BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GERALD and MARY BRADY, CAROL and ROBERT SANDERS, JAMES and MARY COOKMAN, GEORGE WENDERROTH, SAM BRADY, GEORGE and HEIDI CAVAGNARO, REX and FRANKIE MORNINGSTAR, and GEORGE and ELEANOR ROGERS,	)	
Petitioners,	)	LUBA NO. 82-072
v.	)	FINAL OPINION AND ORDER
DOUGLAS COUNTY,	)	
Respondent.	)	

Appeal from Douglas County.

Allen L. Johnson, Eugene, filed a petition for review and argued the cause for petitioners.

Corinne C. Sherton, Salem, filed a brief and argued the cause for Respondent.

COX, Board Member; BAGG, Board Member; participated in the decision.

REMANDED in part. 3/17/83

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), as amended by Oregon Laws 1981, ch 748.

COX, Board Member.

NATURE OF PROCEEDING

Petitioners seek review of the land use decision of Respondent Douglas County entitled "Findings of Fact and Decision, Cow Creek Sub-Basin Water Impoundment," dated July 23, 1982 (corrected order issued August 6, 1982), and described therein as follows:

> "This is a review of the decision of the Douglas County Hearings Officer approving a request for a Comprehensive Plan Map Designation Amendment from Agriculture, Farm/Forest Transitional, and Timber Lands to Public/Semi-Public and a Zone Change from Exlclusive [sic] Farm Use-Grazing, (EFU), Farm Forest (FF), and Timberland Resource (TR) to Water Impoundment on property totalling 920 acres more or less to build a multi-purpose water impoundment." Record 3594-A, 3595, 3598.

This contested decision culminates a process which included a quasi-judicial hearing before a county hearings officer, various information and citizen advisory committee meetings, and several intermediate resolutions and orders by the Douglas County Commissioners. Petitioners seek invalidation, reversal, or remand of each element of the decision.

ALLEGATIONS OF ERROR

Petitioners set forth ten assignments of error which can be categorized into three topic areas. Assignments of error 1, 2, 3 and 4 all deal with procedural concerns. It should be noted that assignment of error 1 contains 6 subassignments. Of those subassignments, arguments 1 and 2 deal with Statewide Goal No. 1 (Citizen Participation).

Assignments of Error 5, 6 and 7 deal with Statewide Goals 3 (Agricultural Lands) and 4 (Forest Lands).

Finally, Assignments of Error 8, 9 and 10 all deal with constitutional issues identified as condemnation blight or freeze zoning, due process of law guaranteed by the fifth and fourteenth amendments to the U. S. Constitution, and the taking of property in violation of the fifth and fourteenth amendments to the U. S. Constitution, as well as Article I, sec 20 of the Oregon Constitution.

FACTS

Douglas County, in seeking to provide for what it terms present and future water needs for the county, identified and selected future water impoundment sites.[1] The analysis of alternatives narrowed to four sites: Galesville, at Cow Creek River Mile 60; Applegate, at the Applegate Creek Mile 0.5, just off Cow Creek River Mile 72; Gold Mountain, at West Fork Cow Creek River Mile 14; and Honeysuckle, at West Fork Cow Creek River Mile 3. On these sites the county proposes to construct one or more dams and reservoirs to provide water in the South Umpqua Basin which includes the Cow Creek Sub-Basin. The county's immediate interests seem to center on the site at Galesville, which is a small farming community seven miles east of Azalea on Upper Cow Creek.

On February 5, 1982, the Public Works Department applied for the plan amendment, zone amendment and exception described above. A hearings officer conducted hearings on that application on April 8 and 9, and May 6-18, 1982, and issued an order and findings approving the application on July 2, 1982. Petitioners appealed and the county commissioners initiated their own review which took place on July 19 and 23, 1982. The

county's final order was adopted on July 23, 1982. Petitioners appeared through counsel in the original hearings of April and May. However, they appeared without counsel on the appeal to the county commissioners. The county commissioners affirmed the hearings officer and adopted his order with modifications and added some supplementary findings thereto.

The Board of Commissioners final order was adopted on July 23, 1982. Notice of the Board's action, along with a copy of the order and findings was mailed to all parties on July 28, 1982. However, it was later discovered by the Douglas County Planning Department that the findings printed in the "Findings and Fact and Decision" document mailed on July 28 did not include all the modifications to the hearings officer's findings that were adopted by the Board. Therefore, a corrected "Findings of Fact and Decision" document was mailed to all parties on August 6, 1982. On August 19, 1982, LUBA received a notice of intent to appeal the board's decision.

The July 23, 1982 order was the product of a quasi-judicial proceeding conducted by the Douglas County hearings officer and the Board of Commissioners pursuant to its procedural ordinances. The July 23 order approved a goal exception, plan map amendment and zone change for the 920 acre Galesville impoundment site. It states that:

> "* * * the requested zone change, plan amendment, and exception from statewide planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) are hereby approved. The Findings of Fact in support of the exceptions from the State Planning Goals are hereby adopted into the Douglas County Comprehensive Plan."

On July 30, 1982, the Land Conservation and Development

Commission issued a continuance order concluding that the plan complied only with Goals 1, 6-8 and 13. The July 23, 1982 goal exception for the Galesville site was not a part of the plan reviewed by LCDC.

Two months after the adoption of the July 23 order, Douglas County instituted legislative proceedings for the purpose of considering and adopting a host of changes to its Comprehensive Plan and implementing ordinances. The changes were part of an overall effort to update the county's plan and ordinances for re-review by LCDC. (See discussion below). The changes were formally adopted on October 6, 1982 by Douglas County ordinances 82-10-1 through 82-10-4. The ordinances consist of four documents, each of which refers to different aspects of the county's comprehensive plan and implementing ordinances.[2] Portions of the documents identify the Galesville site as the selected Cow Creek Sub-Basin impoundment site, designate the site as public/semi-public on the plan map and zone it Water Impoundment. The October 6, 1982, ordinances state in part:

> "The following amendments to the exceptions document have come about as a result of the hearings officer findings of fact and decision, Cow Creek Sub-Basin Water Impoundment, July 2, 1982 and Board of Commissioners 'Findings of Fact and Decision, Cow Creek Sub-Basin Water Impoundment, July 23, 1982).'
>
> "The Galesville site for the Cow Creek Sub-Basin Water Impoundment was approved by action of the Douglas County Commissioners on July 23, 1982, after a quasi-judicial hearing before a Douglas County Hearings Officer."

On December 10 and 21, 1982, LCDC again reviewed the Douglas County Comprehensive Plan and implementing measures. A

majority of the LCDC concluded that the entire plan and implementing measures for areas of the county other than estuaries, coastal shorelands, land within urban growth boundaries and 33 specific Special Bird Habitat areas were in compliance with the Statewide Planning Goals. The Cow Creek/Galesville site does not fall within those exceptions.

ORDER ON MOTION TO DISMISS

Respondent Douglas County has moved to dismiss petitioners' appeal alleging that with the advent of the October 6, 1982 decision to update the county's plan and ordinance for rereview by LCDC, the July 23, 1982 order which has been appealed by petitioners, was rendered moot. Respondent reasons that since the petitioners did not appeal the October 6, 1982 decision, the decision petitioners appealed no longer exists and their appeal is, therefore, also moot. We deny the respondent's motion to dismiss based on our analysis of the following issues:

1. Was the goal exception, plan map amendment and zone change for the Galesville site adopted on October 6, 1982 based on a "new record" (i.e. different record and different findings than were made at the July 23, 1982 decision)?

2. Did the county intend to replace, repeal, amend or reenact its land use decision of July 23, 1982 when it instituted legislative proceedings culminating in the ordinance adopted on October 6, 1982?

3. Did the ordinances of October 6, 1982 add any element of lawmaking to the July 23 land use decision?

In order to render the earlier proceeding moot, the county must have intended to supersede the prior land use decision

even though both decisions allow the same use of the subject property. Carmel Estate, Inc. v. LCDC, 51 Or App 435, 438 (1981). Our review of the proceedings indicate that Douglas County was not intending to supersede its July 23, 1982 decision. The October 6, 1982 decision incorporated the entire record and findings made in the July 23, 1982 proceeding. The changes pertaining to the Galesville site approved on October 6, 1982 are identical to the changes approved in the July 23, 1982 decision. If the October 6 decision addressing the Galesville site had been based on a different record and different findings, then there would be merit in the argument that the other decision was mooted by the latter one. See Carmel Estates v. LCDC, supra, Multnomah County v. LCDC, 43 Or App 655, 603 P2d 1238 (1979).

In its plan map and legislative rezoning amendments document adopted by Ordinance 8210-2 on October 6, 1982, the Douglas County Planning Department states that the basis for the amended map change pertaining to the Galesville site is the

> "Hearings officers findings of fact and decision, Cow Creek Sub-basin Water Impoundment, July 2, 1982 and Board of Commissioners 'Findings of Fact and Decision, Cow Creek Sub-Basin Water Impoundment, July 26 [sic] 1982' including documentation of compelling reasons requiring exceptions to Goal 3 (Agricultural) and Goal 4 (Forest Land) for removal of the 920 acres of forest and agricultural land from direct farm and timber production."

For all intents and purposes the same language as above quoted is used by the Douglas County Planning Department as the basis for amendments to the plan's water resource element. The department language was adopted by the Board of Commissioners in the October 6, 1982 plan amendment document.

In the proposed amendments to the Exceptions and Non-Exceptions to Resource Goals adopted by the October 6, 1982 ordinance, the Planning Department states:

> "Douglas County has adopted an exception pursuant to statewide planning goal 2 to provisions of goals 3 and 4 for the selection of the Cow Creek Sub-basin Water Improvement site. The county has shown through the hearings officer and the Board of Commissioners hearing process the compelling reasons and facts for the Galesville site selection. The complete record of the proceedings before the hearings officer and Board of Commissioners constitutes the facts upon which the site was selected. The findings of fact and decision, Cow Creek Sub-Basin Water Impoundment, July 23, 1982, are hereby adopted as part of Douglas County's Comprehensive Plan and by reference the findings and entire record of the site selection quasi-judicial proceeding are adopted as part of the comprehensive plan's record documenting the statewide planning goal exception. For further discussion of the exception, the findings of fact and decisions dated July 23, 1982 should be consulted."

Based on the foregoing, we find that no new record and no new findings were used to support the county's October 6, 1982 ordinances. There being no new element of law making added to the July 23, 1982 order, the county did not manifest an intent to replace or amend that order. Therefore, petitioners' appeal from the July 23 order is not rendered moot. The motion to dismiss is denied.

DECISION

Assignment of Error No. 1

Petitioners argue that the county failed to provide the petitioners and the hearings officer with all pertinent information in a timely, simplified, and understandable form, contrary to procedural requirements listed in the six sub-assignments of error. We divide our discussion of the sub-assignment of error into those involving Statewide Goal 1

and those which involve other procedural standards.

Sub-Assignment of Error 1

Sub-Assignment of Error 1 states:

> "The requirement of Statewide Goal One, Citizen Participation, that 'Information necessary to reach policy decisions shall be available in a simplified, understandable form.'"

has been violated.

Sub-Assignment of Error 2

Sub-Assignment of Error 2 states:

> "The requirement of Statewide Goal One, Citizen Participation, that county citizen involvement programs shall be 'appropriate to the scale of the planning effort and shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues.'"

has been violated.

During a prehearing discussion with petitioners' and respondent's attorneys, it became evident that while petitioners had not withdrawn either of these sub-assignments of error, they did recognize that the Land Conservation and Development Commission had, subsequent to the filing of their appeal, acknowledged the Douglas County Comprehensive Plan. The fact that acknowledgment has taken place ousts this Board of authority to hear any allegations regarding statewide goals. The Oregon Court of Appeals affirmed this Board in Fujimoto v. Land Use Board, 52 Or App 875, 878, 879 (1981), when it held

> "When the petition was filed, the acknowledgment had already been made. There was nothing left for LUBA to review in any effective way, for it is not part of the statutory scheme for LUBA to have power to second guess an acknowledgment. * * *
>
> "LUBA has no appellate function from LCDC, and it

has no advisory function to LCDC except in the narrow context of section 6 of the 1979 Act. Whether this proceeding was rendered 'moot' by the acknowledgment or whether LUBA was simply ousted of jurisdiction is, in this instance, an irrelevant matter of semantics. It simply had no function to perform."

Based on the foregoing, the first two subassignments of error to assignment of error no. 1 are denied.

Sub-Assignments of Error 3, 4, 5 and 6 and Assignment of Error 2

Fairly read, petitioners here allege that the county failed to follow its own resolution requiring it to have available to it and the parties important information which did or could have an affect the outcome of the decision. Petitioners claim they have been deprived of information they were entitled to before the county made its decision.

The main thrust of petitioners' concern is that they were not provided with a required draft Environmental Impact Statement (EIS) and a "Land Use Environmental Assessment" (LUEA). Petitioners claim they had a right to the material pursuant to an October 8, 1980 Douglas County resolution. That resolution was an outgrowth of a stipulated settlement to dismiss two Land Use Board of Appeals cases, numbered 80-105 and 80-106, which concerned the impoundment case now before us. In that resolution, it was agreed that

"The Board of Commissioners will fully and carefully consider the information developed through the evaluation process before making a final determination as to its choice of sites. Concerned citizens will be given timely and accurate information on the status and substance of the site selection process. Citizens will also be given ample opportunity to present

written and oral comments on any draft site selection report before final selection of the site."

A part of the October 8, 1980 resolution adopts by its inclusion the following statement:

> "Douglas County's citizen participation program, the statewide citizen participation goal, and federal environmental policy regulations require that all pertinent information concerning alternatives be available to citizens and public officials before choices are made. Further, federal regulations require that federal assessment procedures be integrated with state and local review, participation, and consulation procedures where possible in order to save time and money. See 40 Code of Federal Regulations 1500.4-5."

Petitioners claim that pursuant to the above stipulation, they had been provided what was allegedly the Land Use Environmental Assessment (LUEA), but it was not until well into the hearings process that counsel for the petitioners discovered that the LUEA was missing several major sections that were not to be included until the draft EIS was completed. The missing portions were identified by a CH2M Hill project manager in a memorandum found at Record 2084. That memorandum states:

> "As you requested, below is a list of topics and sections to be completed for the USBR draft EIS (based on my recollection). If you need an exact listing, I can send one when I return to my office."

Included in that list of topics and sections to be completed are the subjects land use, geology, soils, economics, social conditions, population, topography, a summary, an index, a section entitled scoping and a section entitled consultations. Also the subjects of irreversible and irretrievable commitments of resources, unavoidable adverse impacts, and relationships

between short term uses of the environment and long-term productivity were also to be included in the EIS statement and hence, the LUEA document. None of those materials were provided to the petitioners prior to the final decision and the record does not reveal that the county possessed them prior to making the decision.

Petitioners' request for continuation based upon surprise and denied citizen participation was denied. Petitioners also moved to have incorporated into the record and provided for their review missing information which included the results of a survey of Cow Creek Valley residents conducted by CH2M Hill months before the hearing. According to petitioners, the results of the survey (a questionnaire located in the record at 2080) entitled "Survey on Socio-economic Impacts of the Proposed Galesville Dam Project," still had not been released at the time of filing of the petition for review.

Respondent responds to petitioners' allegations by saying

> "[t]he federal rules cited by petitioners, 40 CFR 1500.4-5, established procedures for preparation of federal Environmental Impact Statement (EIS), and do encourage EIS preparation procedures to be integrated with state and local review and participation procedures where possible. These rules do not purport to impose limitations or criteria on the making of land use decisions by a local government and, therefore, are not part of the 'law' or 'procedural requirements' applicable to respondent's decision below. Douglas County has never adopted these federal rules as standards to govern its process of making land use decisions concerning the plan designations and zoning district applied to land within the County."

In light of the October 8, 1980 resolution above quoted, this Board has a difficult time understanding respondent's argument. The county imposed the federal standards on itself

when it signed that resolution. A part of the resolution which was not quoted above states:

> "The County intends to apply for federal assistance. It is probable, therefore, that an environmental assessment and potentially an environmental impact statement will have to be prepared."

The environmental impact statement was to be prepared and, according to this Board's understanding, was to be made a part of the Land Use Environmental Assessment. That material apparently was neither provided to petitioners nor was it before the county prior to the adoption of the contested ordinance. Both neglected activities are in violation of the October 8, 1980 resolution.

In the alternative, respondent takes the position that it did provide all available, relevant and requested information in a timely, simplified and understandable form. The respondent does admit, however, that even though the Public Works Department for Douglas County submitted all information that was available at the time of hearings below, it could not obtain from its consultants documents which had not yet been written. While respondent's position may be well taken, it ignores the October 8 resolution. In that resolution, the county promised to its citizenry to fully and carefully consider the information developed through the evaluation process before making a final determination as to the choice of sites. The county also promised that

> "Concerned citizens will be given timely and accurate information on the status and substance of the site selection process. Citizens will also be given ample opportunity to present written and oral comments on

any draft site selection report before final selection of a site." Resolution October 8, 1980.

Without completion of the draft site selection reports, of which we believe the EIS and the LUEA are an inherent part, the citizens could not have been provided the promised opportunity to comment on those materials prior to final selection of the Galesville site. Also, since we understand the county to have forced itself to consider these documents, the county acted in violation of its own resolution. The county, in short, did not make use of a requirement that it placed on itself.

Finally, respondent argues that its findings are detailed addressing the issue here raised by petitioners. A review of those findings located at Record 3161 through 3164 finds they address only the petitioners' concerns in relation to Statewide Goal 1 and conclude that there has been no Goal 1 violation. The findings are silent on the applicability of the October 8, 1980 resolution. We find that resolution to have been applicable and should have been followed and addressed by the county. The provisions of the October 8, 1980 resolution do not appear to have been followed. Therefore, we affirm petitioners' assignment of error 1, subassignments 3, 4, 5 and 6 and assignment of error no. 2 insofar as they allege a failure to follow the October 8, 1980 resolution.

ASSIGNMENT OF ERROR NO. 3

Petitioners allege

"The County failed to follow the procedure applicable to the matter before it when the hearings officer admitted, over objections by counsel for Petitioner, a missing chapter of the envirnomental assessment in the midst of the hearing."

Our reading of petitioners' assignment of error indicates that their use of the term "environmental assessment" in this assignment of error is equivalent to the material that is otherwise known as the CH2M Hill analysis, the Environmental Impact Statement and the Land Use Environmental Assessment. To the extent we have dealt with those materials in our first assignment of error, we affirm this third assignment of error for the same reasons as stated above.

ASSIGNMENT OF ERROR NO. 4

Petitioners here claim

> "The County Commissioners failed to follow the procedure applicable to the matter before them because they failed to perform a review of the record as required by Douglas County's Land Use and Development Ordinance Section 2.700."

Under this assignment of error, in essence petitioners are claiming that the county commissioners failed to review tape recordings made of the ten days of testimony presented at the hearings officer level. According to petitioners, no transcript or minutes were made of those ten days of hearings.

The pertinent portions of the Douglas County Land Use and Development Ordinance cited by petitioners require that on review of a hearings officer's decision

> "Only those members of the Board reviewing the record may act on the matter reviewed." (Sec 2.700(e) LUDO)

The record is defined to include:

> "The transcript of the hearing if required by the Board or otherwise provided or the tape recording or other evidence of the proceeding of the hearing and review by the Hearings Officer, Committee or Commission." (Sec 2.700(a)(3) LUDO)

Petitioners reason that in light of the absence of a

transcript of the tapes, the minutes and a lack of any record indicating that the commissioners had checked out the ten days of tapes, no sufficient review has been made of the record. Thus section 2.700(e) has been violated.

Respondent argue that it is not clear how the failure of the commissioners to listen to the 61 hearing tapes would be, in this particular case, a failure to follow applicable procedure. Citing Section 2.700(a)(3) of the Land Use and Development Ordinance, petitioners define the record as including:

> "The transcript of the hearing if required by the board or otherwise provided or the tape recording, or other evidence of the proceeding of the hearing and review by the hearings Officer, Committee or Commission." (Emphasis added).

Respondent reasons that the "other evidence" could certainly be minutes of the hearing. As respondent argues

> "In this instance, however, given the massive documentary record established below, and the extensive findings adopted by the Hearings Officer, the Board could reasonably have concluded that these constitute 'other evidence' of the hearing proceeding sufficient for them to carry out their review function."

Next respondent argues that the petitioners have not established that their substantial rights were prejudiced by any failure of the Board to listen to the tape recordings.

During discussion of preliminary matters with this Board, the petitioners proposed to solve this question by holding an evidentiary hearing to determine exactly what the local government did review. We believe such an evidentiary hearing may be the only way to settle this issue, but the fact that it has never been held, combined with the fact that we are

remanding this matter on other grounds, indicates to us that it would be best to settle this controversy at the local level. We suggest that the respondent cooperate with the petitioners in answering the questions raised in this allegation of error, specifically those raised which relate to the fact that the board may act on the matter reviewed only if it has reviewed the tapes.

ASSIGNMENTS OF ERROR NO. 5, 6, 7.

Petitioners next assert the county failed to show by a statement of compelling facts and reasons, supported by substantial evidence, that it was impossible to apply Statewide Goals 3 and 4 to the subject lands. In addition, petitioners allege the decision improperly removes several hundred acres of agricultural land from EFU zoning by placing the land in use designations which allow non-farm uses outright.

Here again, as in assignment of error 1, sub-assignments 1 and 2, we find this Board has no function to perform in reviewing petitioners' allegations of error. Fujimoto v. Land Use Board, supra. Therefore, petitioners assignments of error 5, 6 and 7 are denied.

ASSIGNMENT OF ERROR NO. 8

Petitioners' eighth assignment of error alleges that

> "The plan and zone designations are not consistent with the Douglas County Comprehensive Plan because they designate as 'Public/Semi-Public' lands which are not either in public ownership or currently devoted to a public or semi-public use."

The argument being made here is that Douglas County did not follow applicable law when it designated the subject site "Public/Semi-Public" in its plan map and zoning ordinance. In

order for this Board to sustain petitioners' assignment of error, we must find either that the contested designations could not legally be made or that improper procedures were used in making the designations.

Douglas County's comprehensive plan has been acknowledged. Under the land use element of that plan, the policy behind the Public-Semi-Public designation is described. It includes a statement that

> "The Public/Semi-Public designation will be applied to existing water impoundment sites in excess of 1,000 acre feet and to selected impoundment sites after an exception has been taken and appropriate goals have been addressed. The selection of such sites will be based on the criteria and policies contained in the water resources element." (Record Exhibit Y, page 365)

And in the description of Public/Semi-Public uses which may be designated on the plan map, it is stated that

> "As future public/semi-public needs become apparent, then adjustments to the plan map and appropriate exceptions wil have to be provided. Existing public and semi-public uses located in other plan designations may be implemented by a public and semi-public implementing zone. Public/semi-pbulic uses typical to Douglas County are:
>
> "- Cemeteries
> "- Churches
> "- Grange and other community meeting halls
> "- Fire stations
> "- Water impoundment sites * * * *"
> (Record Exhibit Y, page 425)

A fair reading of these comprehensive plan provisions would lead one to conclude that the Public/Semi-Public plan map and zoning designation can be applied to both existing and proposed water impoundment sites whether or not presently owned by the public. That is the interpretation given by the county inherent in its findings. County commissioners should, in the

first instance, "have the power and right to interpret local enactments" and they are "entitled to some weight unless it is clearly contrary to the express language and intent of the Charter [plan]." Fifth Avenue Corp. v. Washington County, 282 Or 591, 599-600, 581 P2d 50 (1978). Another way of stating the rule is that a reviewing court should defer to a local government's interpretation of its own plan, provided the interpretation is reasonable. Miller v. City Council of Grants Pass, 39 Or App 589, 594, 592 P2d 1088 (1979).

Douglas County's interpretation of its plan provisions relating to Public/Semi-Public designations is reasonable and not clearly contrary to either the language or intent of the plan. As these designations are consistent with the comprehensive plan, they were legally made. Petitioners do not argue that improper procedures were followed in making the designations. There being no error in law or procedure, petitioners' eighth assignment of error dismissed.

ASSIGNMENTS OF ERROR NO. 9 AND 10

Petitioners' ninth and tenth assignments of error allege that

> "The semi-public plan designation and water impoundment zone designation deprive the Petitioners of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution by subjecting their lands to freeze zoning for an improper public purpose: namely, to avoid and circumvent the purpose and intent of the takings clauses of the Fifth Amendment to the United States Consitution and of Article I, Section 20, [sic] of the Oregon Constitution."

> "The semi-public plan designation and water impoundment zone designation deprive the Petitioners of due process of law and constitute a taking of their property without just compensation in violation of the

Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 [sic] or [sic] the Oregon Consitution because they result in such governmental intrusion as to inflict virtually irreversible damage and constitute constructive possession of the subject properties without just compensation first having been paid."

Both of these assignments raise the issue of the scope of LUBA's jurisdiction to review constitutional issues. More specifically, the guestion is whether LUBA has jurisdiction to decide takings claims. The board's jurisdiction is set out in Oregon Laws 1979, ch 772, as amended by Oregon Laws 1981, ch 748, which states:

"the board shall have exclusive jurisdiction to review any land use decision of a local government * * * *" Sec 4(1)

"The board shall reverse or remand the land use decision only if:

(a) The board finds that the local government or special district governing body:

* * *

"(E) Made a decision that was unconstituional;" Sec 5(4)(a)(E).

And a further provision is made that

"In the case of disputed allegations of unconstitutionality of the decision, * * * which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations." Sec 4(7)

At oral argument, LUBA requested the parties to submit supplemental memoranda of law on both the issue of LUBA's jurisdiction over constitutional claims and the issue of what constitutional standard should be applied. Petitioners' memo on these issues argues that LUBA's jurisdiction to review local government decisions for constitutional error is restricted to

situations where the local government has the authority to make the decision which is being appealed.

In other words, where the local government lacks the authority to decide a constitutional question, then LUBA cannot assume jurisdiction (except insofar as LUBA may determine whether constitutional procedure was followed by the local government in making its land use decision). Petitioners' memo analogizes takings claims to vested rights claims and cites Union Oil Co. v. Clackamas County, 5 Or LUBA 150 (1982), for the proposition that LUBA cannot review that which a local government lacks the authority to decide. Petitioners' memo concludes by admitting that "Luba probably cannot consider the taking question[s]."

On the basis of petitioners' memorandum of law asserting that LUBA probably has no jurisdiction over takings questions, petitioners' ninth and tenth assignments of error are considered withdrawn. There being no controversy or adversary position on these assignments, they are dismissed.

Petitioners' admissions notwithstanding, it should be noted that LUBA probably does not have jurisdiction over takings claims anyway. LUBA's jurisdictional statute refers only to decisions made by a local government that can be reversed or remanded. Takings claims require a determination of damages. LUBA cannot grant either damages or injunctive relief.

Even though takings issues are colored with land use overtones, takings determinations have historically been the province of the circuit courts. The circuit court is the only body that can engage in complex evidentiary matters, grant

injunctive relief, and award damages. Those are not traditional or statutorial powers held by LUBA, or more importantly, local governments. LUBA is empowered to primarily review only land use decisions of local governments and state agencies.

Authors of a recent law review article put it another way:

> "It is clear from the scheme of this legislation that neither LCDC nor the Land Use Board of Appeals has jurisdiction to entertain a taking claim related to a land use decision. There are two reasons for this. First, each agency only has the power to 'reverse or remand the land use decision under review' and hence has no authority to determine an award of compensation for inverse condemnation. While the Board has the authority to render a declaration that the land use decision is unconstitutional, invalidation is not the proper remedy for a taking."
>
> "Under Oregon's statewide planning legislation, state administrative agencies have exclusive jurisdiction for determining the validity of land use decisions under the statewide planning goals and other statutory and constitutional grounds. Circuit courts, however, are vested with the sole authority to decide takings claims arising out of [land use] decisions. Because the nature of the relief is fundamentally different in each instance, and because temporary losses may be compensated under the taking clause, such proceedings may be maintained simultaneously."

Morgan and Shonkwiler, Regulatory Takings in Oregon: A Walk Down Fifth Avenue Without Due Proces, 15 Willamette Law Review 591, 664 and 674 (1980) (footnotes omitted).

Our interpretation of LUBA's authority indicates that LUBA does not have jurisdiction over takings claims and apparently all such claims should be prosecuted through the circuit courts.

This case is remanded to Douglas County for further proceedings not inconsisent with this opinion.

FOOTNOTES

[1] On August 6, 1980, the county commissioners adopted Phase II of the Douglas County Comprehensive Plan, identifying a number of potential dam sites, including Galesville. On August 13 and September 10, 1980, the commissioners issued a letter and resolution selecting Galesville as a preferred site. Petitioners appealed the selection of Galesville on the grounds that its selection was made without evaluating alternatives or statewide goals. The commission rescinded those actions as being premature. They then set in motion procedures to complete the site selection process and address all applicable goals, plan policies and other regulations.

On March 18, 1981, the commissioners adopted a resolution and findings identifying Galesville as the "preferred" site and directing the County Planning and Public Works Department to file notices, obtain permits, coordinate plans with state and federal agencies, gather data and carry out environmental evaluations of alternative impoundment sites and seek funding. The resolution stated that "concerned citizens will be given timely and accurate information and an opportunity to participate in the site selection and project authorization process.

Pursuant to those and other directives, the county secured the services of various consultants, including International Engineering, CH2M Hill, Tuscon Meyer and Associates and others. It also began investigating various funding possibilities, particularly funding by the Bureau of Reclamation through its Small Projects Reclamation Act loan/grant program. It determined that an environmental impact statement would probably be required. It authorized CH2M Hill to prepare a document that would serve as the basis for an environmental assessment or environmental impact statement.

[2] The ordinance include amendments not relevant to this case.

STATE OF OREGON INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

DATE: 2/24/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: BRADY V. DOUGLAS COUNTY
LUBA NO. 82-072

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

Petitioners have made allegations of statewide goal violations. However, the Douglas County comprehensive plan has been partially acknowledged, and that acknowledgment covers the goal issues involved in this appeal. We are issuing this opinion only to meet the letter of the law stated in Oregon Laws 1979, ch 772, sec 6, as amended by Oregon Laws 1981, ch 748.

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.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GERALD and MARY BRADY, CAROL and ROBERT SANDERS, JAMES and MARY COOKMAN, GEORGE WENDERROTH, SAM BRADY, GEORGE and HEIDI CAVAGNARO, REX and FRANKIE MORNINGSTAR, and GEORGE and ELEANOR ROGERS, Petitioners,	LUBA NO. 82-072
v.	PROPOSED OPINION AND ORDER
DOUGLAS COUNTY, Respondent.	

Appeal from Douglas County.

Allen L. Johnson, Eugene, filed a petition for review and argued the cause for petitioners.

Corinne C. Sherton, Salem, filed a brief and argued the cause for Respondent.

COX, Board Member; BAGG, Board Member; participated in the decision.

2/24/83

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), as amended by Oregon Laws 1981, ch 748.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GERALD and MARY BRADY, CAROL and ROBERT SANDERS, JAMES and MARY COOKMAN, GEORGE WENDERROTH, SAM BRADY, GEORGE and HEIDI CAVANGNARO, REX and FRANKIE MORNINGSTAR, and GEORGE and ELEANOR ROGERS,	)	
Petitioners,	)	LUBA NO. 82-072
v.	)	CA A27745
DOUGLAS COUNTY,	)	
Respondent.	)	

Submitted on remand from the Oregon Court of Appeals, September 6, 1983.

Judicial Review from the Land Use Board of Appeals.

IT IS HEREBY ORDERED that the previous opinion dated March 17, 1983 is vacated and this appeal is hereby dismissed without costs to either party, consistent with the stipulation of the parties and the remand of the Oregon Court of Appeals. Petitioners' $150 deposit for costs shall be returned.

Dated this 27th day of September, 1983.