

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

DEC 27 10 01 AM '82

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2
3 EARL C. MOORE,)
MARNA L. MOORE,)
4) Petitioners,)
5) vs.)
6 CLACKAMAS COUNTY,)
7) Respondent.)
8

LUBA No. 82-073
FINAL OPINION
AND ORDER

9 Appeal from Clackamas County.

10 Earl C. and Marna L. Moore, Milwaukie, filed the Petition
for Review and argued the cause on their own behalf.

11 Jon S. Henricksen, Gladstone, filed the brief and argued
12 the cause on behalf of Respondent Participant Jennifer Harding.

13 No appearance by Clackamas County.

14 BAGG, Board Member; COX, Board Member; participated in this
15 decision.

16 REMANDED

12/27/82

17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.
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1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal Clackamas County's approval of a
4 conditional use and wetland application to construct a parking
5 lot adjacent to and for the use of a racquetball facility in
6 Clackamas County.

7 FACTS

8 The property is located on the southside of Boardman Avenue
9 approximately 300 feet east of its intersection with McLoughlin
10 Boulevard in the Jennings Lodge area of Clackamas County. The
11 property is about 3.2 acres big and is zoned R-7, single-family
12 residential with a 7,000 square foot minimum lot size. The
13 area is developed with a mixture of single-family residential,
14 multi-family residential, commercial and open space uses. A
15 drainage channel runs through the property, and the property is
16 classified as a wetland and designated as high priority open
17 space in the county plan. Standing water is found on the
18 property during various times of the year. Property to the
19 southeast of the subject property is designated as a resource
20 protection area.

21 In 1976, a racquetball court was constructed immediately
22 west of the subject property. In October 1980, the owner of
23 the racquetball facility, the applicant herein, applied to
24 Clackamas County to construct an off-street parking lot within
25 the wetland area. That application was postponed, but in
26 February of 1981, the applicant obtained approval to add a

1 swimming pool to the facility. As part of the approval of the
2 swimming pool, the applicant obtained approval to decrease the
3 number of ordinance required parking places.

4 In November of 1981, the applicant again made application
5 to construct additional off-street parking. The hearings
6 officer denied the applicant's request and an appeal to the
7 board of county commissioners followed. On July 27, 1982 the
8 commissioners entered an order overruling the hearings officer
9 and approving the request.

10 The county found that Section 301.05(A)(16) of its zoning
11 ordinance would allow off-street parking associated with this
12 commercial use if the proposal satisfies the criteria under
13 Section 1203 of the zoning ordinance. Section 1203 provides
14 five criteria for approval. The criteria are:

15 "The Hearings Officer may allow a conditional use,
16 after a hearing conducted pursuant to Section 1300,
17 provided that the applicant provides evidence
18 substantiating that all the requirements of this
19 Ordinance relative to the proposed use are satisfied,
20 and demonstrates that the proposed use also satisfies
21 the following criteria:

19 "A. The use is listed as a conditional use in the
20 underlying district.

20 "B. The characteristics of the site are suitable for
21 the proposed use considering size, shape,
22 location, topography, existence of improvements
23 and natural features.

23 "C. The site and proposed development is timely,
24 considering the adequacy of transportation
25 systems, public facilities and services existing
26 or planned for the area affected by the use.

25 "D. The proposed use will not alter the character of
26 the surrounding area in a manner which

1 substantially limits, impairs, or precludes the
2 use of surrounding properties for the primary
uses listed in the underlying district.

3 "E. The proposal satisfies the goals and policies of
4 the Comprehensive Plan which apply to the
proposed use."

5 The county also found that this particular application was
6 subject to Section 1011 of the zoning and development ordinance
7 because the subject property is in a wetland. Section
8 1011.02(A)(5) provides that wetlands are subject to
9 requirements as designated open space resources, and Section
10 1011.02(B)(1)(f) provides that wetlands are high priority open
11 spaces. Section 1011.03(B) provides that high priority open
12 space is to be preserved outright except that some commercial
13 or industrial developments may be allowed subject to provisions
14 of Section 1011.04. Section 1011.04 lists a number of criteria
15 that must be met before any development may occur. The
16 relevant criteria are:

17 "High priority open space wetlands and Significant
18 Natural Areas shall not be disturbed unless approved
19 by the Hearings Officer, pursuant to subsection 1300,
20 for a specific commercial or industrial development
21 plan. Approval shall not be granted unless the
applicant demonstrates that the following social,
economic, energy and appropriate environmental
considerations are addressed and satisfied:

22 "A. Social: The proposed development would not
23 result in the loss of a rare, irretrievable or
24 irreplaceable natural feature or scientific
25 opportunity, or the disturbance of a
26 substantially unaltered natural feature or area
in or adjacent to the proposed site, unless the
benefit to the public from the proposed use
clearly outweighs the public good from retaining
the feature or area.

1 "B. Economic:

2 "1. The wetland or Significant Natural Area must
3 be disturbed for reasonable use of the site
4 and, if not disturbed, the applicant would
5 be substantially damaged.

6 "2. The use proposed is a benefit to the
7 community and meets a substantial public
8 need or provides for a public good which
9 clearly outweighs retention of the wetland
10 or Significant Natural Area.

11 "Energy:

12 "1. Disturbance of the open space will not
13 require public costs, including maintenance,
14 due to secondary impacts, or exacerbate
15 existing conditions.

16 "2. The development, as proposed, supports the
17 Comprehensive Plan policies for energy
18 efficient land use considering such things
19 as transportation costs, efficient
20 utilization of urban services, area
21 self-sufficiency, and retention of natural
22 features which create micro-climates
23 conducive to energy efficiency.

24 "D. Environmental: Disturbance of the wetland or
25 Significant Natural Area is minimized, as
26 provided under subsection 1011.030 and the review
process and conditions of development pursuant to
Section 1103, and the following specific
conditions applying to wetlands or Significant
Natural Areas are satisfied:

"1. Wetlands:

"a. The wetland can be altered without
substantial adverse impact upon the
character of the area, and function of
the wetland.

"b. The wetland does not support rare or
endangered species.

"c. Elimination, alteration or relocation
does not significantly alter water
movement, including normal levels or

1 rates of runoff into and from wetlands.

2 "d. The proposed use or alteration of the
3 wetland is approved by the U.S. Army
4 Corps of Engineers and the Division of
5 State Lands.

6 ASSIGNMENT OF ERROR NO. 1

7 "Respondent Violated the Clackamas County
8 Comprehensive Plan by Authorizing fill in a Floodplain
9 and Floodway."

10 Petitioners claim the Clackamas County Comprehensive Plan
11 prohibits fill in floodways and the floodplains of small
12 streams. Petitioners allege that the subject property is more
13 than just a wetland, it is within a floodplain and is part of a
14 water course that empties into the Willamette River.

15 Petitioners cite Section 11.0 et sec, "Open Space and
16 Floodplains" in the county's land use element of its
17 comprehensive plan for the proposition that no fill is allowed.

18 Respondent does not deny the property is in a floodplain or
19 in a floodway. Respondent denies the construction of the
20 parking lot will involve a fill. Respondent further states the
21 comprehensive plan does not prohibit fill.

22 As we read Section 11.0 of the land use element of the
23 comprehensive plan, there does not appear an absolute
24 prohibition on fill or development. Fill and development is
25 restricted "to ensure that danger to life and property will not
26 result."¹ The first assignment of error is denied.

1 ASSIGNMENTS OF ERROR NO. 2 and 3

2 1. Assignment of Error No. 2.

3 "Respondent Violated Section 1203 (B) of its
4 Zoning Ordinance by Failing to Apply it properly
5 to the Facts and Because the Site is not
6 Suitable."

7 2. Assignment of Error No. 3.

8 "Respondent Violated Section 1203 (D) of its
9 Zoning Ordinance Because Respondent Failed to
10 Make the Required Finding and Because the Facts
11 Do Not Support Such Finding."

12 Petitioners argue that respondent failed to consider the
13 size, shape, topography and natural features of the property as
14 required by Section 1203(B) of its ordinance. Also, the county
15 did not address the criteria in Subsection D in its decision,
16 according to petitioners. There is no discussion in the county
17 findings of the character of the surrounding area or whether
18 the proposed use will alter that character. Petitioners say
19 the facts show that fill has contributed to flooding, and the
20 flooding is evidence enough that the character of the
21 surrounding property will be altered by this permit.

22 Respondent answers that the size and shape and features of
23 the lot were considered. According to respondent, the county
24 board made a visit to the site. Also, respondent charges that
25 petitioners' real concern is with historic fill material
26 predating this application and, therefore, beyond the scope of
this appeal. Respondent claims the county properly determined
that the proposed activity would not adversely affect other

1 properties.

2 The county's findings do consider this site and the
3 physical characteristics of the site. The county states that a
4 portion of the wetland has already been disturbed by historic
5 fill, and

6 "there will be no further disturbance since fill of
7 base rock, which is permeable, will be placed on top
8 of the existing fill. The disturbance which has taken
9 place will not be enhanced simply by putting rock on
the site, and further, the rock, and existing fill
could be removed at a time in the future." Record p.
2.

10 However, the findings do not include any facts which would go
11 to prove the county's conclusion that the placement of rock on
12 the property will not further disturb this portion of the
13 wetland. The county's statement does not answer petitioners'
14 evidence and fears, recited to the county and evident in the
15 record, that the placement of rock will in fact affect water
16 flow and thereby adversely affect petitioners' property. The
17 finding, then, is insufficient to address the concerns
18 articulated by petitioners. See Gruber v Lincoln County, 2 Or
19 LUBA 180 (1981); Lee v City of Portland, 3 Or LUBA 31 (1981).
20 In order to withstand review, the county's order must state
21 facts which show that no disturbance will take place or that in
22 some succinct manner answer the facts and arguments made by
23 petitioners. Gruber, supra².

24 Assignments of error number 2 and 3 are sustained.
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1 ASSIGNMENTS OF ERROR NO. 4 THROUGH 7

2 1. Assignment of Error No. 4.

3 "Respondent Violated Section 1011.04 (A) of the
4 Zoning Ordinance Because if [sic] Failed to Make
5 the Conclusion Called for and Because the
6 Evidence Supports the Opposite Conclusion."

7 2. Assignment of Error No. 5.

8 "Respondent Violated Section 1011.04 (B) of the
9 Zoning Ordinance Because it Failed to Conclude
10 that the Fill is Necessary so Applicant Can Have
11 Reasonable Use, Because the Fill is Not
12 Necessary, and Because the Facts Show the Wetland
13 Will be Disturbed.

14 3. Assignment of Error No. 6.

15 "Respondent Violated Section 1011.04 (C) of the
16 Zoning Ordinance Because the Evidence Does Not
17 Support its Conclusion."

18 4. Assignment of Error No. 7.

19 "Respondent Violated Section 1011.04 (D) of the
20 Zoning Ordinance Because it Made Conclusions Not
21 Supported by Evidence and it Failed to Make
22 Required Conclusions." (Emphasis in Original).

23 As noted above, Section 1011.04 of the county zoning and
24 development code provides criteria which must be met before
25 development may occur within wetlands and significant natural
26 areas. As we understand petitioners' arguments, petitioners
say that the county order does not show the applicant to have
met the relevant ordinance criteria. As to the first
criterion, that the public benefit from development outweighs
the public good in retaining the area in a natural state,
petitioners argue that the county made no such conclusion. The
county only found that the parking lot will help a parking

1 problem, and even if that were true, the county did not reach
2 the conclusion called for in the ordinance. Further, under
3 Section 1011.04(A), the county's finding that no disturbance
4 will result from the parking lot is not supported by evidence
5 in the record. According to petitioner, the gravel will occupy
6 space that would otherwise be occupied by water, and the only
7 result must be displacement of the water. Petitioners argue
8 the parking lot will decrease the water retention ability of
9 the wetland and have adverse affects on the drainage system and
10 surrounding properties.

11 Respondent replies the problem with the parking lot is
12 pre-existing, and the one year review provision provided for in
13 the county order will provide adequate protection for
14 petitioners' concerns.

15 We agree with petitioners that the county's findings do not
16 include sufficient facts to show either that there will be no
17 displacement of water or injury to the natural resource or that
18 the benefit from the parking lot "clearly outweighs" retaining
19 the area as is. There are no facts in the order or in the
20 record to support the county's assertion that the addition of
21 rock will not alter the wetlands' ability to retain rainwater.

22 As to the requirement in 1011.04(B) that the natural area
23 may be disturbed in order for the applicant to make reasonable
24 use of the property, petitioners say respondent did not make
25 the required conclusion that the applicant will suffer
26 substantial damage without the development. The county only

1 concluded the applicant's proposed use was reasonable and would
2 benefit the public because it would allow "some cars now parked
3 on the public road to be parked off the road." Petitioners
4 argue that the applicant already has a reasonable use of the
5 property, and had she not built the swimming pool and converted
6 her own parking places, she would not now need these additional
7 parking spaces.

8 Respondent counters that gravel does not constitute fill
9 and that a past commercial endeavor on the property has no
10 bearing or relevance to this case.

11 As we understand the requirements of this section, the
12 county would have to find the parking lot to be more than a
13 convenience to the public. There is no discussion of how the
14 applicant might be "substantially damaged" by failure to allow
15 the parking lot, and there is no discussion of how the parking
16 lot would provide such a benefit to the public as to outweigh
17 the policy of retention of the wetland or significant natural
18 area. The county has failed to indicate how the applicant has
19 met the burden established in the ordinance.³

20 As to the matter of whether construction might entail
21 "public costs, including maintenance...or exacerbate existing
22 conditions" in Section 1011.04(C), petitioners argue that the
23 county's simple conclusion that this criterion is satisfied is
24 unsupported in the record. Petitioners cite again evidence to
25 suggest that the fill for the parking lot will disturb the
26 wetland and exacerbate flooding of petitioners' property.

1 Respondent asserts the county made correct findings, and
2 respondent charges that petitioners are not arguing the
3 specifics of this development.

4 We agree with petitioners. The county's findings do not
5 address the criteria in Section 1011.04(C). The applicable
6 finding is as follows:

7 "The applicant satisfied the energy consideration set
8 forth. The wetlands will not be disturbed and
9 consequently will not require public costs due to
10 maintenance.

11 "The development, since it does not disturb the
12 wetlands is yet an aid to the self-sufficiency of the
13 area, and retains the natural features of the site."

14 This finding is conclusional, and as discussed earlier, there
15 is evidence in the record to suggest that the wetland will be
16 disturbed by the construction. The county was therefore
17 required to explain how it is that county criteria will be met
18 before it may conclude the wetlands will not be disturbed.

19 Petitioners' assertion as to Section 1011.04(D), requiring
20 that any disturbance to the wetland or significant natural area
21 be minimized, is that the county only concluded the applicant
22 satisfied each of the criteria. Such a conclusion is not
23 sufficient to meet all criteria listed under that section of
24 the ordinance and is not supported by evidence in the record,
25 according to petitioners. Petitioners again point to evidence
26 in the record showing that the fill will alter the wetland.

We agree with that portion of petitioners' argument
alleging the county failed to make adequate findings showing

1 compliance with Section 1011.04(D). The findings only conclude
2 the criteria were met. Conclusional findings are not
3 sufficient to show that the applicant met her burden as stated
4 in the county's ordinance. South of Sunnyside Neighborhood
5 League v Clackamas County Commissioners, 280 Or 3, 569 P2d 1063
6 (1977); Dupont v Jefferson County, 1 Or LUBA 136 (1980);
7 Richland Enterprises v City of Woodburn, 6 Or LUBA 60 (1982).

8 Assignments of error 4 through 7 are sustained.

9 CONCLUSION

10 In summary, the county's order simply does not include
11 enough basic facts from which the county could conclude that
12 the applicable criteria had been met. The county appears to
13 begin with the premise that the wetland will not be disturbed,
14 and that premise is not supported in the record. The county
15 did not introduce any engineering information, and we have been
16 cited to no evidence in the record to counter evidence offered
17 by the petitioners that construction of a parking lot will
18 alter the wetland and exacerbate water runoff and drainage
19 problems on the subject property and on adjacent properties.
20 We remand this matter to the county for further proceedings not
21 inconsistent with this opinion.

22 Remanded.

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FOOTNOTES

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We are not cited to a definition of "fill" in the comprehensive plan and zoning ordinance. However, we believe the common understanding of the word "fill," "to make an embankment in or raise the level of (a low place) with earth, gravel, or rock" in Websters 3d New International Dictionary (1961) is sufficient to cover the placement of gravel on this property.

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Included is the county's finding under Section 1203 of its zoning and development ordinance. This is not the whole of the county's discussion which might apply to Section 1203, but it is characteristic:

"D. The applicant satisfies the criteria set forth in Section 1203 of the Clackamas County Zoning and Development Ordinance for approval as a conditional use, based upon the following finding:

"1. The characteristics of the site are suitable for the proposed use. The property is a wetland as defined in the Ordinance and the applicant satisfies the criteria set forth in Section 1011.04 notwithstanding said criteria are valid only if a wetland is to be disturbed; and,

"2. The proposed use complies with the Clackamas County Comprehensive Plan. It is the intent of the Comprehensive Plan to preserve wetlands. The property is a wetland, it will be preserved. The proposed development hardly rises to the status of development. The applicant is merely putting gravel on an existing fill.

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The county has not explained, in its ordinance or in its order, what it means by "reasonable use" and "substantial injury."