complete
8 "vegetative cover." The county does not use the term "forest
9 cover." Petitioners take exception to the county finding that
10 the conditions are "not so extreme as to make necessary to so
11 completely maintain the existing vegetative cover * * * *"
12 Record/Findings 30. Petitioners are mindful of an engineer's
13 report relied upon by the county to support the conclusion that
14 the land can tolerate the disturbances occasioned by the
15 applicant's development; but petitioners insist that the design
16 for the homes, driveways, drainage system or retention basins
17 are not fully designed. They complain the conclusion that the
18 drainage system plan will prevent a reduced erosion hazard is
19 premature.

20 Lastly, petitioners argue that there is no finding that the
21 land is not presently serving as a livestock habitat.

22 Respondents state at the outset that the only issue raised
23 by petitioners under this assignment of error is the adequacy
24 of the evidence. Respondents say "it must be assumed that the
25 findings are adequate and that they reflect a correct
26 interpretation of the goals." Respondent's Brief at 27.

1 Respondents note that petitioners do not question that the
2 lands are not composed of existing potential forest lands which
3 are suitable for commercial forest uses, and respondents turn
4 their attention to the county's findings attempting to show
5 that the property does not consist of "other forested lands"
6 that are needed for protection of watershed, wildlife,
7 fisheries and recreation. Part of respondents' argument echos
8 the argument under Goal 3, that the Land Conservation and
9 Development Commission has not determined by either the goal or
10 a rule what the words "forested" and "needed" mean. Respondent
11 concludes that there is no basis on which one may determine
12 that the county's findings or the evidence on which it relies
13 is inadequate. As with respondents' argument under Goal 3, the
14 Board declines to recommend to the commission that the goal is
15 too vague to be enforced.

16 The following county finding under Goal 4 is based,
17 according to respondents, on a forester's report and an aerial
18 photograph.

19 "The subject property is not existing commercial
20 forest land because: it consists primarily of soils
21 with no forest site class; the soils which do have a
22 site class are either scattered in isolated clumps
23 across an erosive slope or located on a geographically
24 separate northern slope; the area is not suitable for
25 reforestation; and the state forestry plan itself
26 shows that the bulk of the property would not return
the money put into it, much less anything over that.

24 "2) Other forested lands needed for watershed
25 protection, wildlife and fisheries habitat, and
recreation.

26 "Facts:

1 "As the colored aerial photograph [sic] shows, the
2 bulk of the property does not consist of forested
3 lands. The south slope has a few scattered
4 groves of conifers, but it is primarily a mixture
5 of steep slopes, grassy hillsides, scrub white
6 oak, and scattered maple trees. Ex. HH. See
7 also, Forester's report. Exhibit O."
8 Record/Findings 28. (Emphasis added).

9 The forester's report cited in this finding includes the
10 following statement:

11 "The reason for this lack of timber is soil, not
12 management. The soil is a shallowly silty clay which
13 prevents adequate root development for commercial
14 forest growth and inability to retain adequate soil
15 moisture. The soil properties when combined with the
16 extreme south slope exposure prevents that portion of
17 the Thurmond property south of the ridge from ever
18 being considered commercial forest land.

19 "There is no fish habitat nor any water areas or
20 wetlands associated with the site. The site has
21 neither outstanding scenic views nor any qualities of
22 wilderness. Wildlife is scarce or nonexistent due to
23 its lack of adequate habitat.

24 The county concludes in its findings that these are not
25 "forested lands," and it is, therefore, not necessary to
26 consider whether they are needed for watershed protection,
27 wildlife and fisheries habitat.⁵

28 As to the third part of the definition, requiring Goal 4
29 application for "lands where extreme conditions of climate,
30 soil and topography require the maintenance of vegetative cover
31 irrespective of use," respondents point to county findings
32 which assume that part 3 of the forested lands definition in
33 Goal 4 means "complete maintenance of vegetative cover." The
34 county's finding states:

1 "The site does contain erosive soils that will
2 require the maintenance of vegetative cover over much
3 of the project area, including the larger part of most
4 lots. However, the conditions are not so extreme as
5 to make it necessary to so completely maintain the
6 existing vegetative cover as to exclude the limited
7 disturbances contemplated by the Applicant.
8 Therefore, these are not lands where extreme
9 conditions require the maintenance of cover
10 irrespective of any use, including the proposed use.
11 Even if they were, the applicant has demonstrated that
12 the cover will be maintained to the full extent made
13 necessary by the described conditions, thereby
14 complying with the requirement of the goal."
15 Record/Findings pg. 30.

9 Respondents point to the finding and the SCS soil narratives as
10 appropriate recitals that the conditions on this property "are
11 not so extreme as to require the complete maintenance of
12 vegetative cover to the exclusion of the proposed use."

13 Respondent's Brief at 31. Respondents argue that

14 "preservation of the property as forest land would
15 permit continued grazing and other farm uses which
16 have been shown to be clearly deleterious. In
17 addition, it would permit continued logging of the
18 clumps of commercial timber on the south slope under
19 the Oregon Forest Practices Act. Neither such logging
20 nor such grazing would further the purpose of the
21 groundcover maintenance element of Goal Four. In
22 fact, they would defeat it."

19 As to the matter of the fourth definition of forest lands
20 as "other forested lands in urban and agricultural areas which
21 provide urban buffers, windbreaks, wildlife, and fisheries
22 habitat, livestock habitat, scenic corridors and recreational
23 use," respondents note again that the property is not
24 "forested." Further, the bulk of the land is not in an
25 agricultural area, as found by the county.

26 We agree with respondents. The petitioners attack the

1 evidence chosen by the county to support its finding that the
2 land is not subject to Goal 4. We believe the findings
3 reference and the record contains substantial evidence from
4 which the county could conclude the property is not "forested,"
5 by the common understanding of that term. As LCDC has not
6 refined the definition of the word "forested," we may look to a
7 dictionary definition of the term.⁶ "Forest" in Black's Law
8 Dictionary is defined as "[a] tract of land covered with trees
9 and one usually of considerable extent." Black's Law
10 Dictionary (rev 4th ed, 1968). The county articulated its
11 reasons for concluding the land did not fit the definition.
12 The county relied upon and we believe was entitled to rely on a
13 color aerial photograph and the report of a forester which
14 references a vegetative cover of grass, white oak and small
15 clumps of Douglas Fir, but notes that "[b]y far the greater
16 area is covered with grasses and white oak which is indicative
17 of the soil type shown * * * *" Report of the Forester in
18 Attachment 3 to the Record. We do not view the fact that trees
19 may be growing on the property in various places, as the record
20 seems to indicate, to mean the land is "forested" within the
21 meaning of Goal 4. See Ager v Klamath County, 3 LCDC 157, LCDC
22 79-030 (1979). The forester's report stating that the area is
23 "covered with grasses and white oak" is, in fact, not entirely
24 borne out by the color aerial photograph of the property.
25 Indeed, the photograph clearly shows the property subject to
26 the appeal is equally divided between brown open space and

1 green tree cover of some kind. It is quite clear from the
2 photograph in the record, then, that "the far greater area" is
3 not "covered with white oak." See LCDC Determination, LUBA No.
4 81-107, 81-107A of February 9, 1982.

5 Further, even if we were to interpret the land as being
6 "forested," the county has made sufficient findings supported
7 with substantial evidence to show that the land is nonetheless
8 not required to be kept in its present condition to protect
9 watershed, wildlife, recreation or to provide buffers,
10 windbreaks, wildlife and livestock habitat for scenic
11 corridors. Our view is based on the findings quoted supra at
12 pp. 22, 23, at footnote No. 5 on page 23, on the report of the
13 engineer (Exhibit Y), the report of the soil scientist (Exhibit
14 P) and the geologist (Exhibit KK), and also on the
15 comprehensive conditions attached to development of the
16 property. These conditions are quoted at pp. 13-15, supra, and
17 we believe they provide adequate insurance for Goal 4 (and Goal
18 5) resource protection purposes.

19 We believe that the county has adequately shown that this
20 property is not subject to Goal 4. Indeed, though not subject
21 to Goal 4, we agree with the county that the protections under
22 Goal 4 will be enhanced by this development. See also our
23 discussion under Goal 5, infra.

24 The second assignment of error is denied.

25 / /

26 / /

1 THIRD ASSIGNMENT OF ERROR

2 "A VIOLATION OF GOAL TWO OCCURRED BY THE RESPONDENT'S
3 APPROVAL OF A RESIDENTIAL DEVELOPMENT IN AGRICULTURAL
4 AND FOREST LANDS WITHOUT THE EXCEPTION PROCEDURE
5 REQUIRED BY GOAL TWO OR A FINDING THAT THE LAND IS
6 COMMITTED TO NON-AGRICULTURAL OR NON-FOREST USE."

7 This assignment of error asserts that there is no proper
8 exception taken to either Goal 3 or Goal 4 and the findings do
9 not show that the land is otherwise committed to non-forest or
10 non-agricultural uses. This assignment of error assumes, of
11 course, that the lands are indeed agricultural lands and forest
12 lands. As we do not find that the county erred in concluding
13 that the lands were not subject to the protections of Goals 3
14 and 4, we find no exceptions were required.

15 The third assignment of error is denied.

16 FOURTH ASSIGNMENT OF ERROR

17 "RESPONDENT'S DETERMINATION THAT GOAL FIVE IS NOT
18 APPLICABLE TO THE PRESENT CASE IS NOT SUPPORTED BY
19 SUBSTANTIAL EVIDENCE."

20 This assignment of error was clarified at the hearing on
21 this matter. The petitioners do not assert, as stated above,
22 that the county did not find Goal 5 applicable. Petitioners'
23 assertion is that the county's findings showing compliance with
24 Goal 5 are not supported by substantial evidence.⁷

25 Petitioners begin the argument by asserting that Goal 5
26 requires that lands be inventoried as open space if the parcels
27 are particularly necessary for (1) agricultural uses, (2)
28 forest uses, and (3) lands that would, if continued in present
29 use, protect air, stream or water supplies. Petitioners assume

1 that the land is agricultural and forest lands under points (1)
2 and (2), and as we have concluded that they are not
3 agricultural or forest lands, we need not consider those first
4 two points.

5 As to the matter of the protection of air, streams or water
6 supplies, petitioners point again to concern expressed by
7 participants in the proceedings before the county over the
8 maintenance of existing water supplies for homeowners in the
9 Camp Creek area. Testimony as to gallonage yields from wells
10 and a drop in the static level of wells is recited as evidence
11 for the proposition that water is limited in the area.

12 Petitioners claim that the county board's rejection of this
13 evidence is in error. Chief in petitioners' concern is the
14 adequacy of protection of the water supply. The county's
15 conditioning approval of the development in stages and upon a
16 report by a qualified hydrologist showing that added uses will
17 not deprive prior users access to water is not sufficient,
18 according to petitioners. Petitioners question the ability of
19 the county to approve the development in stages and refuse any
20 stage under Lane Code 10.700-515(5). Petitioners' assert that
21 there is no evidence in the record to show that the volume of
22 the area's water supply can be accurately determined now. In
23 short, petitioners believe that protections afforded by future
24 studies are not sufficient.⁸

25 Respondents direct attention to the county's findings on
26 Goal 5. The discussion of the property, of the inventories

1 required under Goal 5 and the method used to achieve the goal
2 consumes some nine pages. The principle conclusion relied upon
3 by the county and supported, we believe, by evidence in the
4 record, is that this development designed with large open
5 spaces, retained vegetation, soils, geologic and hydrological
6 review provides sufficient protection under Goal 5. Recitation
7 of the county's findings here would render this opinion
8 unnecessarily long. Our view is that the county's reliance
9 upon expert evidence and the protections afforded by its
10 ordinance controlling planned unit development approvals is
11 sufficient to achieve the goal. Particularly, the conflicts
12 occasioned by the development are to be limited by:

13 "(1) Providing for a use which eliminates
14 conflicts that would result from allowing competition
15 from livestock; (2) providing for a large area of
16 natural open space along the main drainage ways and
17 wooded areas of the subject property, in which
18 residential, farming, and other incompatible uses
19 would be prohibited; (3) providing for additional
watering places in the form of detention basins; (4)
requiring preservation of existing vegetation on
homesites; and (5) limiting density to rural levels to
two acres or more per home in the residential area and
five acres or more per home overall." Findings
document at 43b.

20 These conditions are sufficient to insure protection. We
21 do not believe the hydrologic and other scientific work must be
22 in final form now. It is sufficient that the experts have
23 concluded that solutions to water and other potential Goal 5
24 problems are possible, indeed, likely. To require greater
25 detail now would be to take needed design flexibility away from
26 the developer and the county. What is required here is enough

1 evidence to show potential problems and to show the problems
2 are solvable. Norvell v. Portland Area LGBC, 43 Or App 849
3 (1979); Van Volkinburg v. Marion County, 2 Or LUBA 112 (1980);
4 Miller v. Portland, 2 Or LUBA 363 (1981). This showing has
5 been made here by evidence in the record and conditions placed
6 on the preliminary approval. See Lane Code provisions
7 controlling PUD preliminary and final approval at Section
8 10.700-505 to 10.700-615.

9 The fourth assignment of error is denied.

10 FIFTH ASSIGNMENT OF ERROR

11 "VIOLATION OF GOAL SEVEN OCCURRED BECAUSE THE
12 FINDING OF COMPLIANCE IS NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE."

13 Petitioners here argue that evidence from the applicant's
14 witnesses and the opponents' testimony establish that the land
15 is subject to extensive erosion hazard.⁹ Petitioners claim
16 that the applicant's landscaping plans consisting of leaving as
17 much of the surface as possible in native vegetation will not
18 reduce this erosion factor. Construction of roadways and
19 houses will increase erosion, according to petitioners.
20 Petitioners also cite evidence in the record to support their
21 view that sewage disposal will result in additional runoff as
22 there is no place for water from drain fields to permeate into
23 the ground. Petitioners view the applicant's plan for
24 retention basins to be incomplete as it is not completely
25 formulated.

26 Respondents characterized the fifth assignment of error as

1 one of substantial evidence and not interpretation or
2 application of the goal. Respondents point out that the only
3 evidence question presented is one of erosion control.
4 Respondents point to an engineering report stating that 94-95%
5 of the site will remain in its undisturbed natural state and
6 improvements will be made at culvert inlets to minimize
7 erosion. Further, cut and fill will be seeded to minimize
8 erosion and detention basins will act as holding ponds. Also,
9 the Soil Conservation Service materials cited in the record
10 provide methods to minimize erosion control, and those
11 suggestions are made conditions by operation of the county's
12 order. Respondents conclude that the evidence in the record
13 together with the county's conditions "supply substantial
14 evidence for the county's conclusion that the product will have
15 the appropriate safeguards for the erosion hazard." Brief of
16 Respondent at 36.

17 In part, the county's findings about erosion are as follows:

18 "The SCS soils materials and the geologists report
19 demonstrate that the property consists of soils that
20 are free from landslide and weak foundation soil
21 hazards. Erosion will be controlled better than in
22 the past by the landscaping protections and
23 architectural review procedures and standards for the
24 P.U.D., as previously outlined. Ground water will be
25 protected by regulation of septic field construction
26 and location, by retaining vegetation, by eliminating
livestock wastes, and the other measures provided.
See engineer's report. The area is not in an
earthquake zone. The applicable water quality plan
foresees no hazards (engineer's report). The area is
well out of the floodplain and is not subject to
stream flooding.

1 "Finding: For the reasons stated above and based
2 upon the facts set forth by the Applicant and his
3 consultants, the Commission finds that the plan for
4 the subject property has been based upon known areas
5 of natural disasters and hazard, that the development
6 is keyed to the degree of hazard present, and that the
7 development will not be subject to such hazards if
8 executed pursuant to the requirements and conditions
9 of the PUD ordinance." Record/Findings 45-46.

6 "The SCS materials contain specific recommendations
7 for safe use of each of the site's soils for
8 construction purposes. Those recommendations will be
9 binding standards for construction of all improvements
10 on the site. There is no evidence of all improvements
11 on the site. There is no evidence that such measures
12 will be inadequate to protect against increased
13 erosion." Record/Findings 114

10 "The description and depiction of soil types contained
11 in Exhibit Q, consisting of a summary spread sheet, a
12 photo-map, SCS soil descriptions (narrative and OR-1),
13 and 'Subdivision or Urban Development,' are approved,
14 adopted and incorporated herein by reference."
15 Record/Findings 114.

14 Under the county's PUD ordinance, the preliminary PUD
15 approval stage serves to identify problems and develop
16 solutions that will reasonably assure proper resolution of the
17 identified problems. As we read the PUD ordinance, precise
18 solutions and plans are not required until the next step, the
19 final planned unit stage. We view the county's efforts under
20 the present stage to be sufficient and to be well supported.
21 The county is entitled to believe experts that tell the county,
22 based on their experience, that the identified problems are
23 solvable by the methods suggested to the county commissioners.
24 It is correct that there is other evidence in the record
25 suggesting that the difficulties are more severe than believed
26 to be so by the county, but the county is entitled to make a

1 decision given this conflicting evidence. In this case, it is
2 not a question of bald opinion against hard fact, but a matter
3 of facts on both sides of the erosion issue. In such a case,
4 the county is entitled to choose between different sets of
5 facts and conclusions. Christian Retreat Center v. Board of
6 Comm. for Wash. Co., 28 Or App 673, 560 P2d 1100, rev den
7 (1977); Sane Orderly Development v. Douglas County Bd. of
8 Comm'rs, 2 Or LUBA 196 (1981); Stringer v Polk County, 1 Or
9 LUBA 104 (1980).

10 The fifth assignment of error is denied.

11 SIXTH ASSIGNMENT OF ERROR

12 "VIOLATION OF GOAL TEN OCCURRED BY OMISSION OF
13 FINDINGS OF NEED FOR RESIDENTIAL DEVELOPMENT OUTSIDE
THE URBAN GROWTH BOUNDARY."

14 Under this assignment of error, petitioners state that Goal
15 10 requires residential development to be accommodated "as much
16 as possible within the urban growth boundaries." Petition for
17 Review at 36. Petitioners cite Still v Board of County
18 Commissioners, 42 Or App 115, ___ P2d ___ (1979) for the
19 proposition that a determination of whether land is needed for
20 residences "should be made in accordance with Goal 10, which
21 mandates that local governments should designate sufficient
22 suitable land within the urban growth boundaries to meet
23 residential needs." Petitioners fault the county board for
24 citing no evidence to show that there is not presently
25 sufficient land within urban growth boundaries for residential
26 developments.

1 Respondents assert that Goal 10 has never been interpreted
2 to limit housing availability outside urban growth boundaries.
3 Goal 10 requires provision for "the housing needs of the
4 citizens of the state." The goal provides that

5 "[b]uildable lands for residential use shall be
6 inventoried and plans shall encourage the availability
7 of adequate numbers of housing units at price ranges
8 and rent levels which are commensurate with the
9 financial capabilities of Oregon households and allow
10 for flexibility of housing location, type and density.

11 "Buildable Lands - refers to lands in urban and
12 urbanizable areas that are suitable, available and
13 necessary for residential use.

14 "Household - refers to one or more persons
15 occupying a single housing unit."

16 There is nothing in the goal that limits rural residential
17 housing. The limitation on rural residential housing and on
18 development outside urban growth boundaries is found through
19 interpretation of Goals 14, 3, 4, and 5. We do not view Goal
20 10 itself to prohibit developments of the kind on review here
21 outside urban growth boundaries.

22 The sixth assignment of error is denied.

23 The herein challenged land use decisions of Lane County are
24 sustained.
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FOOTNOTES

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The Fish and Wildlife Service defines peripheral deer range as follows:

"Foothill areas of the county generally located between commercial forest lands and valley floors. These lands support substantial big game populations and serve as a wintering area for animals from major range in severe winters. However, conflicts exist between big game and other uses. These existing conflicts limit management options and recreational opportunities." Record/Findings 70.

2

Goal 3 defines agricultural lands as:

"In western Oregon is land of predominantly Class I, II, III and IV soils and in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event.

"More detailed soil data to define agricultural land may be utilized by local governments if such data permits achievement of this goal."

3

Respondents support their position on the duty of the Board and on the defects in last minute rulemaking in case by case goal clarification with citations to the history of Goal 3.

4

ORS 215.203 defines "farm use" as

1 "the current employment of land for the primary
2 purpose of obtaining a profit in money by raising,
3 harvesting and selling crops or by the feeding,
4 breeding, management and sale of, or the produce of,
5 livestock, poultry, fur-bearing animals or honeybees
6 or for dairying and the sale of dairy products or any
7 other agricultural or horticultural use or animal
8 husbandry or any combination thereof. 'Farm use'
includes the preparation and storage of the products
raised on such land for man's use and animal use and
disposal by marketing or otherwise. It does not
include the use of land subject to the provisions of
ORS chapter 321, except land used exclusively for
growing cultured Christmas trees as defined in
subsection (3) of this section."

9
10 5

11 Notwithstanding this finding, the county does address the
12 matter of watershed protection and habitat. In the findings
13 addressing Goal 5, the county states:

14 "Water areas, wetlands, watersheds and groundwater
15 resources. The project includes no bodies of water,
16 named creeks, or important groundwater resources. It
17 is part of the overall watershed of the McKenzie
18 River, and drains across properties below into the
McKenzie.

19 "The applicant's planners and engineers have designed
20 the drainage and road system to assure that there will
21 be minimal impact, and a probable lessening of
22 impact, on the properties and waters below. See
23 report, maps, diagrams, and specifications. Exhibits
24 Y, Z, AA."

25 We believe we may look anywhere in the findings document
26 for findings about Goal 4 (or any relevant matter). Placement
of the findings by heading is not important. See Sunnyside
Neighborhood League v Clackamas County Commissioners, 280 Or 3,
569 P2d 1063 (1977); Lee v City of Portland, 3 Or LUBA 31
(1981).

27
28 6

29 See Springfield Ed Assoc. v. School Dist., 290 Or 217, 621
30 P2d 547 (1980); Theland v. Mult. Co., _____ Or LUBA _____ (LUBA
31 No. 81-081, 1981) for a discussion of how such terms may be
32 interpreted.

Goal 5: "To conserve open space and protect natural and scenic resources.

"Programs shall be provided that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character. The location, quality and quantity of the following resources shall be inventoried:

- "a. Land needed or desirable for open space;
- "b. Mineral and aggregate resources;
- "c. Energy sources;
- "d. Fish and wildlife areas and habitats;
- "e. Ecologically and scientifically significant natural areas, including desert areas;
- "f. Outstanding scenic views and sites;
- "g. Water areas, wetlands, watersheds and groundwater resources;
- "h. Wilderness areas;
- "i. Historic areas, sites, structures and objects;
- "j. Cultural areas;
- "k. Potential and approved Oregon recreation trails;
- "l. Potential and approved federal wild and scenic waterways and state scenic waters.

"Where no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character. Where conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."

Petitioners recite other concerns about future urban development in the area and concerns discussed elsewhere on fish and wildlife habitat. We do not understand petitioners to be attacking the development under the provisions of Goal 14, and we do not view the concern expressed on page 33 of the Petition for Review to be sufficiently developed for us to rule on it. As stated, it appears to be more a comment rather than an argument on the urbanization of this area.

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Goal 7 states:

"Developments subject to damage or that could result in loss of life shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards. Plans shall be based on an inventory of known areas of natural disaster and hazard."

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

1
2
3 ELSIE OSBORNE, VINCENT)
ZAWODNY and ORENE SEAMAN,)
4 Petitioners,)
5 v.)
6 THE BOARD OF COUNTY)
7 COMMISSIONERS OF LANE)
COUNTY, et al.)
8 Respondents.)

LUBA NO. 81-107

PROPOSED OPINION
AND ORDER

9 Appeal from Lane County.

10 Roxie A. Merrell, Eugene, filed a petition for review and
11 argued the cause for petitioners.

12 Allen L. Johnson, Eugene, filed a brief and argued the
13 cause for Respondent Robert E. Thurmond. With him on the brief
were Lombard, Gardner, Honsowetz, Brewer & Schons.

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

15 Affirmed.

1/19/82

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

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

ELSIE OSBORNE, VINCENT)
ZAWODNY and IRENE SEAMAN,)
)
Petitioners,)
)
v.)
)
BOARD OF COUNTY COMMISSIONERS)
OF LANE COUNTY, et al,)
)
Respondents.)

LUBA No. 81-107

LCDC DETERMINATION

The Land Conservation and Development Commission hereby
approves the recommendation of the Land Use Board of Appeals in
LUBA case No. 81-107.

Dated this 17th day of March, 1982.

For the Commission:



James F. Ross, Director
Department of Land Conservation
and Development



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 2/23/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: OSBORNE V. LANE COUNTY
LUBA NO. 81-107

Enclosed is a replacement second assignment of error (Goal 4) in the Osborne, et al v. Lane County, et al case, LUBA No. 81-107. This new discussion begins on page 17 and ends on page 25. The changes involve inclusion of additional findings and review of an aerial photograph showing the subject property. We considered the findings and the aerial photograph in order to clarify for you the amount of property that has trees growing on it. Also, we corrected an error in the earlier opinion that incorrectly referenced a finding of the county's on tree cover when, in fact, it was a statement out of a forester's report. We also discuss watershed a bit more thoroughly.

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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STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 1/18/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: OSBORNE V. LANE COUNTY
LUBA NO. 81-107 and 81-107A

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

There are six assignments of error. Each assignment of error is about a goal violation, and in each case we find the county's findings are sufficient to show compliance with statewide planning goals.

The property does not contain class I-IV soil, and the allegation of error with respect to Goal 3 is that the property nonetheless is "other land" and needed for agricultural use or protection of adjacent agricultural land. We reject this assertion. Our view is that the county demonstrated that the property was, indeed, not suitable for farm use and was not needed to protect adjacent farmland.

The only other assignment of error in which we touch on goal policy issues in addition to the adequacy of the findings is in the sixth assignment of error. The petitioner has alleged a violation of Goal 10, and we conclude that there is no prohibition in Goal 10 against building residences outside of urban growth boundaries. If such activity is contrary to the goals, it is contrary to goals other than Goal 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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1 four-for-the-price-of-one-sales." A conference call was held
2 on 10/25/81 to discuss the matter.¹

3 Petitioners reply that the respondent's motion to dismiss
4 was not timely filed. 'Petitioner cites LUBA Rule 14(B)
5 limiting a party to ten days in which to challenge the failure
6 of an adverse party to comply with any of the requirements of
7 statute or Board rule. In this case, more than 10 days elapsed
8 between the time of service of the notice of intent to appeal
9 and the filing of the motion to dismiss.

10 A challenge to the Board's authority to act may be brought
11 at any time and is not subject to the ten day requirement in
12 LUBA Rule 14(B). See Grant County v. Oregon Dep't. of Fish and
13 Wildlife, 1 Or LUBA 214 (1980). Here, respondent attacks the
14 notice of intent to appeal on what we understand to be
15 jurisdictional grounds. Respondent is not limited by Rule
16 14(B).

17 As to the matter of whether the notice of intent to appeal
18 designates a final order, petitioners respond that the oral
19 decisions made by the county were reduced to writing and bear
20 the signature of the governing body. Simply because of a
21 ministerial error, alleges petitioners, the date written on the
22 orders incorrectly appears as July 29, 1981. Petitioners
23 attach an affidavit of the secretary to the Board of
24 Commissioners, Teri Andreasen. Ms. Andreasen relates that the
25 county counsel had directed her to date the orders as of the
26 date of the county commissioners' hearing on the matter. That

1 hearing was August 19, not July 29.

2 Petitioners do not know, and claim not to be able to know,
3 the date the orders were actually signed. Respondent advises
4 that the signing must have been some time in September, and
5 Petitioners agree, but the date cannot be made certain. The
6 important fact is that at the time the notice of intent to
7 appeal was filed, there were no written orders signed by the
8 governing body. The date the orders were actually signed is
9 not known.

10 We do not believe the facts dictate dismissal of this case
11 on the grounds that no orders were signed and issued on August
12 19, 1981. It is unknown precisely when the orders were
13 prepared, and it is unknown when the orders were signed.
14 Nonetheless, the notice of intent to appeal was filed within 30
15 days of August 19, accurately recites the decisions made and
16 includes the dates that the orders purport to be effective
17 (August 19, 1981). Petitioners' counsel notes that she had to
18 either file by September 17 or risk having her appeal dismissed
19 for the reason it was not filed within 30 days of the date the
20 land use decision became final. Indeed, the county counsel
21 advises that the county's deed records show August 19 the date
22 the orders were entered; and we agree that petitioners, faced
23 with these circumstances, had little choice but to go ahead and
24 file the notice of intent to appeal.

25 As to the second grounds for dismissal, that the notice
26 does not designate a land use decision, petitioners state that

1 the two (remaining) land use decisions under review should be
2 considered as a single land use decision for the purposes of
3 review. The two decisions (1) provide for an initial zone
4 designation of PUD and allow a minor partition and (2) give a
5 preliminary approval of a proposed McKenzie Ridge PUD.

6 Petitioners say the testimony and evidence on both approvals
7 were combined at a single hearing, and one record exists for
8 both decisions. Petitioners urge that requiring the land use
9 decisions be separated and appealed separately would require
10 duplication of a lengthy record and incur unnecessary costs.
11 Further, even if the two decisions were considered to require
12 two separate appeals, there is no basis for a dismissal as
13 inclusion of both land use decisions was harmless error and
14 respondents are not prejudiced by this error.

15 Oregon Laws 1979, ch 772, sec 4(4), as amended, provides
16 that a notice of intent to appeal a land use decision must be
17 filed within a prescribed time "and shall be accompanied by a
18 filing fee of \$50 and a deposit for costs to be established by
19 the board" (the deposit is \$150). The provision does not talk
20 about "decisions" but requires "a notice of intent to appeal a
21 land use decision shall be filed * * * *" (Emphasis added).
22 Further, as respondent notes, section 4(2) requires that a
23 person who has filed a notice of intent to appeal "may petition
24 the Board for review of that decision * * * *" There is
25 nothing in the statute that suggests that a petitioner may file
26 one notice of intent to appeal listing several decisions,

1 submit one filing fee and thereby be able to appeal several
2 separate decisions.

3 It is not contested that there were two separate decisions
4 made by Lane County. It is the Board's view that each of those
5 decisions should have been appealed by filing a notice of
6 intent to appeal each decision and by including with that
7 filing the appropriate deposit for costs and filing fee. The
8 fact that a common record exists for all land use decisions
9 made by the county on that date is not determinative. The
10 record certainly may be combined for the purposes of handling
11 several appeals, and unused portions of the petitioners'
12 deposit for costs may be returned to them at the close of the
13 proceeding. See Oregon Laws 1979, ch 772, sec 4(9). The Board
14 is of the view that this error is grounds for dismissal, but we
15 decline to dismiss the case.

16 As noted above, the one notice of intent to appeal
17 accurately describes the local decisions petitioners seek to
18 appeal. The respondent certainly was in no doubt as to what
19 decision or decisions are challenged. We believe to dismiss
20 the case because separate notices were not filed is not
21 required by the statute and would serve no purpose. The notice
22 of intent to appeal in this case did what the law designed it
23 to do, it notified the respondent of the decision to be
24 reviewed. Atwood v. Portland, ____ Or LUBA ____ (LUBA No.
25 81-158, 1981). We believe, in this case, that this statute
26 controlling land use appeals should be liberally construed to

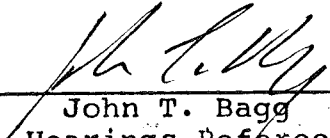
1 effect its purposes. See 3 Sands Sutherland, Statutory
2 Construction, sec 67.08 (4th ed, 1974).

3 With respect to the matter of the filing fees, we note that
4 before 1963, judicial opinion in this state was that where a
5 notice of appeal had to be accompanied by a filing fee, failure
6 to pay the fee resulted in the court having no jurisdiction.
7 The Supreme Court in Critron v. Hazeltine, 227 Or 330, 261 P2d
8 1011 (1961) stated that the payment of the fee was "the act
9 required to be done, but which the appellant failed to do
10 within the prescribed time" and dismissed the case. 227 Or at
11 333. However, in U. S. National Bank v. Lloyd's, 239 Or 298,
12 382 P2d 851, 396 P2d 765 (1963), the court overruled the
13 Critron case. The court said that when a filing fee is
14 required and the county clerk accepts the document for filing,
15 a filing has occurred. The case may not then be dismissed for
16 failure to pay the fee along with the filing of the document.
17 We read this case to suggest to us that the Board would be
18 viewed as being "overly technical" were it to dismiss this case
19 without giving the opportunity to petitioners to file the
20 additional required filing fee (as there is now only one other
21 case on appeal). See Hilliard v. Lane County, 51 Or App 587,
22 626 P2d 905 (1980).

23 Petitioners shall have ten days within which to file an
24 additional filing fee and deposit for costs in order to appeal
25 the second of the two land use decisions remaining. If the
26 //

1 petitioners fail to make the required payment within ten days,
2 this case and all of it will be dismissed.²

3 Dated this 18th day of November, 1981.

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6 _____
7 John T. Bagg
8 Hearings Referee
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FOOTNOTES

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As a result of the conference call, two of the four land use decisions listed in paragraph I of the notice of intent to appeal were dismissed by stipulation. They are

the order approving the application of R. E. Thurmond for a land partition (m 284-80);

the order approving the zoning of Tax Lot 123 General Rural (ZC 78-418).

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The required payment was made before this order was signed.