

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUN 5 5 14 PM '86

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CARL M. HALVORSON and )  
 LITTLE WHALE COVE HOMEOWNERS' )  
 ASSOCIATION, )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 LINCOLN COUNTY, )  
 )  
 Respondents. )

LUBA No. 86-009  
 FINAL OPINION  
 AND ORDER

10 Appeal from Lincoln County

11 Garry P. McMurry, of Rankin, McMurray, VavRosky and  
 12 Doherty, Portland, filed the petition for review and argued on  
 behalf of petitioners.

13 Catherine Riffe and Robert Shoemaker of Lindsay, Hart, Neil  
 14 and Weigler, Portland, filed a response brief and argued on  
 behalf of participant-respondent Thomas McDonald.

15 Nancy Craven, County Counsel, filed a response brief and  
 argued on behalf of Respondent Lincoln County.

16 KRESSEL, Chief Referee; BAGG, Referee; DuBAY, Referee,  
 17 participated in the decision.

18 REMANDED 06/05/86

19 You are entitled to judicial review of this Order.  
 20 Judicial review is governed by the provisions of ORS 197.850.  
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1 Opinion by Kressel.

2 NATURE OF DECISION

3 This is an appeal of a plan amendment adding approximately 24  
4 acres to the Depoe Bay Urban Growth Boundary (UGB). The amend-  
5 ment would permit the extension of sewer service to the property,  
6 thereby facilitating more intensive residential development.

7 FACTS

8 In 1984, ordinances adding the 24 acres to the UGB were  
9 adopted by Depoe Bay and Lincoln County. Petitioners sought  
10 review of the county's ordinance. In Halvorson v. Lincoln  
11 County, Or LUBA \_\_\_\_ , (No. 84-099, July 19, 1985) we remanded the  
12 county's ordinance on grounds it did not satisfy requirements for  
13 UGB amendment set forth in Statewide Goal 14.

14 In January, 1986, the Lincoln County Board of Commissioners  
15 adopted the ordinance at issue in this appeal. The ordinance  
16 again amends the county's comprehensive plan by expanding the UGB  
17 to include the 24 acres.

18 The property is bounded by U.S. Highway 101 on the east,  
19 Highway 101 and the Whale Cove Inn on the south, the Little Whale  
20 Cove subdivision on the north and the Pacific Ocean on the west.  
21 The Depoe Bay city limits are at the property's northern  
22 boundary.

23 The property is in 17 ownerships. Twenty-four lots are  
24 within a platted subdivison (Whale Cove Subdivision). Eight are  
25 developed with single family residences.

26 The land is zoned Suburban Residential (15,000 square feet

1 per dwelling where sewers are unavailable). However, many of the  
2 lots are substandard in area, having been created prior to the  
3 adoption of zoning. A "grandfather" clause in the county zoning  
4 ordinance allows development on these substandard lots, but  
5 intensive development will not be authorized unless sewers are  
6 installed.

7 Whale Cove subdivision is served by three platted streets.  
8 Six-inch water lines run down two of the streets. Power  
9 facilities, including PUD poles, street lights, and underground  
10 power lines are also in place on the property. Fire protection  
11 and ambulance services are provided by the Depoe Bay Rural Fire  
12 Protection District. Police protection is provided by the  
13 Lincoln County Sheriff and the State Police.

14 The Little Whale Cove Subdivision, which is immediately north  
15 of the 24 acres, is served by sewers constructed in the 1970's.  
16 The sewer lines extend close to the subdivision's southern  
17 boundary. The eight-inch lines can serve development on the 24  
18 acres to the south. Also, the main trunk line connecting the  
19 Little Whale Cove Subdivision to the Depoe Bay sewage treatment  
20 facility was oversized to accommodate additional development,  
21 including development on the adjacent 24 acres.

22 The 24 acres are identified in the acknowledged Lincoln  
23 County plan inventory as forest land. However, LCDC approved a  
24 resource goal exception on grounds the property was either  
25 developed or irrevocably committed to uses not permitted by  
26 Statewide Goal 4 (Forest Lands). We examined the resource goal

1 exception in the prior appeal and were unable to conclude that  
2 it also exempted the property from Goal 14 requirements.

3 Halvorson v. Lincoln County, Supra, Slip Op at 7; See 1000  
4 Friends of Oregon v. LCDC, 73 Or App 350, 698 P2d 1027, rev  
5 allowed 300 Or 111 (1985); 1000 Friends of Oregon v. LCDC, 78  
6 Or App 270, \_\_\_ P2d \_\_\_ (1986).

7 FIRST ASSIGNMENT OF ERROR

8 The county's original justification for the UGB amendment,  
9 and the one it asserts again in this proceeding, is that the  
10 land is "committed to urban use." "Committment" is not a term  
11 used in Goal 14, the statewide goal regulating the formation  
12 and adjustment of the UGB. However, LCDC has recognized that  
13 lands committed to urban use may be included inside a UGB, even  
14 if those lands are not needed to accommodate projected  
15 population demands. See, e.g., LCDC Continuance Order,  
16 Metropolitan Service District Acknowledged Request, September  
17 28, 1979. The committment theory is explained as follows in  
18 City of Salem v. Families for Responsible Government, 64 Or App  
19 238, 668 P2d 395 (1983):

20 "As a general rule, a local government is not  
21 permitted to establish an urban growth boundary  
22 containing more land than the locality 'needs' for  
23 future growth. However, in certain limited  
24 circumstances, an urban growth boundary may contain  
25 extra land. When existing urban development or  
26 existing public facilities have 'committed' an  
'unnecessary' piece of land to urban use, the local  
government may include that land in the boundary in  
order to avoid illogical development or service  
patterns. Metro Continuance Order, supra at 12. To  
justify such a boundary, the local government must  
demonstrate, through the application of Goal 14's

1 locational factors, that the land in question is in  
fact 'committed' to urban use."

2 The so-called locational factors in Goal 14 are 64 Or  
3 App at 243.

4 \* \* \*

5 "(3) Orderly and economic provision for public  
6 facilities and services;

7 "(4) Maximum efficiency of land uses within and on the  
fringe of the existing urban area;

8 "(5) Environmental, energy, economic and social  
9 consequences

10 "(6) Retention of agricultural land as defined, with  
Class I being the highest priority for retention  
11 and Class VI the lowest priority; and,

12 "(7) Compatibility of the proposed urban uses with  
nearby agricultural activities."

13 In the prior appeal, the county's findings of commitment  
14 emphasized that the land was in many ownerships, that it had  
15 been partly developed with residences, and that some urban  
16 services were available. However, we held the findings were  
17 insufficient to show commitment to urban use. Our remand  
18 order called on the county to demonstrate that the property was  
19 committed to "...uses of a kind and intensity characteristic of  
20 urban development in the City of Depoe Bay."<sup>1</sup> Slip Op at 8.

21 On remand, the county compared the level of development and  
22 services available to the 24 acres with the density and types  
23 of services available in the adjacent city. As a result of the  
24 comparison, the county concluded that the property is "...  
25 committed by existing urban development and existing public

26 / / /

1 facilities to urban use." Record at 17. The findings state:

2 " 3. The density of housing on the subject property is  
3 characteristic of and consistent with density  
4 (sic) of housing west of Highway 101 in the City  
5 of Depoe Bay.

6 \* \* \*

7 " 9. The City of Depoe Bay and the subject property  
8 are serviced by and receive the same police and  
9 fire protection, sanitary service, health  
10 services and electrical power as are provided on  
11 a county or area-wide basis. The same school  
12 district serves both the City of Depoe Bay and  
13 the subject property.

14 "10. Power facilities, including PUD poles, street  
15 lights and underground power lines, are in place  
16 on the subject property. These facilities are  
17 characteristic of and compatible with existing  
18 structures and facilities in the City of Depoe  
19 Bay.

20 "11. The subject property is served by the City of  
21 Depoe Bay water system, through the Miroco Water  
22 District.

23 \* \* \*

24 "16. The main trunk line running from the sewer line  
25 within Little Whale Cove to the City of Depoe  
26 Bay's sewage treatment facility was constructed  
to a twelve-inch diameter. One reason for this  
was to accommodate anticipated future development  
of the subject property." Record at 13-16.

17 Petitioners first maintain that in order to show  
18 committment to urban use, the county must show the property is  
19 served by sewers or that a sewer connection is available at its  
20 boundary. The availability of other municipal services, such  
21 as electrical power and public water, does not demonstrate  
22 committment, in their view, because "[T]hose services were not  
23 unique to Depoe Bay but, to the contrary were in existence at  
24 the County level." Petition at 5. Thus, petitioners insist  
25 that committment requires more than that the level of  
26

1 development and scope of available services are  
2 "characteristic" of urban development in the City of Depoe Bay  
3 (the test we articulated in the prior appeal). They say  
4 committment depends on whether the land is served or can  
5 readily be served by utilities "unique" to the city (i.e.,  
6 sewers).

7 Without question, the case for including the 24 acres  
8 inside the UGB would be stronger if sewer lines were in place  
9 or connections were available at the boundary. However, we do  
10 not believe committment depends solely on these circumstances.  
11 Other factors may be considered in determining whether  
12 inclusion of the land in the UGB would be permissible under a  
13 Goal 14 committment analysis.

14 In City of Salem v. Families for Responsible Government,  
15 supra, the court of appeals upheld a committment determination  
16 based on findings of some development and that the neighboring  
17 city planned to provide water systems, sewer systems and roads  
18 to the property. 64 Or App at 249-50. Extensive planning of  
19 these services was given considerable weight in the committment  
20 analysis.

21 As the summary of facts shows, the case for committment in  
22 this instance rests on a combination of present development at  
23 a level similar to development in the adjacent city and the  
24 fact that additional municipal services have been planned.  
25 The property is extensivly parcelized and is in numerous  
26 ownerships. It is on the fringe of the city and is adjacent to

1 urbanized (i.e. developed and fully serviced) land. There are  
2 now eight dwellings on the 24 acres. The density is comparable  
3 to that in the neighboring city. Existing services and  
4 facilities include streets, electrical power, fire hydrants,  
5 and water mains. Although the property is not sewered and the  
6 nearest connection is not at the boundary, the record shows  
7 that sewer lines are nearby and were planned to accommodate  
8 development of this property.

9       Petitioners incorrectly construe our prior opinion to rule  
10 out a commitment determination unless the land is served by  
11 the one utility available to Depoe Bay residents that is not  
12 available on the city's fringe. We did not intend to create  
13 such a narrow test and do not believe such a test is implied by  
14 City of Salem v. Families for Responsible Government, supra.  
15 Subject to our ruling in the second assignment of error, infra,  
16 (concerning Factor 5 of Goal 14) we hold that the county's  
17 findings demonstrate the degree of development and planning  
18 necessary to show commitment to urban use.

19       The first assignment of error is denied.

20       SECOND ASSIGNMENT OF ERROR

21       Petitioners next allege that certain findings adopted by  
22 the county are not supported by substantial evidence. The  
23 first finding is that

24       "In 1976, the Depoe Bay Sanitary District and Thomas  
25 McDonald requested of Carl Halvorson that the sewer  
26 lines in the Little Whale Cove, the property  
immediately to the north of the subject property, be  
sized during construction to provide adequate capacity



1 to accommodate future development on the subject  
property." Record at 15.

2 We reject the evidentiary challenge to this finding. Letters  
3 in the record provide substantial evidence that the request was  
4 made. See Braidwood v. City of Portland, 24 Or App 477, 546  
5 P2d 777 (1976).

6 The next finding challenged by petitioners states

7 "15. The eight inch sewer lines within Little Whale  
8 Cove are of sufficient size to serve present and  
9 anticipated future improvements on the subject  
property." Record at 15.

10 An evidentiary challenge to a similar finding was made and  
11 rejected in the prior appeal. The record contains a letter  
12 from Petitioner Halvorson to the State Department of  
13 Environmental Quality indicating that the sewer system would be  
14 adequate to accommodate Little Whale Cove and "...the seventy  
15 (70) additional lots that Mr. McDonald was proposing...."  
16 Supplemental Record at 39A, Exhibit 13-4. There is additional  
17 support for the finding in a written statement by Mr. David  
18 Reeser, an engineer for the Depoe Bay Sanitary District.

19 The next finding attacked by petitioners states:

20 "16. The main trunk line running from the sewer lines  
21 within Little Whale Cove to the City of Depoe  
22 Bay's sewage treatment facility was constructed  
23 to a twelve-inch diameter. One reason for this  
24 was to accommodate anticipated future development  
25 of the subject property." Record at 15.

26 The record supports this finding. A letter by Mr. Reeser  
states:

"It was my understanding that capacity for the Whale  
Cove area was included in the design of the system [at

1 Little Whale Cove]--partially by utilizing excess  
2 capacity of the Little Whale Cove system and partially  
3 by a future trunk line to be constructed down Highway  
4 101 which would connect into a ten-inch stub  
5 constructed as part of the Little Whale Cove  
6 development. Also as part of the Little Whale Cove  
7 development, the main trunk running from Little Whale  
8 Cove to the Depoe Bay treatment facility was increased  
9 to twelve-inch diameter in order that capacity for the  
10 additional lands east of Little Whale Cove and in the  
11 Whale Cove area could be served in the future."  
12 Record at 27.

13  
14 Petitioners next challenge the evidentiary support for the  
15 finding that sewer service to the 24 acres will

16 "Eliminate potential negative environmental  
17 consequences resulting from failure of existing  
18 sub-surface sewage disposal systems and will permit  
19 construction of improvements on existing undeveloped  
20 lots." Record at 16.

21 The claim is that the record contains no proof of failure of  
22 existing sewage disposal systems. However, the claim is  
23 refuted by statements of lot owners that soil conditions in the  
24 area have resulted in "faulty septic systems." Record at 40.

25 Petitioners' strongest attack in this assignment of error  
26 directs attention to the following finding:

27 "24. Inclusion of the subject property within Depoe  
28 Bay's urban growth boundary, in itself, makes no  
29 physical change on the land and is thus neutral  
30 regarding energy, economic or social  
31 consequences. Future development at urban  
32 density may or may not have adverse energy,  
33 economic and/or social consequences depending  
34 upon the alternatives to that development."  
35 Record at 17.

36 The finding seems to say that locational Factor 5 in Goal 14  
37 ("Environmental, energy, economic and social consequences")  
38 has no bearing on the analysis of whether the property is

1 committed to urban use. Petitioners say that if this is the  
2 intended meaning, the finding is an attempt to circumvent Goal  
3 14:

4 "To say that the decision to draw an urban growth  
5 boundary without reference to need and to ignore  
6 energy, environmental economical and social  
7 consequences by that decision totally ignores Factor 5  
8 of Goal 14....The argument that the mere redrawing of  
9 a line does not impact the use of the land is absurd.  
10 Once the land is in the UGB considerations of energy,  
11 economics, environment and social consequences are  
12 beyond meaningful scrutiny." Petition at 11.

13 Respondents answer this challenge in several ways, none of  
14 which are persuasive. First, they argue that Factor 5 is  
15 inapplicable to a UGB determination based on commitment to  
16 urban use. They maintain the factor comes into play only when  
17 the locality has quantified a need for a certain amount of  
18 urban land and is considering how best to meet the need from  
19 the available land inventory. Where specific land is  
20 committed to urban use, they argue, "...there is probably  
21 little, if any, economic, social or energy impact from  
22 including the property in the Urban Growth Boundary."  
23 Respondents Brief at 16.

24 We reject respondent's argument. It presupposes that a  
25 commitment determination can be made without reference to the  
26 consequences of such a determination. In City of Salem v.  
Families for Responsible Government, supra, the court stated  
that to justify a UGB determination based on commitment

"...the local government must demonstrate, through the  
application of Goal 14's locational factors, that the  
land in question is in fact 'committed' to urban

1 use." 64 Or App at 243.

2 The court did not indicate that any of the locational factors  
3 could be discounted in a commitment analysis.<sup>2</sup>

4 We believe that in cases of this sort, the consequences of  
5 a commitment determination are a component of the  
6 determination itself. If land outside a UGB is not needed to  
7 accommodate projected demands (as here), but is proposed to be  
8 brought within the boundary for other reasons, Factor 5 of Goal  
9 14 requires that the consequences of that change be examined.  
10 The consequences cannot be evaluated in a vacuum; they depend  
11 on the level or intensity of development that likely be  
12 permitted once the land is brought within the UGB. Stated in  
13 other terms, where a commitment claim is based on partial  
14 development of the land and the availability of some services  
15 (as here), the claim cannot be sustained under Goal 14 without  
16 (1) consideration of the level of development likely to result  
17 from inclusion of the land within the UGB and (2) the  
18 environmental, energy, economic, and social consequences of  
19 allowing that level of development.

20 We reject Respondents' contention that inclusion of the 24  
21 acres inside the Depoe Bay UGB "...makes no physical change on  
22 the land and is thus neutral regarding energy, economic or  
23 social consequences." Record at 16 (emphasis added).  
24 Concededly, the UGB amendment does not automatically result in  
25 intensive land development. However, the amendment clearly  
26 sets the stage for development. If 1000 Friends of Oregon v.

1 Wasco County, 299 Or 344, \_\_\_ P2d\_\_\_ (198\_\_\_) (Application of  
2 goal to incorporation decision). The amendment process may, as  
3 petitioners allege, be the last occasion for "meaningful  
4 scrutiny" by planning officials of a significant  
5 intensification of land use. Accordingly, we hold that the  
6 amendment may not be authorized in this case until the  
7 consequences of including the land within the UGB (Goal 14,  
8 Factor 5) are expressly considered.<sup>3</sup>

9 Based on the foregoing, we sustain this challenge. A  
10 remand is therefore in order.

11 THIRD ASSIGNMENT OF ERROR

12 Petitioners next attack many of the conclusions  
13 accompanying the county's decision. Some of their attacks  
14 reiterate points we have already discussed. We address the  
15 remaining contentions.

16 Petitioners allege that the record does not support the  
17 county's conclusion that

18 "Inclusion of the subject property within the Depoe  
19 Bay urban growth boundary will facilitate the orderly  
20 and economic provision of public facilities and  
21 services." Record at 17.

22 However, as already noted, the county found that the sewer  
23 system on the adjacent land was installed so as to accommodate  
24 eventual extension of service to this property. In addition,  
25 the county found that the property is served by water and  
26 electrical power lines. The record supports their findings.  
It follows that the amendment will facilitate the orderly and

1 economic provision of services. See City of Salem v. Families  
2 for Responsible Government, supra, 64 Or App at 250.

3 Petitioners next take issue with the conclusion that

4 "Inclusion of the subject property within the Depoe  
5 Bay Urban Growth Boundary will maximize the efficiency  
6 of land uses within and on the fringe of the existing  
7 urban area." Record at 17.

8 Petitioners' complaint is that the county reached the  
9 conclusion without disclosure by the landowner of the exact  
10 type of development planned for the property. The petition  
11 states:

12 "There is simply no way that the county can conclude  
13 that this amendment will 'maximize the efficiency of  
14 land uses' without knowing the density of development,  
15 whether it is going to be a hotel, motel, time-share  
16 or single family dwellings." Petition at 14.

17 We have previously held that the county's committment  
18 determination could not be made without an assessment of the  
19 foreseeable level of development of the property, and the  
20 consequences of that development. Factor 5 of Goal 14 was the  
21 basis for that holding. Here, petitioner asserts that Factor 4  
22 also requires such detail. The factor reads:

23 "(4) Maximum efficiency of land uses within and on the  
24 fringe of the existing urban area."

25 In City of Salem v. Families for Responsible Government, supra,  
26 the court stated:

27 "[A]s a general rule, it is efficient to extend urban  
28 development into areas where such development has  
29 already begun, some urban services already exist and  
30 additional services are planned." 64 Or App at 250

The county could (and did) apply the same general rule in this

1 instance. We find no defect in the challenged conclusion.

2 Petitioners also attack the following conclusion in the  
3 county's decision:

4 "The long terms environmental, economic, social and  
5 energy consequences resulting from inclusion of the  
6 property in the Depoe Bay urban growth boundary will  
7 not be significantly more adverse than would result  
8 from inclusion of other areas within the boundry."  
9 Record at 17.

10 Petitioner correctly points out that this conclusion does not  
11 correspond with any of the locational factors required to be  
12 considered under Goal 14. If this case involved an exception  
13 to Goal 14 based on ORS 197.732(1)(c)(C), the conclusion would  
14 have its place. Here, we consider it to be surplusage.

15 Petitioners' final salvo aims at the following conclusion:

16 "The proposed urban density residential uses on the  
17 subject property will be compatible with other  
18 adjacent uses." Record at 18.

19 They contend that the compatibility determination cannot be  
20 made until the county is advised of the type of development  
21 proposed for the 24 acres. However, we do not find any  
22 requirement in Factor 7 of Goal 14 for the compatibility  
23 analysis petitioners attack. Factor 7 calls for consideration  
24 of the

25 "Compatibility of the proposed urban use with nearby  
26 agricultural activities" (emphasis added).

27 The county addressed this factor in a portion of its decision  
28 not challenged by petitoners. Accordingly, this challenge does  
29 not warrant relief.

30 The third assignment of error is denied.

1           Based on the challenge under Goal 14, Factor 5, this  
2 decision must be remanded to the county. On remand, the county  
3 should explain (1) the level of development that would be  
4 permitted upon inclusion of the land within the UGB and (2) the  
5 environmental, energy, economic and social consequences of  
6 allowing that development.

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1 FOOTNOTES

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4 We believed this approach was preferable to attempting to  
5 create an all-purpose definition of "urban use" and testing the  
6 level of development against such a definition. The parties do  
7 not dispute the approach we took.

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10 We are aware that the court sanctioned one commitment  
11 claim by reference only to Factors 3 and 4 of Goal 14. 64 Or  
12 App at 250. However, we do not take this to mean that the  
13 remaining Goal 14 locational factors may be disregarded in a  
14 commitment analysis.

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17 Respondents point out that a conclusion in the challenged  
18 decision states:

19 "No adverse environmental, energy, economic or social  
20 consequences will result from the inclusion of the subject  
21 property within the Depoe Bay Urban Growth Boundary."  
22 Record at 17.

23 This conclusion is not sufficient answer to petitioners'  
24 challenge under Goal 14, Factor 5. Nor is it sufficient to  
25 argue, as Respondents do in their brief, that the record  
26 contains information from which the necessary findings could be  
made or that petitioners failed to make an issue of Factor 5  
during the county's hearings does not adequately discuss factor  
5 of Goal 14.