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

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WILLIAM R. DYKE, SR.,)
Petitioner,)
vs.)
CLATSOP COUNTY,)
Respondent,)
and)
CLATSOP RESOURCES, INC.,)
Intervenor-Respondent.)

LUBA No. 88-110
FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Vincent P. Salvi, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Clatsop County.

Edward J. Sullivan, Portland, and W. Louis Larson, Astoria, filed a response brief and argued on behalf of intervenor-respondent. With them on the brief were Mitchell, Lang & Smith and Larson & Fischer.

HOLSTUN, Chief Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 03/08/89

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

1 Holstun, Chief Referee.

2 NATURE OF THE DECISION

3 Petitioner seeks review of an order of the Clatsop County
4 Board of Commissioners approving a conditional use permit for a
5 solid waste disposal site.

6 MOTION TO INTERVENE

7 Clatsop Resources, Inc., moves to intervene in this
8 proceeding on the side of respondent. There is no opposition
9 to the motion, and it is allowed.

10 FACTS

11 The subject 160 acre parcel is zoned Forest-80 (F-80), a
12 zone designed to provide for large scale commercial forest
13 management. Clatsop County Land and Water Development and Use
14 Ordinance (LWDUO) Section 3.551. Under LWDUO Section 3.555,
15 certain nonforest uses, including solid waste disposal sites,
16 are allowed in the F-80 zone as conditional uses, provided an
17 exception to Statewide Planning Goal 4 (Forest Lands) is
18 approved.

19 On August 3, 1988, intervenor-respondent (intervenor)
20 submitted an application for a conditional use permit and a
21 Goal 4 exception to allow development of the proposed solid
22 waste disposal site. On September 29, 1988, the planning
23 commission approved the application, to be effective "upon
24 approval by the board of commissioners." Record 216.

25 On November 9, 1988, the board of commissioners adopted
26 Resolution and Order (Resolution) 88-11-9, approving a

1 conditional use permit "for use of the * * * property for a
2 solid waste disposal site pursuant to Section 5000 of the
3 [LWDUO] * * *." Record 62. Also on November 9, 1988, the
4 board of commissioners adopted Ordinance 88-11 amending the
5 county's acknowledged plan to include an exception to Goal 4
6 for intervenor's property. Record 64-119.

7 FIRST ASSIGNMENT OF ERROR

8 "The County erred in granting an exception for 160
9 acres when the record is clear that only 60 acres is
required to meet the landfill needs of the County."

10 Under LWDUO Section 3.555, approval of a conditional use
11 permit for a solid waste disposal site in the F-80 zone also
12 requires adoption of an exception to Goal 4. Among the
13 standards that must be satisfied for an exception to Goal 4 is
14 OAR 660-04-020(2)(a) which provides as follows:

15 "'Reasons justify why the state policy embodied in the
16 applicable goals should not apply': The exception
17 shall set forth the facts and assumptions used as the
18 basis for determining that a state policy embodied in
19 a goal should not apply to specific properties or
20 situations including the amount of land for the use
21 being planned and why the use requires a location on
22 resource land." (Emphasis added).

23 Petitioner interprets the above rule standard to require
24 the county to justify in its exception the amount of land
25 included in the adopted exception. Petitioner argues the
26 record in this case shows only 60 acres is required for the
proposed landfill, not the 160 acres the county approved in its
ordinance adopting the exception.

Intervenor claims the record shows that 160 acres is

1 required, arguing that portions of the site are not usable and
2 that the landfill might serve other counties in Oregon and
3 Washington.¹

4 Intervenor also argues that petitioner's challenge under
5 the first assignment of error should be rejected because it
6 challenges the exception adopted by Ordinance 88-11, while the
7 notice of intent to appeal identifies Resolution 88-11-9 as the
8 decision being appealed. Intervenor argues we lack
9 jurisdiction to consider petitioner's challenge to Ordinance
10 88-11. We turn first to the jurisdictional issue raised by
11 intervenor.

12 Our jurisdiction to review land use decisions is triggered
13 by filing a notice of intent to appeal. ORS 197.830(1);
14 OAR 661-10-015(1). The notice of intent to appeal in this
15 proceeding provides in pertinent part:

16 "Notice is hereby given that petitioner intends to
17 appeal that land use decision of respondent entitled:
18 'In the matter of a Conditional Use Permit in Clatsop
19 County by Clatsop Resources, Inc.; Granting the
20 Application with Conditions and Adopting Certain
21 Findings,' which became final on November 9, 1988 and
22 which involves the approval of an exception to Goal 4
23 and a conditional use request by Clatsop Resources,
24 Inc., to develop and operate a solid waste landfill on
25 a 160 acre site in forest resource lands."

26 We understand petitioner to assert in the above quoted
notice, and in his brief, that he challenges a single decision,
Resolution 88-11-9, which grants conditional use approval and
adopts an exception to Goal 4. We do not understand petitioner
to argue that the above-quoted notice of intent to appeal

1 identifies, as the subject of this appeal, two decisions, i.e.,
2 a conditional use permit approval decision and a separate
3 decision to adopt an exception. We turn to Resolution 88-11-9
4 and Ordinance 88-11 to determine whether petitioner's view of
5 the county's action is correct.

6 Resolution 88-11-9 states in pertinent part:

7 "IT APPEARING TO THE BOARD that the * * * petitioner
8 applied to the Clatsop County Planning Commission for
9 a Conditional Use Permit on certain real property
10 described in Ordinance 88-11 and by this reference
11 made a part hereof, for use of the aforesaid property
12 for a solid waste disposal site * * *;

13 * * * * *

14 "IT FURTHER APPEARING TO THE BOARD that the findings
15 adopted as part of Ordinance 88-11 should be adopted
16 as the basis for the aforesaid Conditional Use Permit
17 decision, and the Board of Commissioners being fully
18 advised in the premises; now therefore

19 "IT IS HEREBY RESOLVED AND ORDERED that the findings
20 of the Board of Commissioners by this reference made a
21 part hereof, be and hereby are adopted as the basis of
22 this Commission's action; and

23 * * * * *

24 "IT IS FURTHER RESOLVED AND ORDERED that the petition
25 to which reference was hereinabove made, referring to
26 property described in Ordinance 88-11, be and hereby
is granted subject to the conditions contained in
Exhibit 'A' of Ordinance 88-11 and by this reference
is made a part hereof, all in accordance with the
provisions of Clatsop County Land and Water
Development and Use Ordinance * * * and the rules and
regulations of this Commission." Record 62-63.

Ordinance 88-11 is a three page document captioned:

"AN ORDINANCE AMENDING THE CLATSOP COUNTY
COMPREHENSIVE PLAN (AN EXCEPTION TO THE FOREST LANDS
GOAL) AS ADOPTED BY THE BOARD OF CONTY [sic]
COMMISSIONERS ADOPTING CERTAIN FINDINGS RESCINDING
INCONSISTENT PROVISIONS."

1 Ordinance 88-11 adopts and incorporates by reference a 52 page
2 document which identifies conditional use permit and goal
3 exception approval standards and provides findings addressing
4 those standards.

5 In acting on requests for land use approval, local
6 governments may do so in a single decision or in more than one
7 decision.² See Hemstreet v. City of Seaside, ___ Or LUBA ___
8 (LUBA No. 87-094, April 22, 1988) slip op 6-10; Tides Unit
9 Owners Association v. City of Seaside, 11 Or LUBA 84, 90
10 (1984). Where more than one final decision is rendered in a
11 local government's land use proceeding, there is the
12 possibility of more than one appeal to this Board.³

13 The county's decision in Ordinance 88-11 to adopt an
14 amendment to its comprehensive plan and its decision in
15 Resolution and Order 88-11-9 to grant a conditional use permit
16 are closely related. They concern the same solid waste
17 landfill proposal. They incorporate, and are both supported
18 by, the same 52 page findings document (Exhibit A). Record
19 67-119. The findings document addresses the applicable
20 conditional use permit standards (Record 70-78) as well as goal
21 exception standards (Record 89-116).

22 However, petitioner does not argue he appealed two closely
23 related land use decisions. Rather, he argues that the most
24 reasonable reading of Resolution 88-11-9 is that it
25 incorporates Ordinance 88-11. We disagree. Resolution 88-11-9
26 does adopt, and incorporate by reference, the property

1 description contained in the findings document as well as the
2 findings document itself. However, Resolution 88-11-9 does not
3 incorporate or readopt Ordinance 88-11.

4 Resolution 88-11-9 grants the requested conditional use
5 permit approval, and Ordinance 88-11 grants the requested
6 exception to Goal 4. They are separate decisions.⁴ That
7 these decisions share a common findings document, concern the
8 same property and are both required for the property to be used
9 as a solid waste landfill, does not make them the same decision.

10 Resolution 88-11-9 does not adopt, readopt or incorporate
11 the county's separate decision in Ordinance 88-11. Therefore,
12 petitioner may not, in this review proceeding, challenge the
13 adequacy of the findings which address the exception criteria
14 or the evidentiary support for those findings. Even if the
15 findings supporting the county's goal exception are inadequate
16 or are not supported by substantial evidence, such shortcomings
17 would provide a basis for reversal or remand of Ordinance
18 88-11, not Resolution 88-11-9.

19 In Martin v. City of Tigard, ___ Or LUBA ___ (LUBA No.
20 88-035, September 19, 1988), we explained that a petitioner, in
21 an appeal proceeding before this Board, may not attack prior
22 decisions or anticipated decisions that are not yet final.
23 Id., slip op at 10 (citing Cope v. City of Cannon Beach, 15 Or
24 LUBA 558 (1987); Corbett/Terwilliger/Lair Hill Neighborhood
25 Association v. Portland, ___ Or LUBA ___ (LUBA Nos. 86-063/064,
26 September 9, 1987), slip op 5; Hemstreet v. City of

1 Seaside, ___ Or LUBA ___ (LUBA No. 87-118, June 23, 1988) slip
2 op 6-7). In other words, a party may not appeal one land use
3 decision to LUBA and collaterally attack decisions that were
4 not appealed.

5 Similarly, in this case, petitioner may not challenge the
6 plan amendment adopted by Ordinance 88-11. The bar against
7 such a challenge would perhaps be more obvious if more than 21
8 days separated Ordinance 88-11 and Resolution 88-11-9, so that
9 the appeal period would have run on the earlier decision before
10 the notice of intent to appeal the latter was filed. However,
11 the fact both decisions were adopted on the same day does not
12 lead to a different result. Ordinance 88-11 was not identified
13 in the notice of intent to appeal, and the time for appealing
14 that decision has now expired.

15 Finally, we note that it might be possible to disagree with
16 both petitioner and intervenor and read the notice of intent to
17 appeal to identify both Resolution 88-11-9 and Ordinance 88-11
18 as the subject of the appeal. However, as we have explained in
19 previous cases, a petitioner may not, in a single notice of
20 intent to appeal, identify more than one land use decision as
21 the subject of the appeal. Seneca Sawmill v. Lane County, 6 Or
22 LUBA 454 (1982); Osborne v. Lane County, 4 Or LUBA 368
23 (1981).⁵ Petitioner cannot challenge the goal exception
24 adopted by Ordinance 88-11 in his appeal of
25 Resolution 88-11-9.⁶

26 The first assignment of error is denied.

1 SECOND ASSIGNMENT OF ERROR

2 "In imposing Condition No. 11, the County improperly
3 construed the applicable law and made a decision not
4 supported by substantial evidence in the whole record."

5 Under this assignment of error, petitioner challenges
6 Condition 11, which provides as follows:

7 "At the request of Clatsop County, a joint review of
8 additional material (e.g., contaminated soils, oil
9 spill sludge, asbestos etc.) that may be included in
10 the solid waste landfill shall be conducted."
11 Record 117.

12 Petitioner points to the definition of "solid waste" in the
13 LWDUO which explicitly excludes environmentally hazardous
14 waste. LWDUO Section 1.030. Petitioner interprets Condition
15 11 to allow the inclusion of hazardous and toxic materials in
16 the approved solid waste landfill and, therefore, argues the
17 approval is not in compliance with the intent and purpose of
18 the LWDUO classification of a solid waste landfill.

19 Petitioner also argues that under our decision in Benjamin
20 Franklin Development v. Clackamas County, 14 Or LUBA 758, 761
21 (1986), the appropriate standard for review of approval
22 conditions is "whether the conditions are reasonable
23 considering the evidence in the record." Petitioner argues
24 there is nothing in the record or in the plan or ordinance to
25 support allowing additional materials, such as those listed in
26 Condition 11, to be included in the solid waste landfill.

27 Petitioner contends

28 "If the county wants the site to be used for hazardous
29 waste disposal, it must take an additional exception
30 to Goal 4, see Jensen v. Clatsop County, 14 Or LUBA

1 776, 786 (1986), and go through an entirely separate
2 permitting process. Without this process the type of
3 materials listed in Condition 11 may not be included
4 in the landfill." Petition for Review 10.

5
6 Petitioner argues Condition 11 is, therefore, improper because
7 the county does not have authority to allow the additional
8 materials listed in the condition to be included in the
9 landfill through the joint review process authorized by the
10 condition.

11 Intervenor responds that the challenged condition simply
12 commits the applicant to a joint study with the county and has
13 no land use impacts. Intervenor agrees that the county's
14 decision does not authorize the acceptance of hazardous waste
15 at the approved landfill. Intervenor also agrees with
16 petitioner that a separate goal exception would have to be
17 taken, and a new conditional use permit granted, if the
18 approved landfill were to be allowed to accept hazardous waste.

19 We agree with the intervenor's interpretation of Condition
20 11. The condition merely requires a joint study and does not
21 allow waste that is not included within the county's definition
22 of "solid waste" to be accepted at the landfill without an
23 additional Goal 4 exception and a new or amended conditional
24 use permit. Petitioner's second assignment of error is based
25 on an incorrect interpretation of Condition 11, and petitioner
26 does not present argument alleging that the condition, as
correctly interpreted, fails to comply with applicable
standards.

1 The second assignment of error is denied.

2 The county's decision is affirmed.

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FOOTNOTES

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Intervenor further notes that portions of the 160 acres which are not immediately needed for landfill purposes effectively remain protected by Goal 4, because landfilling is the only nonforest use authorized by the exception.

2
We note that ORS 215.416(2) requires local governments to establish consolidated procedures so that applicants "may apply at one time for all permits or zone changes needed for a development project." However, ORS 215.416(2) does not foreclose the possibility of multiple final decisions in the consolidated local proceedings.

3
Our rules anticipate this circumstance and allow consolidation of two or more LUBA proceedings where those proceedings seek review of closely related land use decisions. OAR 661-10-055. See e.g., Flowers v. Klamath County, ___ Or LUBA ___ (LUBA Nos. 88-112/113/124, Order on Consolidation and Extensions of Time, January 10, 1989); Pardee v. City of Astoria, ___ Or LUBA ___ (LUBA Nos. 88-049/050/051, December 14, 1988).

4
Although the reason the county adopted two separate decisions is irrelevant, it seems likely that the county adopted the exception by separate ordinance because exceptions are required by OAR 660-04-015(1) to be adopted as an amendment to the comprehensive plan. Presumably, the county adopts plan amendments by ordinance, but decides requests for conditional use permits by resolution and order.

5
In these cases we explained that we will not dismiss appeals that have improperly identified more than one land use decision, provided the petitioner pays the required \$50 filing fee and \$150 deposit for costs for each decision challenged. As of the date the final opinion and order in this proceeding was issued, petitioner had filed only one filing fee and one deposit for costs. We apply the filing fee and deposit for costs to petitioner's appeal of the decision identified in the Notice of Intent to Appeal, Resolution and Order 88-11-9.

1 _____
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2 In Atwood v. Portland, 4 Or LUBA 177 (1981), aff'd without
3 opinion 56 Or App 396 (1982), we proceeded with an appeal where
4 the notice of intent to appeal referred to the wrong ordinance
5 number, but we could determine from the text of the notice
6 which ordinance petitioner meant to challenge and the erroneous
7 reference resulted in no confusion or prejudice to the other
8 parties. In Knight v. City of Coos Bay, 15 Or LUBA 123 (1986),
9 we proceeded to consider the merits of an appeal where two
10 decisions were identified in a single notice of intent to
11 appeal, but the challenge to one of the decisions was dismissed
12 for failure to exhaust administrative remedies. Neither of
13 these cases suggest a rationale that would allow petitioner to
14 challenge the county's decision in Ordinance 88-11 in his
15 appeal of Resolution 88-11-9.

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