BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PORTLAND AUDUBON SOCIETY, DENNIS TYLKA and 1000 FRIENDS OF OREGON, Petitioners, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 85-032 CA A37151 FINAL OPINION ON REMAND

On remand from the Court of Appeals.

Mark J. Greenfield, Portland, filed the petition for review and argued on behalf of petitioners.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of Clackamas County.

Edward I. Engel, Portland, filed a response brief and argued on behalf of Respondents Seller, Peters and Marshall. With him on the brief were Goldsmith, Siegel, Engel & Littlefield.

Michael A. Holstun, Salem, filed a response brief on behalf of Department of Land Conservation and Development.

DuBAY, Referee; KRESSEL, Chief Referee, Bagg, Referee, participated in the decision.

AFFIRMED 04/28/86

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

Opinion by DuBay.

NATURE OF THE DECISION

This is an appeal of a comprehensive plan amendment designating 1.7 acres as wetlands.

FACTS

When the county plan was acknowledged for compliance with statewide planning goals, 56 acres were designated as the Welches Study Area. The study area was scheduled for additional fact finding to determine the extent of Goal 5 resources.[1] On June 27, 1984, the county entered an order designating 18 of the 56 acres as wetlands. Petitioners appealed the decision to this Board. We remanded the decision for further findings, to be discussed in more detail below. Portland Audubon Society v. Clackamas Co., 12 Or LUBA 269, (1984) (PAS I hereafter). After the remand, the county received additional testimony about the extent of the wetlands on part of the study area, the Peters-Seller property. The county found two portions of the property are wetlands as defined in the comprehensive plan, one of 1.65 acres and the other .17 acres. This appeal followed.[2]

FIRST ASSIGNMENT OF ERROR

Petitioners claim the county's definition of wetlands is narrower than the definition used in statewide planning goals. They allege the county's definition allows a smaller wetland area than permissible under statewide goals in violation of Goal 5. The statewide goal definition of wetlands is as

follows:

> "Land areas where excess water is the dominant factor determining the nature of soil development and the types of plant and animal communities living at the soil's surface. Wetlands soils retain sufficient moisture to support aquatic or semi-aquatic plant life."

The county's definition is stated as follows:

> "Areas inundated by surface or groundwater sufficient to support a prevalence of vegetation or aquatic life which requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, sloughs, wet meadows, river overflows, mud flats, natural ponds or other similar areas."

Petitioners point out that the county's definition is narrower than the statewide goals definition. The county designates as wetlands only those areas having a prevalence of vegetation or aquatic life which require saturated or seasonally saturated soil conditions. By contrast the wetlands definition in statewide goals more broadly speaks of soils that support aquatic or semi-aquatic plant life. The difference in the definitions was pointed out in a consultant's report in PAS I:

> "The requirements of this definition for 'prevalence of vegetation' which 'requires' saturated soil conditions is rather stringent. Many plant species can tolerate saturated or seasonally saturated soils but few require those soil conditions. This definition would exclude species that can tolerate a broad range of soil moisture conditions." Record at 397.[3]

Petitioners allege the county erred by not using the goal's definition of wetlands.

Respondents claim petitioners may not raise this point now

because it could have been raised in PAS I but was not. They support the claim by citing the doctrine of "law of the case" as applied in Oregon Education Association v. Eugene School District No. 4J, 64 Or App 326, 653 P2d 1000 (1982); Baker v. Lane County, 37 Or App 87, 586 P2d 114 (1978); and City of Idanha v. Consumers Power, 13 Or App 431, 509 P2d 226, rev den (1973).

In Baker v. Lane County, supra, at 92, the court said:

> "Under the 'law of the case' doctrine, however, defendent is precluded from raising any legal issues decided in the earlier appeal or which could have been raised but were not."

We understand the doctrine to mean that questions that might have been raised in the first appeal may not be asserted for the first time in any subsequent phases of the case.[4]

No authority has been cited which would make this doctrine applicable to our review of land use decisions. LUBA is not a court and does not have a court's inherent powers. However, the legislative direction given to our review of land use decisions supports the idea that the doctrine shall be applicable here.

The legislature intended that final decisions in matters involving land use should be made consistently with sound principles of judicial review. ORS 197.805. The doctrine relied on by respondents is such a principle. It discourages piecemeal litigation by forcing a petitioner to present all claims in a single appeal.

The legislature also intended land use decisions be made promptly. ORS 197.805. In addition to the general policy of timeliness in ORS 197.805, the legislature set strict time limits for review of decisions by LUBA and the appellate court. ORS 197.830(12), 197.855. Another indication of the legislature's intention to streamline the appeals process is found in ORS 197.835(10), requiring LUBA to address "all issues presented" when a decision is reversed or remanded. These provisions all indicate a legislative intent to expedite reviews of land use decisions at the state level and to minimize the number of appeals of the same case.

In Fisher v. City of Gresham, 69 Or App 411, ___ P2d ___ (1984), the Court of Appeals commented on this policy. Opponents of a planned unit development asked LUBA to review an aspect (variance) of the city's decision that had been approved long before the development as a whole was approved. The city claimed the opponents had waived their objection to the variance by not appealing it when it was approved. Although the question whether the objection to the variance could be raised in the second appeal was not decided, the court said:

> "It is clear that the legislative policy in land use cases is that 'time is of the essence in reaching final decisions in matters involving land use.' ORS 197.805, and that disputes involving land use decisions are not to be decided piecemeal in unending appeals." Fisher v. Gresham, supra, at 414.

We believe the goal of avoiding the revolving door of land use appeals would be furthered by application of the "law of the

case" doctrine as asserted here. That is, after a land use decision is remanded by this Board, only legal issues that could not have been raised in the first review may be raised in any later review of the same decision.[5]

Petitioners say the doctrine does not apply here, however, because the definitional question they now seek to present was presented in PAS I. That is, they say that the county's decision was challenged in PAS I for noncompliance with Goal 5, the same goal subject to concern, here. We agree that a Goal 5 challenge was raised in PAS I. We do not agree, however, that the Goal 5 challenge was the same challenge petitioners now ask us to consider.

In PAS I, petitioners alleged:

> "Respondent violated Goal 5 by omitting 'man-made' wetlands from the designated Welches Wetland." Petition for Review, LUBA No. 84-060 at 4.

The express focus of the Goal 5 attack was on the distinction made by the county between man-made and natural wetlands. Petitioners, who were represented by counsel, did not allege the county's definition of wetlands varied from the definition in statewide goals in any other respect. In fact, at oral argument petitioners' counsel stated that the two definitions were essentially the same and that "...the errors alleged really have nothing to do with the differences, if there are any, between the two definitions of wetlands." This statement accurately characterized the limited scope of petitioners' allegations set forth in PAS I.[6]

Our final opinion in PAS I noted that in view of the position taken by petitioners, we would not give consideration to the possible differences between the two definitions. Portland Audubon Society v. Clackamas Co., supra, at 280.

The possible differences between the statewide and the county definition of wetland could have been raised in PAS I. Indeed, the county's order in PAS I stated in unequivocal terms that the wetland boundary determination was based on the county's definition. The order noted that the definition protects plants that require saturated soil conditions, distinguishing such plants from those that merely "tolerate" a wetland environment. The order stated:

> "These characteristics are important when measured by the standards delineated by the Clackamas Co. Zoning Ordinance definition of 'Wetlands.'
>
> * * *
>
> "While there are plants that would tolerate a wetland environment, there is not a prevalence of vegetation which would require this special environment...." (Emphasis in original) Record at 2.

The record in PAS I clearly shows the county made its determination of wetland boundaries based on the definition now challenged as in conflict with Goal 5.[7]

Legal questions that could have been determined in PAS I should not be subject challenge for the first time in this appeal. Petitioners' first assignment of error is such a claim. We deny the assignment of error on this ground.

SECOND ASSIGNMENT OF ERROR

The evidentiary support for the following finding is challenged by petitioners:

> "Based upon the comprehensive study by Bierly, it was determined that wetland obligate species constitute half of the shrub cover in the 'forest opening' area and less than half of the understory cover. Looking at the entire cover, less than half of the coverage is a wetland obligate species, and therefore there is not a prevalence of wetland obligate species in the 'forest opening' area. Accordingly, the forest opening does not meet the definition of wetland, an area with a prevalence of vegetation which requires a wetland environment." Supp. Rec. at 3.[8]

The evidence supporting the finding is the following statement by Bierly, a wetlands consultant:

> "The data from the forest opening shows spirea has an average cover value of 53%, blackberry has an average cover of 21% and rose has an average cover of 5% for the shrubs. The understory in the forest opening is characterized by sage with an average cover of 24%, buttercup has an average of 17%, velvet grass has average cover of 5%, fescue has average cover of 6%, birds foot trefoil has an average cover of 7% for the ground cover. This analysis shows that obligate species constitute only half the shrub cover in the area in question and less than half of the understory cover. By this the analysis forest opening does not meet the definition of wetland in the county comprehensive plan." Supp. Rec. at 115-116.

Petitioners challenge the completeness of this evidence. They say the average percent of coverage for the identified species do not add up to 100 percent of either shrubs or ground cover.

In making this claim, petitioners ask us to assume that the aggregate plant cover must equal 100 percent. However, we have no basis to make this assumption. In fact, a letter to

petitioners indicates the method of measuring foliage cover may not show 100 percent coverage.[9]

We reject this challenge to the evidence.

Petitioners next claim the statement is not believable because Bierly does not specify which plant species are wetland obligates. Since the applicable standard requires a determination whether prevalence of plant coverage is by obligate species, petitioners say Bierly's statement is not reasonable unless obligate species are identified.

However, petitioners do not explain why the wetland indicator values for each plant species needs to be stated by Bierly. Bierly testified that he relied on a list of wetland indicators compiled by the U.S. Fish and Wildlife Service. Supp. Rec. at 114. The record here includes the U.S. Fish and Wildlife Service list. Supp. Rec. at 45-77. This evidence provides a foundation for Bierly's conclusion about wetland plant indicator coverage.

Petitioners next challenge Bierly's conclusion that obligate species do not dominate the forest opening. Petitioners allege the data in the October 1983 Bierly report shows that obligate species are dominant in 8 of the 12 sample plots taken along one of six lines which passes through the forest opening on the Peters-Seller property. Petitioners' argument is based solely on the field survey of shrubs and ground cover along this one line, transect 6.[10] Transect 6, according to Bierly, passes through an Alder forest as well as

the forest opening. The field data does not show which sample plots are in the forest and which are in the opening.

However, the boundaries of the wetlands found by Bierly were not determined solely from the data obtained by sample plots but were also established by use of aerial photos and field examinations of the various plant combinations. Record at 13-14. Petitioners' argument ignores both the boundary between the Alder forest and the forest opening as well as the weight to be given the Alder overstory in the plant coverage analysis. By basing their criticism on only some of the facts relied on by Bierly, petitioners' attack must fail. They have not shown by this attack that Bierly's statement is not evidence a reasonable person would rely on in assessing the scope of the wetland. Braidwood v. City of Portland, 24 Or App 477, 546 P2d 777 (1976).

We last turn to petitioners' claim that Bierly's reports and testimony are not believable because of internal inconsistencies. Petitioners make this charge based on differences between a statement in the October, 1983, report and Bierly's testimony after the remand of PAS I.

The report includes the following comments about the forest opening:

> "The site is characterized by cover dominance of wetland indicators but has a greater number of upland plant indicator species than wetland indicator species. The inclusion of this area as wetland would require a clear definition of 'prevalence.' If it means a greater number of wetland plants than upland plants, the area fails to qualify if it means a

> greater coverage of wetland plants than upland plants than (sic) the area could be considered wetland." (Emphasis supplied) Record at 615.

At the county hearings after the remand in PAS I, Bierly concluded that "obligate species constitute only half the shrub cover in the area in question and less than half the understory cover."

Petitioners allege this latter statement is completely at odds with the prior statement in the October report that the site is characterized by cover dominance of wetland indicators. We do not find inconsistency as petitioners allege.

The report refers to cover dominance of wetland indicators. As we observed above, "wetland indicators" is a broad term. It may be obligate species or may include a broader class of indicator species depending on what definition is used as a standard. The October, 1983, report also states in the same part of the report as quoted above:

> "Wetlands that clearly meet the definitional criteria established by the Corps of Engineers are restricted to those characterized as willow-alder-skunk cabbage swamp (Salix-Alnus Rubra-Lysichitum americanum) on the Peters-Seller properties." Record at 614.

Although the report does not clearly state that the Corps of Engineers' definition was the basis for concluding in the report that the forest opening was dominated by wetland indicators, Bierly clarified the issue in his later testimony. He said:

> "The report submitted in October of 1983 addresses the issue of Corps' jurisdiction and uses their definition when discussing the matter. In that report I

discussed the shrub dominated area in terms of wetland indicators using a broader definition than specified by the Clackamas County Ordinance." Supp. Rec. at 115.

In the same statement, Bierly stated the county's test

> "is whether the area can be characterized by a 'preponderance of wetland plant cover' in the sense of an area significantly dominated by obligate wetland species." Supp. Rec. at 115.

Applying this county test, Bierly found the obligate wetland species constitute only half the shrub cover and less than half of the understory cover.

On these facts, Bierly's October, 1983, report is not inconsistent with his later testimony.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners challenge the order for failure to designate a wetland impact area. According to petitioners, OAR 660-16-000(2) requires that local governments inventory Goal 5 resources and their associated impact areas. The interpretive rule by the Land Conservation and Development Commission provides in part:

> "For site specific resources, determination of location must include a designation or map of the boundaries of resource site and of the impact area to be affected, if different." (Emphasis added.)

The county addressed this issue as follows:

> "Assuming that consideration of an 'impact area' is required by the LCDC Goal 5 administrative rule (OAR 660-16-000), this board finds that the allowable development on the areas not designated as wetland in this action will have no significant impact on the area designated as wetlands. There is no need for any further Goal 5 analysis since the county comprehensive

plan and zoning and development ordinance prohibit any development on areas designated as wetland."

Petitioners challenge this finding as conclusional, and not supported by substantial evidence.

Respondents answer this charge by again alleging this issue could have been raised in the first appeal of the county's wetland designation. Therefore, say respondents, the "law of the case" principle prevents petitioners from raising the issue here.

We reject this defense. As we understand the doctrine of "law of the case" as discussed in the first assignment of error, questions that could have been raised on appeal are deemed adjudicated and may not be raised later in the same case. Here, the challenged finding could not have been attacked in PAS I because it wasn't made by the county in that proceeding. Petitioners had no opportunity to challenge the finding until it was made, i.e., until entry of the county's order after the remand in PAS I.

"Impact area" is not defined in either the statewide goals or LCDC's interpretive rules. However, the intended meaning may be derived from other portions of the rule. When Goal 5 resources are inventoried, the local government must identify uses conflicting with the resource site. Conflicting resources are defined in the rule as uses "which, if allowed, could negatively impact a Goal 5 resource site." OAR 660-16-005. Also, the rule recognizes that Goal 5 resource sites may impact

the identified conflicting uses. The conflicting uses may occur either on the resource site or elsewhere. Mobile Crushing Company v. Lane County, 11 Or LUBA 173 (1984). From these provisions it is apparent an impact area is the area where uses may occur that could adversely affect the resource site or be adversely affected by use of the resource site. The rule requires this impact area be identified if it is not coterminus with the resource site.

The county's finding that development on areas outside the designated wetlands will have no significant impact on the wetlands is therefore equivalent to a finding that the impact area is coterminus with the wetlands. The rule allows such determination. However, we must also consider petitioners' allegations that the finding is inadequate, and not supported by substantial evidence.

When this finding is viewed in isolation, petitioners' arguments appear meritorious. But the finding must be considered together with the county's previous order in PAS I. The order on review has not changed the wetland boundary established in PAS I to any significant degree established in PAS I. The county's order at that time included findings about zoning on nearby lands, allowable uses, identification of conflicting uses, and an analysis of the economic, social, energy and environmental consequences associated with the conflicting uses.

As part of its analysis, the county found that the wetland

should not degrade because (1) the wetland is in a different drainage basin than the areas north and west which would be developed; (2) the zoning ordinance "adequately protects the wetland;" and (3) the county ordinance requires detailed storm water and sedimentation plans prior to development and prohibits altering drainage patterns or routing water to the wetland from a sub basin. See PAS I Record at 7-11. These findings provide the rationale for the conclusion challenged here by petitioners.

This assignment of error is denied.

Affirmed.

FOOTNOTES

1

The study area designation was approved in accordance with OAR 660-16-000(5)(b). This rule states:

> "(b) Delay Goal 5 Process: When some information is available, indicating the possible existence of a resource site, but that information is not adequate to identify with particularity the location, quality and quantity of the resource site, the local government shall only include the site on the comprehensive plan inventory as a special category. The local government must express its intent relative to the resource site through a plan policy to address that resource site and proceed through the Goal 5 process in the future. The plan should include a time frame for this review. Special implementing measures are not appropriate or required for the Goal 5 compliance purposes until adequate information is available to enable further review and adoption of such measures. The statement in the plan commits the local government to address the resource site through the Goal 5 process in the postacknowledgement period. Such future actions could require a plan amendment."

2

The appeal of the decision now before us was dismissed by this Board for failure to exhaust available remedies according to ORS 197.825(2)(a). Portland Audubon Society v. Clackamas Co., ___ Or LUBA ___ (1985) (LUBA No. 85-032, dated August 20, 1985). Our decision was reversed and remanded by the Court of Appeals. Portland Audubon Society v. Clackamas Co., ___ Or App ___, ___ P2d ___ (1986) (Slip Op. dated January 15, 1986).

3

Citations to the record refer to the record in PAS I. Citations to the Supplemental Record refer to the record of the county's proceedings after our remand of PAS I.

4

Generally, the law of the case designates the principle that determinations of legal questions by an appellate court are foreclosed from relitigation in the same case when the matter is remanded to a lower court. The doctrine prevents such relitigation either in the lower court after the remand or in the appellate court if the case is appealed a second time. The doctrine also may foreclose relitigation of legal determinations made at the trial court level after previous determinations by a different trial court or judge. See Morley v. Morley, 24 Or App 777, 547 P2d 636 (1976); 5 Am Jur 18A, Appeal and Error Section 744.

The principle relied on by respondent is referred to as the "law of the case" even though no determination of legal issues has occurred. The cases cited in the text apply the doctrine in this situation. We also use the "law of the case" doctrine in this sense.

5

Particular circumstances, such as the fact that the party was not represented by counsel in the first appeal might warrant relaxation of the rule. c.f. Hilliard v. Lane County, 51 Or App 587, 595-6, 626 P2d 905 (1981), rev den 291 Or 368. However, in our opinion, the rule applies without qualification in this case.

6

The petition does aver that:

> "Respondent was not free to apply Goal 5 using its own definition of the terms of the goal. It must apply all of the words of the goal as they are defined in the goals and interpreted by LCDC. Otherwise respondent is not applying Goal 5." Petition in LUBA No. 84-060 at 6.

Although this allegation is broadly worded, it is clear from the context that petitioner was complaining about the county's failure to protect man-made wetlands as well as natural wetlands. This was the substance of the Goal 1 challenge. Indeed, had the above quoted language been unaccompanied by a specific claim, we would have dismissed it as overly broad. Petitioners can therefore not rely on that broad language to say the specific Goal 5 claim it now wishes to raise was raised in the prior appeal.

7

We also note the present claim of error is not based on new findings of facts or rationale adopted by the county after the order of remand in PAS I.

8

"Obligate Species" is used in the order is a reference to a classification of plants based on the frequency the plant species is found in wetlands. Obligate species are found in wetlands 95 percent of the time.

9

The letter from a professor of geography states plant area coverage is an estimate of foliage area projected onto the ground determined separately for each species. Supplemental Record at 13. Under this standard, only where the area of plant foliage covers exactly 100 percent of the sample ground area, without gaps or overlaps, will coverage equal 100 percent.

10

The data, at page 627 of the Record, shows plant coverage classes of shrubs and ground cover observed on 12 one meter square sample plots. The plots are spaced 50 feet apart along one of six lines, called transects, on the Peters-Seller property.