

Court of Appeals

LAND USE

BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AUG 12 1 18 PM '85

ROBERT WARREN, TONY COLE,
GINGER COLE, EDWARD MYROWITZ,
OREGON WILDERNESS COALITION,
an Oregon corporation, and
DONNA SHELTON,

Petitioners,

vs.

LANE COUNTY, VICTOR RENAGHAN
and LINDA RENAGHAN,

Respondents.

LUBA No. 81-102

FINAL OPINION
AND ORDER OF DISMISSAL

Appeal from Lane County.

Timothy J. Sercombe, Eugene, filed the petition for review and argued the cause on behalf of Petitioners.

William A. Van Vactor, Eugene, filed the response brief and argued the cause on behalf of Respondent Lane County.

Michael E. Farthing, Eugene, filed the response brief and argued the cause on behalf of Respondents Renaghans.

BAGG, Chief Referee; DUBAY, Referee; KRESSEL, Referee; participated in this decision.

DISMISSED

08/12/85

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a subarea comprehensive plan amendment
4 and zone change redesignating a 26 acre parcel from "Natural
5 Resource Forest" to Tourist Commercial" and a 160 acre parcel
6 from "Natural Resource Forest" to "Conservation/Recreation Open
7 Space." The subject land is commonly known as the Renaghan
8 property.

9 FACTS AND PROCEDURAL HISTORY

10 In Warren v. Lane County, 6 Or LUBA 47 (1982) we dismissed
11 petitioners' appeal because we found petitioners lacked
12 standing. The Supreme Court reversed our order. Warren v.
13 Lane Co., 297 Or 290, 686 P2d 316 (1984). Before us now is
14 Lane County and Victor and Linda Renaghan's motion to dismiss.
15 These respondents claim the issues in this appeal are moot.¹

16 The Supreme Court's decision was issued on June 19, 1984.
17 On October 3, 1984, the Land Conservation and Development
18 Commission issued an order finding, with an exception not
19 relevant to this case, the Lane County Comprehensive Plan and
20 land use regulations to be in compliance with statewide
21 planning goals.² The LCDC acknowledgement order supplies the
22 impetus for respondents' argument before us that these
23 proceedings are moot.³ Respondents argue the acknowledgment
24 order resolves all the issues in the case. Because we may not
25 "second guess" an acknowledgment order, we must dismiss the
26 appeal. See Fujimoto v. Land Use Board of Appeals, 52 Or App

1 875, 630 P2d 364, rev den, 291 Or 662 (1981), according to
2 petitioners.

3 Important to petitioners' case is their view that the LCDC
4 acknowledgment does not validate the application of particular
5 zones to particular pieces of property. That is, when LCDC
6 acknowledged the Lane County plan and zoning ordinance, it did
7 not consider whether the county had properly applied particular
8 zones to individual parcels of land. Petitioners argue the
9 acknowledgment, therefore, is not an acknowledgment that a
10 destination resort plan designation and zone for the Renaghan
11 property complies with the goals.

12 We reject petitioners' view that the LCDC acknowledgment
13 did not include acknowledgment of the county's zoning for the
14 Renaghan property. The portions of the acknowledgment record
15 before us show the issue of the proper designation for the
16 subject property to be one of considerable focus by LCDC
17 staff. Further, because the property was subject to an
18 exception, the Commission was bound to consider the specific
19 use of the property during its review of the exception. The
20 Commission has described its review of applicability of
21 statewide planning goals to particular land in question to be
22 its "basic responsibility." Eckworth and Hall v. Coos County,
23 3 LCDC 254, 259 (1979). Once this review and acknowledgment
24 has taken place, it is not up to the Land Use Board of Appeals
25 to question whether the acknowledged plan, zoning ordinance and
26 plan map comply with statewide goals. Byrd v. Stringer, 295 Or

1 311, 666 P2d 1332 (1983).⁴

2 The scope of the acknowledgment is important to this case.
3 We have no jurisdiction to review a land use decision for
4 compliance with statewide planning goals where the commission
5 has granted acknowledgment. Fujimoto, supra.

6 PETITIONERS' ASSIGNMENTS OF ERROR

7 The petition for review includes five assignments of
8 error. The last two allege violation of Goal 4. All parties
9 agree the last two assignments of error are rendered moot by
10 LCDC's acknowledgment order. Petitioners argue, however, that
11 the first three assignments of error are not moot. They are:

12 FIRST ASSIGNMENT OF ERROR

13 "The notification used by Lane County for amendment of
14 a comprehensive plan and taking goal exception was
insufficient and prejudicial."

15 SECOND ASSIGNMENT OF ERROR

16 "The plan change was adopted prior to entry of
supporting findings."

17 THIRD ASSIGNMENT OF ERROR

18 "The findings of fact justifying the action taken are
19 not supported by substantial evidence in the record."

20 ASSIGNMENTS OF ERROR NO. 1 and 2

21 Petitioners' first and second assignments of error are
22 moot. Citizens were given the opportunity to appear and
23 comment on the new plan and zoning regulations prior to
24 adoption in 1984. Because citizens, including petitioners
25 here, were given an opportunity to present views and evidence
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1 on the new plan and zone designations to be applied to this
2 property, any procedural error occurring during the pendency of
3 the quasi-judicial proceeding has been rendered harmless to
4 petitioners. That is, any failure to afford petitioners due
5 process was cured by the legislative proceeding which gave
6 petitioners a new forum in which to express views on the use of
7 the Renaghan property. See, Card v. Flegal, 26 Or App 783, 554
8 P2d 596 (1977), rev den, 277 Or 491 (1977); Casey v. Dayton, 5
9 Or LUBA 96 (1982); Davis v. Nehalem, 4 Or LUBA 1 (1981).

10 Further, ORS 197.835(8)(a)(B) permits remand or reversal
11 only where the petitioner can show prejudice to some
12 substantial right. There is no prejudice here. The new
13 opportunity to comment on the very issues extant in the 1981
14 quasi-judicial proceeding protects petitioners' rights. Casey
15 v. Dayton, supra.

16 We believe the same rule applies with regard to
17 petitioners' arguments on the manner used to adopt findings.
18 We understand the Supreme Court's order in this case to direct
19 us to examine the findings made in support of the rezoning
20 decision. The findings made in support of the rezoning
21 decision are the same findings made to support the later
22 legislative action. We do not see any purpose in reviewing the
23 procedure to adopt findings in support of a quasi-judicial
24 decision when the same findings, subject to our review by the
25 Supreme Court's order, were readopted as part of the
26 justification for a later legislative act.

1 We conclude, therefore, that the first and second
2 assignments of error are moot.

3 ASSIGNMENT OF ERROR NO. 3

4 In a memorandum filed after the remand order by the Supreme
5 Court, petitioners explain that the issues in the third
6 assignment of error are

- 7 "1. Lack of findings in the record on water supply to
8 the proposed development given the Coastal
9 Subarea Plan findings and policies on critical
10 water supply problems in the subarea, excessive
11 demands on wells, and requirement of proof of
12 adequate domestic and firefighting water supply
13 prior to approval of a development of greater
14 than four units;
- 15 "2. Lack of findings or insufficiency of findings on
16 development constraints in light of the Coastal
17 Subarea Plan findings on severe flooding problems
18 in the 'lower reaches of . . . Big Creek', plan
19 requirements for geologic study prior to
20 developmental approval, and slope analysis, soil
21 analysis and a market study requirements prior to
22 development approval." Petitioners' Supplemental
23 Memorandum In Opposition to Motion to Dismiss,
24 April 25, 1985.

25 As discussed earlier, the LCDC acknowledgment included
26 acknowledgment of the specific land use designations applied to
the Renaghan property. The question now before us is whether
petitioners have raised arguments outside the goals. If
petitioners' arguments raise questions of goal compliance, we
believe the issues are moot. Whitesides Hardware v. City of
Corvallis, 68 Or App 204, 680 P2d 1004 (1984). In Whitesides,
we found the City of Corvallis violated a comprehensive plan
provision limiting development outside the core area of the

1 city when it allowed a major development request located some
2 distance from downtown. The Court of Appeals found LUBA should
3 have denied all petitioners' allegations because the plan had
4 been acknowledged by LCDC. The court said

5 "although Whitesides attempts to frame the issue
6 otherwise, every substantial challenge to the
7 ordinance was foreclosed by LCDC's determination of
8 goal compliance. See Fujimoto v. Land Use Board of
9 Appeals, 52 Or App 875, 630 P2d 364, rev den, 291 Or
10 662 (1981). LUBA should have denied all the
11 assignments of error." Whitesides, 68 Or App at
12 206-207. (Emphasis added).

13 Therefore, if petitioners' challenges to compliance with the
14 comprehensive plan are challenges which may be seen to raise
15 goal issues, at least in the main, then petitioners' challenges
16 must be dismissed under the court's reasoning in Whitesides.

17 Petitioners' third assignment of error is about water
18 supply, flooding, the need for geologic study and certain other
19 development constraints. See the petitioners' summary of the
20 issues on page 6, supra. These issues may be characterized as
21 goal related and not founded in purely local comprehensive plan
22 policies. That is, the water supply issue is a question of
23 public facilities and services which is a matter regulated by
24 Goal 11.⁵ The development constraint issue and geologic
25 hazard issue fall within the purview of Goal 7, the "Areas
26 Subject To Natural Disasters And Hazards" goal.⁶ Because the
issues are included within the broad frame of issues found in
Goals 11 and 7, the challenges petitioners make under the
comprehensive plan may be viewed as having their foundation in

1 questions of goal compliance. Because the county plan and
2 implementing ordinances have been acknowledged, the goal issues
3 no longer exist; and, as in Whitesides, essentially all of the
4 issues presented by petitioners have been answered by the
5 acknowledgment. We are required therefore to dismiss the
6 case. Fujimoto, supra.

7 ADDITIONAL CLAIM OF ERROR

8 Petitioners make an additional claim that the new
9 designations for the property violate procedures established in
10 the new plan. This claim of error was not included in the
11 petitioners' petition for review, but appears for the first
12 time as part of petitioners' answer to respondents' assertion
13 the case is moot. As we understand the argument, petitioners
14 say the legislative action taken to redesignate the Renaghan
15 property violates comprehensive plan provisions controlling how
16 destination resort zoning is to be applied. If the legislative
17 act redesignating the property is in violation of the plan, the
18 new designations may not be used in support of a claim that the
19 challenge to the quasi-judicial action is now moot.

20 Petitioners' arguments can be summarized as follows: (1)
21 the Lane County Comprehensive Plan provides destination resorts
22 can be designated only through a quasi-judicial procedure after
23 the filing of an application; (2) there has been no such
24 application in this case; the county simply designated the
25 property for destination resorts in the new plan and zoning
26 ordinance; and (3) this act violates the comprehensive plan

1 provision referred to in (1).

2 There is language in the new comprehensive plan to support
3 petitioners' argument. Policy 19 of the plan provides:

4 "Destination Resort designation and zoning shall be
5 considered only on a case-by-case basis, and may be
6 evaluated concurrently. No designations rezoning
shall occur in the absence of a specific application
which addresses the criteria stated above."

7 Also, plan Policy 20 discusses requests for specific plan
8 changes and states:

9 "Lane County recognizes that the legislative process
10 does not allow for time-consuming scrutiny of
11 individual requests, yet the county also recognizes
12 that there may be substantial merit to numerous CPR
requests."

13 We decline to adopt petitioners' view that destination
14 resort zoning may only be applied after a quasi-judicial
15 procedure. While we agree the new plan limits designation of
16 destination resort property to those established by
17 quasi-judicial proceedings, there is nothing in the old plan
18 and zoning ordinance prohibiting the county's acts and we are
19 cited to no legal prohibition against the county's act. The
20 new plan and zoning ordinance, along with new designations for
21 properties within the county, were adopted at the same time.
22 There was no Policy 19 in the old plan to prohibit the county
23 from making sweeping changes in designation of particular
24 properties. Petitioners would have us, in effect, read Policy
25 19 retroactively, and there is nothing in the county plan and
26 ordinance scheme suggesting such a reading is required. We

1 decline to adopt petitioners' view. Denny v. Bean, 51 Or 180,
2 93 P 693 (1908); 2 Sands Sutherland, Statutory Construction,
3 Section 41.04 (4th Ed, 1973).

4 We therefore reject petitioners' claim that the adoption of
5 the new comprehensive plan and zoning ordinance, or the
6 designations applied to the Renaghan property, violate the
7 comprehensive plan.

8 This appeal is dismissed.

1 FOOTNOTES

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4 While the matter was pending before the Supreme Court, the
5 county adopted a new comprehensive plan and zoning ordinance
6 which included new plan and zoning designations for the subject
7 property. The new designations call for resort development on
8 the property, thereby reaching the same end achieved by the
9 quasi-judicial plan and zone change under review here.
10 Petitioners did not appeal these legislative acts.

11 The county asked the Supreme Court to dismiss the
12 proceeding, arguing that adoption of the new plan and zoning
13 ordinance rendered review of our decision moot. The Supreme
14 Court rejected this argument because the findings of fact and
15 conclusions of law used to support the county's earlier
16 quasi-judicial decision were the same as those used to support
17 the new legislative changes. The court said:

18 "For purposes of judicial review, adopting a new
19 comprehensive plan, which in effect, readopts a prior
20 plan amendment and is enacted on essentially the same
21 findings, does not moot a prior appeal challenging the
22 adequacy of those findings. A determination by LUBA
23 of substantive issues raised by the petitioners would
24 not be meaningless. The effect of the recently
25 adopted new comprehensive plan and zone designations
26 for the subject property is that, on remand, LUBA
would determine whether the new plan complied with
goal exception standards. We hold that this appeal is
not moot and deny Lane County's Motion to Dismiss."
Warren, supra, 297 Or at 295.

18 The court then remanded the case to us for review.

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21 The staff report of the acknowledgment proceedings reveals
22 considerable attention was paid to the Renaghan property.

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24 The Lane County acknowledgment is on appeal to the Court of
25 Appeals.

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Acknowledgment of the county's plan and implementing
regulations is governed by ORS 197.225 through 197.265. ORS

1 197.015(1) defines acknowledgment as a

2 "[c]ommission order that certifies that a
3 comprehensive plan and land use regulations, land use
4 regulation or plan or regulation amendment complies
5 with the goals."

6 ORS 197.250 requires all comprehensive plans and land use
7 regulations to comply with statewide planning goals. There is
8 no mention of application of a comprehensive plan or a land use
9 regulation to a specific piece of property in either of the
10 quoted statutes. However, in ORS 197.251, the Land
11 Conservation and Development Commission is given the authority
12 to grant an acknowledgment for a particular or a limited
13 geographical area. ORS 197.251(6). This provision
14 contemplates scrutiny of the application of particular
15 regulations to geographical areas (or properties) within the
16 local jurisdiction. Indeed, the parties do not dispute that
17 LCDC had before it, during the pendency of the Lane County
18 acknowledgment proceeding, not only Lane County Comprehensive
19 Plan and regulations, but also zoning maps and information on
20 individual plan and zone designations for all the particular
21 geographical areas of the county. The Renaghan property was no
22 exception.

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Goal 11 states:

"GOAL: To plan and develop a timely, orderly and
efficient arrangement of public facilities and
services to serve as a framework for urban and rural
development.

"Urban and rural development shall be guided and
supported by types and levels of urban and rural
public facilities and services appropriate for, but
limited to, the needs and requirements of the urban,
urbanizable and rural areas to be served. A provision
for key facilities shall be included in each plan. To
meet current and long-range needs, a provision for
solid waste disposal sites, including sites for inert
waste, shall be included in each plan.

"A Timely, Orderly and Efficient Arrangement - refers
to a system or plan that coordinates the type,
location and delivery of public facilities and
services in a manner that best supports the existing
and proposed land uses.

1 "Rural Facilities and Services - refers to facilities
2 and services which the governing body determines to be
3 suitable and appropriate solely for the needs of rural
4 use.

5 "Urban Facilities and Services - refers to key
6 facilities and to appropriate types and levels of at
7 least the following: police protection; fire
8 protection; sanitary facilities; storm drainage
9 facilities; planning, zoning and subdivision control;
10 health services; recreation facilities and services;
11 energy and communication services; and community
12 governmental services."

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6 Goal 7 states:

"GOAL: To protect life and property from natural
disasters and hazards.

"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."