

JUN 3 11 36 AM '82

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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)

Petitioner,)

v.)

LINCOLN COUNTY BOARD)
OF COMMISSIONERS,)

Respondent.)

JOE JOHNSON and MARY JOHNSON,)

Participants.)

LUBA NO. 81-137

FINAL OPINION
AND ORDER

Appeal from Lincoln County.

Mary Diets
Assistant Attorney General
100 State Office Bldg.
Salem, OR 97310

Dennis Bartoldus
Attorney at Law
PO Box 1270
Newport, OR 97365

Nancy Craven
County Counsel
County Courthouse
Room 201
225 West Olive
Newport, OR 97365

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

Dismissed.

6/03/82

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 Participants Joe and Mary Johnson move to dismiss the above
3 entitled action. The decision on appeal gives tentative
4 approval for a seven lot subdivision on a 39-acre parcel of
5 land in Lincoln County. The subdivision is called the Ollala
6 Ridge Subdivision.

7 Participants give three reasons why the Board should
8 dismiss the appeal.

9 "1. The DLCD appeal from the Lincoln County
10 Planning Commission to the Lincoln County Board of
11 Commissioners was not timely filed after the Planning
12 Commission granted approval to the subdivision.

13 "2. The appeal by DLCD was not timely filed
14 because the zoning to RR-5 took place on May 6, 1981.

15 "3. DLCD has no authority or standing to appeal
16 a decision of the Planning Commission to the County
17 Commission nor does it have authority or standing to
18 appeal the decision of the County Commissioners to
19 LUBA. Furthermore DLCD did not appear before the
20 Planning Commission and therefore lacks standing to
21 appeal or participate."

22 In support of the first reason for dismissal, participants
23 claim the decision of the planning commission was made and
24 finalized on July 13, 1981, and DLCD did not file an appeal
25 with the county board until August 17. Participants say the
26 Lincoln County Subdivision Ordinance Section 8(a)(1) requires
that an appeal from the planning commission to the county board
must be filed within 30 days of the planning commission
decision. We note the July 13 action was a motion and vote of
the planning commission with no written findings and order. As
a condition of approval, the applicants had to file certain

1 information in writing. The writings were submitted and an
2 order with findings was signed on July 27, 1981.¹

3 Participants say "it has been a long established practice
4 of the planning commission that they do not formally adopt
5 written findings." Participants claim that review of planning
6 commission decisions over the past several years shows it is
7 the formal motion to approve a subdivision that is considered
8 final approval from which appeal time runs. But see 1000
9 Friends v. Clackamas County, 3 Or LUBA 203 (1981); Bryant v.
10 Clackamas County, 56 Or App 442 (1982).²

11 In support of participants' second reason for dismissal,
12 participants advise the action rezoning the property to rural
13 residential 5 (RR5) was taken by the Board of Commissioners in
14 May of 1981. Participants say DLCD received the same notice of
15 the changes as other citizens in Lincoln County, and DLCD did
16 not appear to contest the zone change. Participants state that
17 the only action of the planning commission on July 13 was to
18 approve a particular subdivision for that property, not change
19 the zone. Therefore, any challenge to the subdivision based on
20 compliance with statewide goals addressed at the zone change
21 proceeding is not timely, according to participants.

22 In support of their third ground for dismissal,
23 participants argue that DLCD lacks standing to appeal the
24 decision for two reasons. First, DLCD has no statutory
25 authority to appeal; and secondly, even if such authority
26 existed, there is no issue here which affects DLCD. That is,

1 DLCD is not "adversely affected" within the meaning of Oregon
2 Laws 1979, ch 772, sec ____ as amended in Oregon Laws 1981, ch
3 748, sec _____. In support of its view, participants cite the
4 duties of the director of DLCD in ORS 197.090 and argues that
5 nothing in the statute gives DLCD the authority to appeal a
6 local land use decision. Further, nowhere in the statutes is
7 there any indication of a legislative intent to allow DLCD to
8 police local land use decisions in particular cases.

9 Subsequent to the first motion to dismiss, the Court of
10 Appeals in Ochoco Construction v. DLCD and Crook County Board
11 of Commissioners, 56 Or App 32, ____ P2d ____ (1982) held that
12 DLCD has no authority to appeal the decision of a local
13 governing body. In a later memorandum, participants state that
14 the court pointed out that DLCD is an agency of the state whose
15 authority "extends as far as the statute extends, and no
16 further." Ochoco, supra at 40 citing Board of Commissioners of
17 Clackamas County v. LCDC, 35 Or App 725, 732, 582 P2d 59
18 (1978); Hawkins v. Bd. of Medical Examiners, 23 Or App 320,
19 322, 54 P2d 152 (1975). Although the Ochoco decision involved
20 an alleged violation of an acknowledged comprehensive plan (the
21 Crook County Comprehensive Plan), participants argue that
22 DLCD's authority to appeal a decision to the Land Use Board is
23 the same whether the land use decision under review was taken
24 under an acknowledged comprehensive plan or an unacknowledged
25 plan. Participants note the legislature did grant DLCD the
26 power to issue enforcement orders in case satisfactory progress

1 was not being made toward compliance. DLCD has issued no such
2 enforcement order in Lincoln County. The legislature has
3 provided for certain remedies, and it is clear that the
4 legislature did not intend the department to invent its own
5 remedies, according to participants.

6 Participants also urge DLCD is not affected by the decision
7 because the decision has no statewide impact. We understand
8 participants to argue that a subdivision approval is a local
9 matter, and DLCD's interest in local matters is limited to
10 whether the local jurisdiction is making "satisfactory progress"
11 toward a comprehensive plan. See ORS 197.320.

12 Petitioners respond to the first of participants' grounds
13 for dismissal by stating that DLCD did comply with Lincoln
14 County Subdivision Ordinance Section VIII regarding the time to
15 appeal. Section VIII of the Lincoln County Subdivision
16 Ordinance requires an appeal to be filed within 30 days of the
17 date of the planning commission decision. On July 13, 1981,
18 the planning commission approved the motion to grant approval
19 to the subdivision with conditions. One of the conditions
20 required that findings of fact be presented by applicant's
21 counsel along with certain other matters at the July 27
22 meeting. At that meeting, the findings of fact and conclusions
23 of law were signed by the planning commission. DLCD argues
24 that Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973)
25 requires findings of fact and Heilman v. City of Roseburg, 39
26 Or App 71, 591 P2d 390 (1979) requires that the determination

1 of facts be preliminary to the decision. The decision, then,
2 could not legally occur before July 27, 1981.

3 We agree with the petitioners. See Bryant v. Clackamas
4 County, supra, and Urban Resources v. Portland, ___ Or
5 LUBA ___ (LUBA NO. 81-132, 1982).

6 As to the second reason advanced for dismissal, petitioners
7 state that Woodcock v. LCDC, 51 Or App 577, 626 P2d 901 (1981)
8 controls. In the Woodcock case, the Court of Appeals held that
9 until a comprehensive plan has been acknowledged, decisions
10 relying on the plan (including exceptions) are subject to
11 challenge.

12 We agree with the petitioners. Our review of a specific
13 subdivision application, whether or not grounded in an earlier
14 zone change, may include all bases for the decision. That is,
15 prior to acknowledgment, we will consider the adequacy of any
16 decision against all applicable criteria including statewide
17 land use planning goals. We will not presume that a local
18 ordinance is in compliance with the goals and that a decision
19 made under that ordinance is immune from a goal challenge.

20 As to the third of participants' reasons for dismissal,
21 DLCD cites DLCD v. Crook County, 2 Or LUBA 269 (1981) for the
22 proposition that DLCD has authority and standing to appeal
23 local land use decisions and argues that the Ochoco
24 Construction case is distinguishable from the present
25 controversy.³

26 The action in Ochoco was taken under an acknowledged

1 comprehensive plan. DLCD says that the court viewed
2 implementation of an acknowledged plan as a local aspect of
3 land use planning. However, DLCD points out that prior to
4 acknowledgment, local governments must apply statewide planning
5 goals in making decisions. Application of statewide goals is a
6 matter of statewide concern, and "application of the goals by a
7 local government prior to acknowledgment involves more than the
8 performance of local aspects of land use planning." ORS
9 197.005(1) clearly sets out a purpose to insure coordinated
10 statewide planning, and the petitioner posits that the
11 Legislature intended DLCD to have authority to appeal local
12 decisions which do not adequately apply statewide goals.

13 DLCD also states that it was not until 1981 that ORS
14 197.175(2) was amended that local governments were required by
15 statute to make decisions in compliance with statewide
16 goals.⁴ There is now "a specific statutory duty to apply the
17 goals to land use decisions made prior to acknowledgment." The
18 purpose of ORS Chapter 197, to achieve coordinated land use
19 planning, along with the general duty of LCDC to perform "other
20 functions" required to carry out the purposes of ORS Chapter
21 197, supports the conclusion that the Department does have
22 authority to seek review of local land use decisions made prior
23 to acknowledgment, according to DLCD.

24 Lastly, DLCD posits that the power of DLCD to appear before
25 local governments must necessarily be implied in order for the
26 1981 Legislative Amendments to work. Under ORS 197.605 to 630,

1 DLCD may appeal local decisions to the commission in certain
2 limited circumstances.⁵ A prerequisite for any person to
3 appeal to the commission is appearance in the local government
4 proceedings leading to the decision. No statutory authority
5 exists for DLCD to make such appearance, and the power to
6 appear must necessarily be implied if it is to exist at all.
7 As we understand the argument, an implied power to appeal local
8 land use decisions made prior to acknowledgment may also be
9 seen when one considers the purposes of DLCD and the whole of
10 Chapter 197. In other words, implied powers must exist if the
11 purposes of ORS Chapter 197 are to be fulfilled. These implied
12 powers exist to enable DLCD to appeal local land use decisions
13 made prior to acknowledgment.

14 We believe Ochoco, supra, controls. The Court of Appeals
15 decided the Ochoco case on the basis of DLCD powers under ORS
16 Chapter 197. In its decision, the court reviewed the statutory
17 responsibilities given to the commission and stated

18 "* * * land use decisions are to be made at a local
19 level, subject only to the duties expressly delegated
to the statewide planning agency.

20 "We begin, therefore, with the premise that the
21 legislature intended local governments to perform the
22 local aspects of land use planning in this state. The
23 Department's role is an exception to the general
24 rule. Because it is an exception, it is limited to
25 the duties and powers expressly or by necessary
26 implication vested in the Department by the
legislature. See Morrison v. School Dist. No. 48,
Wash. Co., 53 Or App 148, 152, 631 P2d 784, 788
(1981)." Ochoco, 56 Or App at 40-41.

1 The court stated that LCDC's planning duties are to establish
2 statewide goals, review comprehensive plans, and consider goal
3 issues arising out of cases before the Land Use Board of
4 Appeals. The court found no express authorization for the
5 Department to contest land use decisions made by local
6 governments after LCDC has acknowledged the government's
7 comprehensive plan.

8 The Court added that DLCD's authority to appear before the
9 Land Use Board "depends on its authority to appear before a
10 local governing body in the first place. The Court found that
11 there is no authority to so appear in the Department's "own
12 organic statute," and Oregon Laws 1979, ch 772, sec 4(3) does
13 not help. In other words, the Court of Appeals concluded that
14 there is no statutory authority allowing DLCD to appear and
15 contest land use decisions made after acknowledgment of local
16 land use plans.

17 The Court was also unwilling to find any implied powers
18 that would enable DLCD to appeal post-acknowledgment land use
19 decisions.

20 "Neither do we think the authority may be implied. In
21 light of the legislature's expressed preference for
22 local management of land use planning and its
23 circumscribed grants of authority to the Department
24 and LCDC, we think that if the legislature had
25 intended to convey such a significant power to the
Department, it would have specifically expressed its
intent to do so. See Board of Comm. of Clackamas
County v. LCDC, supra, 35 Or App at 730, 731.
Ochoco, 56 Or App at 42.

26 Indeed, the court in a footnote analyzes the legislature's

1 apparent intended role for DLCD in local decision-making.

2 "For instance, the legislature clearly stated its
3 intent to authorize both counties and the state to
4 bring civil actions enjoining persons and agencies
5 that fail to obtain permits for activities of
6 state-wide significance. See former ORS 197.410(3),
7 which has been amended by Or Laws 1981, ch 748, sec
8 13(2). Had it also intended to authorize the
9 Department to appeal local land use decisions, it
10 could have expressed that intent with equal clarity.
11 Moreover, the 1981 legislature expressly authorized
12 the Department's director to appeal to LCDC a local
13 government decision to adopt an amendment to an
14 acknowledged comprehensive plan or land use regulation
15 or a new land use regulation so long as the Department
16 'participated either orally or in writing in the local
17 government proceedings leading to the final opinion.'
18 See Or Laws 1981, ch 748, sec 5a(2). The absence of
19 an express authorization in 1979 for Department
20 appeals of local land use decisions strongly suggests
21 that the 1979 legislature did not intend to grant such
22 authority." Ibid.

23 In analyzing the "other duties" language in ORS 197.045(4)
24 and 197.090(4), the court said .

25 "We do not accept the argument that the
26 legislature intended to grant such a significant power
to the Department by such general terms. When the
legislature chose to authorize the Department to adopt
state-wide goals and to review local comprehensive
plans, it expressed that intent clearly. Had it also
intended to allow the Department to police local
implementation of comprehensive plans once they have
been acknowledged, we believe it would have so
provided with equal clarity." Ochoco, 56 Or App at 43.

27 The court concludes that DLCD is not without power to
28 control local government action.

29 "The Department greatly understates the extent of
30 control it was given over local government action. It
31 helps formulate the state-wide goals. It, through
32 LCDC, decides whether or not a given comprehensive
33 plan is in compliance with the state-wide goals. If
34 it becomes dissatisfied with the course of local
35 decisions, it can initiate a revision of the

1 state-wide goals. With legislative approval, it can
2 obtain designation of areas of critical state concern
3 and closely monitor the use of those areas. ORS
4 197.405. We hold that the land use statutory scheme
5 did not authorize the Department, either expressly or
6 by implication, to contest individual decisions of
7 local governments applying acknowledged comprehensive
8 plans." Ochoco, 56 Or App at 45.

6 We believe the Ochoco case stands for the proposition that
7 DLCD's power, if any, to appeal local government land use
8 decisions must be found expressly in statute. Where it is not
9 found, it may not be implied.⁷ This view applies equally to
10 decisions made prior to acknowledgment and those made after
11 acknowledgment. As there is no express authority to appeal
12 local decisions made after acknowledgment, and as there is no
13 express authority to appeal local decisions made before
14 acknowledgment, DLCD is without power to bring this proceeding.

15 . This case is dismissed.

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1

The record shows a letter sent by the planning director advising all interested parties that the decision would not become final until August 13, 1981.

2

Participants are mistaken as to the time of appeal. The Court of Appeals in Bryant v. Clackamas County, supra, clearly held the time for appeal is the time written notice is sent, and not the time of an oral motion and vote.

3

DLCD attaches its petition for review in the Supreme Court to a memorandum in opposition to the motion to dismiss. In the petition, DLCD argues that the Court of Appeal's decision was incorrect. DLCD argues that the intent of the Legislature was to insure coordinated planning within the state, and DLCD has the responsibility to require jurisdictions to carry out statutory requirements to adopt plans in conformance with the goals in a satisfactory and timely manner. In so doing, DLCD must work closely with local government. DLCD states that it is "difficult to believe that after so much money and effort has been spent on the adoption of plans and ordinances which comply with statewide planning goals, the Legislature would place on the individual citizens of the state, the entire burden and responsibility of making sure the local plans are properly implemented."

DLCD also asserts the court's opinion will create an untenable result when viewed in the light of amendments by the 1981 Legislature. Under the amendments, DLCD may now appeal local land use decisions, and a prerequisite to DLCD's appeal is that DLCD must have appeared orally in writing before the local government. There is no express authority for such appearance.

"* * * However, as with the statutes in the present case, there is no express statutory authority to appear before local governments. Certainly, it was the intent of the legislature to allow DLCD to appear before local governing bodies. Consequently, the authority to appear before local governments must be implied. Unless such authority is implied, the statutory scheme is not workable. Petitioner believes the same rationale applies to the present case. In order to make the statutory scheme workable, the

1 authority for DLCD to appear before local governments
must be implied."

2 DLCD argues that local governments may indeed consider,
3 promote and manage all local aspects of land use planning, but
4 local government action must not be inconsistent with statewide
5 planning goals. We understand DLCD to believe that DLCD is
6 responsible, at least in part, for insuring such consistency.
7 DLCD also claims that DLCD and local governments have different
functions, and neither role is to be an exception to the
other. DLCD argues that the statutes should be broadly
construed to effectuate the purpose of coordinated land use
planning within the state.

8 This Board is not in a position to declare the Court of
9 Appeals' opinion incorrect or erroneous in any part. We must
10 assume the court's decision is correct until advised otherwise
11 by the Supreme Court. Our job, then, is to determine whether
12 the Court of Appeals' decision as to DLCD appeal of actions
13 under acknowledged comprehensive plans applies equally to DLCD
14 appeal of local government actions under unacknowledged
15 comprehensive plans.

13 4
14 Petitioner refers to ORS 197.175(2)(c) which states
15 "Except as provided in ORS 197.605(6), if its
16 comprehensive plan and land use regulations have not
been acknowledged by the commission, make land use
decisions in compliance with the goals".

17 Before this enactment, the only statutory direction to local
18 governments to make decisions in accordance with the goals
existed in ORS 197.175(1)

19 "cities and counties shall exercise their planning and
20 zoning responsibilities * * * in accordance with ORS
21 197.005 to 197.430 and 197.605 to 197.650 and the
goals * * * *"

22 5
23 The circumstances are amendments to acknowledged plans or
24 land use regulations or the adoption of new land use
regulations.

25 6
26 The court notes that the 1981 Legislature expressly
authorized the Director of DLCD to appeal to LCDC a local

1 government decision to adopt an amendment to an acknowledged
2 comprehensive plan or a land use regulation or a new land use
3 regulation. The Department must have participated orally or in
4 writing in the local government proceedings. The court states
5 that the "absence of an express authorization in 1979 for
6 Department appeals of local land use decision strongly suggests
7 that the 1979 Legislature did not intend to grant such
8 authority."

7 We recognize that sometimes powers must be implied in order
8 to effectuate a stated legislative purpose. For example, where
9 DLCD now has the power to appeal certain local decisions under
10 ORS 197.605 to 197.630, its power to make an "appearance" (if
11 necessary) before the local governing body to exercise the
12 appeal right may be implied.