

LAND USE
BOARD OF APPEALS

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

AUG 11 4 31 PM '89

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DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
YAMHILL COUNTY,)
)
Respondent,)
)
and)
)
ELMER BERNARD, ISHMAEL DUCKETT,)
DAVID VAN BERGEN, and J. ART)
HERBERT,)
)
Intervenors-Respondent.)

LUBA No. 89-040

FINAL OPINION
AND ORDER

JUDY GERRARD, DOUG PARMENTER,)
MELINDA LEE-VAN BOSSUYT, RUTH)
STOLLER, LES MILLER, and HISTORIC)
PRESERVATION LEAGUE OF OREGON,)
)
Petitioners,)
)
vs.)
)
YAMHILL COUNTY,)
)
Respondent,)
)
and)
)
ELMER BERNARD, ISHMAEL DUCKETT,)
DAVID VAN BERGEN, and J. ART)
HERBERT,)
)
Intervenors-Respondent.)

LUBA No. 89-042

Appeal from Yamhill County.

Gabriella I. Lang, Salem, filed a petition for review and argued on behalf of petitioner Department of Land Conservation and Development. With her on the brief was Dave Frohnmayer,

1 Virginia L. Linder and James E. Mountain, Jr.

2 Thomas P. Guilbert, Portland, filed a petition for review
and argued on behalf of petitioners Judy Gerrard, et al.

3 John M. Gray, Jr. and Timothy S. Sadlo, McMinnville, filed
4 a response brief, and John M. Gray, Jr. argued on behalf of
respondent.

5 William J. Moshofsky, Portland, Filed a response brief and
6 argued on behalf of intervenors-respondent. With him on the
brief was O'Connell & Goyak.

7 REVERSED

08/11/89

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

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Opinion by Sherton.

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2 NATURE OF THE DECISION

3 Petitioners appeal Yamhill County Ordinance No. 479, which
4 amends the county's Historic Landmark Preservation Ordinance.

5 MOTION TO INTERVENE

6 Elmer Bernard, Ishmael Duckett, David Van Bergen and J. Art
7 Herbert move to intervene on the side of respondent in this
8 proceeding. There is no opposition to the motion, and it is
9 granted.

10 FACTS

11 The county's comprehensive plan and land use regulations
12 were initially acknowledged by the Land Conservation and
13 Development Commission (LCDC) as complying with the Statewide
14 Planning Goals (goals) by an order dated June 12, 1980. On
15 August 3, 1988, the county adopted Ordinance No. 466, the
16 Historic Landmark Preservation Ordinance (HLPO). Ordinance
17 No. 466 was not appealed to this Board and, therefore, is
18 considered an acknowledged land use regulation. ORS 197.625(1).

19 Section 3 of the HLPO sets out definitions of terms used in
20 the ordinance. Section 5 of the HLPO establishes a process and
21 criteria for county designation of a "landmark," and for removal
22 of a landmark designation.¹ Section 6 of the HLPO requires that
23 a county permit be obtained before a designated landmark can be

24 _____
25 ¹The HLPO also addresses the designation and regulation of "historic
26 districts." However, this aspect of the HLPO was not affected by the
amendments challenged in this appeal.

1 demolished or moved, and establishes procedures and criteria for
2 the issuance of such permits. Section 7 of the HLPO requires
3 that county approval be obtained before a designated landmark is
4 altered or a new structure is built on a designated landmark
5 site, and establishes procedures and criteria for obtaining such
6 approvals. Other sections of the HLPO set out the ordinance's
7 purpose and procedural provisions regarding citizen involvement,
8 notice, public hearings, appeals, fees and enforcement.

9 On April 19, 1989, the county adopted the appealed
10 ordinance amending HLPO Sections 3 and 5. The ordinance adds a
11 definition of "owner" to HLPO Section 3. It adds to the list of
12 information required in an application for landmark designation
13 "a statement signed by the owner, consenting to the
14 designation." HLPO Section 5(2)(f). It also adds the following
15 subsections to HLPO Section 5:

16 "(6) The Board [of commissioners] shall not designate
17 a landmark without the consent of the owner of
18 the landmark.

18 "* * * * *

19 "(8) The process for removing a landmark * * *
20 designation shall be as follows:

21 "(a) Within 60 days of the effective date of
22 Ordinance 479, amending Ordinance 466, any
23 owner of a designated landmark may file
24 with the Board a request for removal of the
25 landmark designation. The request shall
26 include a statement, signed by the owner,
objecting to the continued designation.
Within 14 days of receipt of a request for
removal under this paragraph, the Board
shall, by order, remove the landmark
designation.

1 "(b) A request for removal of a landmark * * *
2 designation not submitted under paragraph
3 (a) above shall be governed by this
4 paragraph. The Board, [Planning]
5 Commission, or any interested person who
6 submits an application to the [Planning]
7 Director may initiate removal of a
8 designation. The Board may amend or
9 rescind its designation by following
10 procedures and standards required by this
11 ordinance for designating a landmark,
12 except that consent of the owner shall not
13 be required to continue the designation."²

14 The challenged ordinance requires the county planning
15 department to provide notice of its adoption to owners of all
16 designated landmarks. Ordinance No. 479, Section 4. It also
17 states that if Ordinance No. 479 is found to be invalid, "a
18 landmark designation that has been rescinded or denied pursuant
19 to the amendments made by this ordinance shall be subject to
20 further review by the Landmarks Commission and the Board of
21 Commissioners in conformance with Ordinance 466" (the original
22 HLPO). Ordinance No. 479, Section 3.

23 ASSIGNMENT OF ERROR

24 "Ordinance 479 violates the purpose of Statewide
25 Planning Goal 5 and the process established by Goal 5
26 and OAR 660-16-000 et seq. for protecting historic
27 areas, by allowing landowner consent to be the
28 deciding factor for inclusion and exclusion of
29 historic areas in the Goal 5 inventory."³

30 ²The new Subsection (8) replaced a former subsection which provided
31 simply that the Board could amend or rescind a landmark designation by
32 following the ordinance's procedures for designating a landmark, including
33 the adoption of written findings.

34 ³The quoted assignment of error was made by petitioner Department of
35 Land Conservation and Development (DLCD). Petitioners Gerrard et al. did
36 not set out assignments of error in their petition for review, as required
37 by OAR 661-10-030(3)(d). However, the arguments made by petitioners

1 Petitioner DLCD argues that Goal 5 requires the county to
2 adopt programs to "protect scenic and historic areas and natural
3 resources for future generations." Petitioner DLCD points out
4 that Goal 5 defines historic areas as "lands with sites,
5 structures and objects that have local, regional, statewide or
6 national historical significance.

7 According to petitioner DLCD, the Goal 5 planning process
8 for historic resources begins with the development of a
9 comprehensive plan (plan) inventory, as provided in
10 OAR 660-16-000. First the local government collects available
11 data. After analyzing the data, the local government determines
12 which historic resource sites are significant, and places them
13 on its plan inventory.

14 Petitioner DLCD argues that OAR 660-16-000 establishes that
15 certain factors, such as value and abundance, are relevant to
16 this determination of significance. However, petitioners
17 contend that neither Goal 5 nor OAR 660-16-000 allows landowner
18 consent to be a deciding factor in determining whether to place
19 a site on a plan inventory of historic resources. According to
20 petitioners, when sufficient information about location, quality
21 and quantity of the resource is available to enable a local
22 government to determine that a site is significant, the local
23 government must include the site on its plan inventory and
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25 Gerrard et al in their petition for review are relevant to the issues
26 raised by petitioner DLCD's assignment of error. Therefore, we address
petitioners Gerrard et al's arguments under this assignment of error.

1 proceed through the rest of the Goal 5 planning process.

2 Petitioners argue that in OAR 660-16-020, LCDC made it
3 clear that landowner involvement in the Goal 5 planning process
4 is desirable, but that landowner consent cannot be a
5 requirement.⁴ Petitioners claim there is ample opportunity for
6 landowner input in the later stages of the Goal 5 planning
7 process, determining the economic, social, environmental and
8 energy (ESEE) consequences of conflicting uses and developing
9 programs to achieve the goal. Petitioners maintain that
10 requiring landowner consent at the inventory stage of the
11 process "prematurely determines a process mandated by state law
12 and potentially can destroy a site subject to Goal 5
13 protection." DLCD Petition for Review 8.

14 Petitioners Gerrard et al. also argue that the landowner
15 consent requirements established by the challenged ordinance
16 would "wrongly delegate legislative responsibility to persons
17 other than those designated with the responsibility for making
18

19 ⁴OAR 660-16-020 ("Landowner Involvement") provides, in part:

20 "(1) The development of inventory data, identification of
21 conflicting uses and adoption of implementing measures
22 must, under Statewide Planning Goals 1 and 2, provide
opportunities for citizen involvement * * *

23 "(2) As the Goal 5 process progresses and more specificity
24 about the nature of the resources, identified conflicting
25 uses, ESEE consequences and implementing measures is
26 known, notice and involvement of affected parties will
become more meaningful. Such notice and landowner
involvement, although not identified as a Goal 5
requirement is in the opinion of the Commission,
imperative."

1 historic preservation decisions under Goal 5." Gerrard Petition
2 for Review 6. Petitioners contend that in Collins v. LCDC,
3 75 Or App 517, 707 P2d 599 (1985), the court ruled that a local
4 government cannot delegate to another body its Goal 5 duties to
5 identify conflicts with inventoried historic resources and
6 develop a program to meet the goal.

7 The county responds that, based on the record below, the
8 board of commissioners determined that a program allowing
9 designation of historic landmarks over the objection of the
10 landowner generates unacceptable social and economic
11 consequences. According to the county, OAR 660-16-010(2)⁵
12 expressly provides that a local government may fully allow uses
13 that conflict with a Goal 5 resource if preservation of the
14 resource would cause unacceptable social or economic
15 consequences. The county contends that under Goal 5 the social
16 and economic consequences of denying specific property rights to
17 owners of designated historic resources is "a legitimate basis
18 for a determination that resource owner rights are more
19 important than resource protection." Respondent's Brief 5.

20
21 ⁵OAR 660-16-010(2) provides as follows:

22 "Allow Conflicting Uses Fully: Based on the analysis of ESEE
23 consequences, a jurisdiction may determine that the conflicting
24 use should be allowed fully, not withstanding the possible
25 impacts on the resource site. This approach may be used when
26 the conflicting use for a particular site is of sufficient
importance, relative to the resource site. Reasons which
support this decision must be presented in the comprehensive
plan, and plan and zone designations must be consistent with
the decision.

1 The county also argues that no authority is delegated by
2 the appealed ordinance. The county contends that Collins v.
3 LCDC, supra, is inapplicable because in that case the City of
4 Jacksonville's program for historic resources depended on an
5 appointed commission to identify conflicting uses and conduct
6 ESEE analyses on a case by case basis. According to the county,
7 under the appealed ordinance, the board of commissioners is
8 responsible for designating landmarks or removing landmark
9 designation by order.

10 Intervenors-respondent (intervenors) argue that Goal 5 does
11 not expressly require or imply that historic landmarks be
12 designated without landowner consent. Intervenors maintain that
13 Goal 5 Implementation Guideline 7 "strongly indicates
14 landowners' consent is an integral part of implementation," by
15 encouraging use of acquisition and incentives to achieve the
16 goal. Intervenors also argue that, in view of the requirement
17 of ORS 197.340(1) that local governments "give the goals equal
18 weight in the planning process," a landowner consent requirement
19 is justified because the county is entitled to give weight to
20 other goals, such as Goal 9 (Economy of the State). Finally,
21 intervenors argue that the appealed amendments to the HLPO are
22 justified because the county either must, or is entitled to,
23 give weight to landowner property rights which are protected by
24 the U.S and Oregon Constitutions.

25 There is a basic disagreement between petitioners and the
26 county as to whether the challenged HLPO amendments alter the

1 county's process for the inventorying of historic resources or
2 the county's choice of program to protect historic resources.
3 In order to resolve this assignment of error, we must consider
4 the nature of the planning process required by Goal 5 for
5 historic resources, the planning process applied by the county
6 to its historic resources, and the changes to that county
7 process effected by the adoption of the appealed amendments to
8 the HLPO.

9 A. Goal 5 Planning Process

10 The first stage of the Goal 5 planning process is the
11 development of an inventory of historic resources. The
12 inventory process begins with the collection of available data
13 from as many sources as possible. OAR 660-16-000(1). The local
14 government then analyzes the data, determining whether there is
15 sufficient information on the location, quality and quantity of
16 each historic resource site to complete the Goal 5 inventory
17 process.⁶ Id.

18 If there is adequate information, the local government must
19 determine the location, quality and quantity of each historic
20 resource site, and whether each site has historical
21 significance. OAR 660-16-000(2) and (3). If the local
22 government determines that a particular resource site does not
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24 ⁶If there is insufficient information to identify with particularity the
25 location, quality and quantity of the resource site, the local government
26 should delay completing the Goal 5 process, and express through a plan
policy its intent to address the resource site and proceed through the
Goal 5 planning process in the future. OAR 660-16-000(5)(b).

1 have historical significance, it need take no further action
2 with regard to the site. The local government is not required
3 to justify in its plan a decision not to include a particular
4 site on the plan inventory unless its decision is challenged
5 based on contradictory data. OAR 660-16-000(5)(a). On the
6 other hand, if the local government determines a site has
7 historical significance, it must include the site on its plan
8 inventory and indicate the location, quality and quantity of the
9 resource site. OAR 660-16-000(5)(c). For sites included on the
10 plan inventory, the local government must proceed through the
11 rest of the Goal 5 planning process. Id.

12 The next step of the Goal 5 planning process is for the
13 local government to identify conflicting uses for the
14 inventoried historic resource sites. OAR 660-16-005. If there
15 are no conflicting uses, the local government must adopt plan
16 and ordinance provisions which ensure preservation of the site.
17 OAR 660-16-005(1). If conflicting uses are identified, the
18 local government must determine the ESEE consequences of the
19 conflicts. OAR 660--6-005(2). The requirements of other goals,
20 where applicable, must be considered at this stage of the
21 process. Id.

22 Finally, based on its determination of ESEE consequences,
23 the local government must "develop a program to achieve the
24 Goal." OAR 660-16-010. Although compliance with Goal 5 is
25 based on the plan's overall ability to protect and conserve
26 historical resources, the local government may generally resolve

1 conflicts with regard to specific resource sites in one of three
2 ways. Id. First, the local government may determine that a
3 site is of such historical importance, and the ESEE consequences
4 of allowing conflicting uses are so great, that all conflicting
5 uses should be prohibited and the resource fully protected. OAR
6 660-16-010(1). Second, the local government may determine that
7 the conflicting use is of such importance, relative to the
8 resource site, that it should be allowed fully, notwithstanding
9 the impacts on the resource site. OAR 660-16-010(2). Third,
10 the local government may determine that both the resource site
11 and the conflicting use are important relative to each other,
12 and that the conflicting use should be allowed in a limited way,
13 so as to protect the resource site to some extent.
14 OAR 660-16-010(3). Reasons supporting the local government's
15 decision to choose one of these three ways to resolve conflicts
16 with an inventoried resource site must be presented in the plan,
17 and plan and zone designations must be consistent with this
18 decision. OAR 660-16-010(1)-(3).

19 B. The County's Goal 5 Planning Process

20 Background information in the county comprehensive plan
21 states that the county carried out a survey of its historic
22 resources in 1984-1985.⁷ However, no attempt was made at that
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25 ⁷Unless otherwise specified, the facts in this section are taken from
26 the findings of Board of Commissioners Order 88-807, which were adopted as
"Background Information" to the county comprehensive plan by Section 3 of
Ordinance No. 471, adopted December 28, 1988.

1 time to analyze the survey data or to determine the historical
2 significance of the surveyed sites. Thus, this 1984-1985 survey
3 is not a plan inventory of historic resources, as described in
4 OAR 660-16-000(5)(c).

5 In 1987, the county appointed a Historic Landmarks
6 Commission to carry out the Goal 5 planning process with regard
7 to the surveyed sites. The commission held public hearings on
8 the proposed Historic Landmarks Preservation Ordinance and on
9 the sites on the 1984-1985 survey. The HLPO recommended by the
10 commission was adopted by the board of commissioners as
11 Ordinance No. 466 on August 3, 1988. In September, 1988, the
12 commission recommended to the board of commissioners that it
13 identify 106 individual historic sites as "significant" historic
14 resources. The owners of 14 of the recommended sites objected
15 to the designation and were allowed to raise their objections at
16 a board of commissioners hearing. Following the hearing, the
17 board of commissioners designated 102 of the recommended sites
18 as "landmarks." The determinations of quality, quantity,
19 location and significance required by Goal 5 were included as
20 findings in the in the board of commissioners orders designating
21 the sites as landmarks.⁸ Thus, it is the sites to which
22 landmark designations have been applied under the HLPO which
23 constitute the county's inventory of historic resources under
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26 ⁸We note that the 13 criteria for landmark designation found in Section
5(4) of the HLPO relate only to the historic significance of the resource.

1 OAR 660-16-000(5)(c).

2 We cannot determine from the record in this case and the
3 county enactments provided to us whether the orders of the board
4 of commissioners designating 102 sites as landmarks also
5 included the identification of conflicting uses and ESEE
6 consequences analyses for those sites required by Goal 5 and
7 OAR 660-16-005, as described above. However, the background
8 information to the plan contains the general statement that
9 "identified uses that conflict with [historic] resources include
10 alteration and demolition. The background information also
11 contains an ESEE consequences analysis of the conflicts between
12 alteration/demolition and historic resources in general. The
13 background information concludes:

14 "Uses conflicting with historic and cultural resources
15 are specifically limited by the HLPO. The HLPO
16 establishes a process for applying Goal 5 to
17 designated landmarks. Alteration and demolition are
subject to review and limitation, and the ordinance
includes a procedure for making additional Landmark
designations."

18 The above-quoted conclusion appears to constitute a
19 determination to apply a "limit conflicting uses" program,
20 pursuant to OAR 660-16-010(3), to all 102 of the designated
21 landmarks on the county's plan inventory of historic resources.

22 C. Effect of Challenged HLPO Amendments

23 As described under the "Facts" section, supra, the
24 challenged amendments to the HLPO affect only the process for
25 applying and removing landmark designation. As explained in the
26 preceeding subsection, the process of applying and removing

1 landmark designation is the county's process for determining
2 what historic resources will be placed on or removed from its
3 plan inventory.⁹ Thus, the issue we must decide is whether
4 Goal 5 and OAR 660-16-000 allow the county to make landowner
5 consent the determinative factor in whether a resource site will
6 be on the county's inventory of historic resources.

7 Goal 5 defines historic resources which must be inventoried
8 as those which have "local, regional statewide or national
9 historic significance." OAR 660-16-000(5)(a) and (b) allow a
10 site to be excluded from a local government's inventory of
11 historic resources if it is not important enough to warrant
12 inclusion or there is insufficient information available about
13 the site. Friends of the Columbia Gorge v. LCDC, 85 Or App 249,
14 252, 736 P2d 575 (1987); Confederated Tribes v. Wallowa County,
15 14 Or LUBA 92, 105 (1985). Under OAR 660-16-000(5)(c), when
16 information is available on the location, quality and quantity
17 of a site, and the local government determines the site to have
18 historic significance as a result of its data collection and
19 analysis, it must include the site on its plan inventory. We
20 conclude that making landowner consent a determinative criterion

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23 ⁹We realize that under the HLPO the application of landmark designation
24 apparently also results in a site being subject to an OAR 660-16-010(3)
25 "limit conflicting uses" program. However, that is a decision that was
26 made by the county when it initially adopted the HLPO, a decision not
affected by the amendments challenged in this appeal. We also note that
such a choice is not mandated by Goal 5 with regard to any particular
resource site. As explained supra, OAR 660-16-010 offers a choice of three
ways to resolve conflicts with individual resource sites.

1 for whether a site will be included on the county's inventory of
2 historic resources is not allowed by Goal 5 and
3 OAR 660-16-000.¹⁰

4 The assignment of error is sustained.¹¹

5 The county's decision is reversed.
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9 ¹⁰In fact, under Goal 5 and OAR 660-16-000, landowner consent is not
10 even a factor relevant to determining whether a site should be included on
11 an inventory of historic resources. On the other hand, we note that
12 impacts on landowners, and the requirements of other goals, are relevant to
an analysis of the ESEE consequences of conflicting uses for a particular
resource site and, therefore, to the choice of a program to resolve such
conflicts as well. However, the HLPO amendments challenged in this appeal
do not amend those parts of the county's Goal 5 planning process.

13 Had the county amended the HLPO to make the choice of a program (1) to
14 protect the resource site fully, (2) to allow conflicting uses fully, or
15 (3) to limit conflicting uses, depend solely on the preference of the
16 individual landowner, we seriously question whether such a program would
17 comply with Goal 5 or OAR 660-16-010 and 660-16-020. Although
18 consideration of landowner desires is required under these rules, the focus
19 in both rules is on resource uses and conflicting uses. The rules and
20 Goal 5 apparently envision a process that examines the relative value and
importance of competing uses. On a case-by-case basis, it seems obvious
that the relative value of a particular inventoried historic site might
well prevail over a conflicting use of much less importance or value. The
rules clearly recognize that the opposite may also be true. However, an
approach that allows the selection of a program to be based in all cases on
the desires of the landowner, without also examining the comparative values
of the particular property for historic or identified conflicting uses,
would appear to be inconsistent with OAR 660-16-010, 660-16-020 and Goal 5.

21 ¹¹We are unable to determine from intervenors' constitutionally based
22 argument whether intervenors are claiming (1) that the provisions of the
23 HLPO regulating demolition, moving and altering of designated landmarks
24 constitute an unconstitutional taking of private property; or (2) that
25 there is a constitutional requirement for making landowner consent a
26 prerequisite to landmark designation. If the former, we note that the
unamended portions of the HLPO are not at issue in this appeal. If the
latter, we do not address intervenors' claim because they have not
developed a legal argument that such a constitutional requirement exists.
See Bergstrom v. Klamath County, ___ Or LUBA ___ (LUBA No. 87-099,
February 25, 1988), slip op 12; Chemeketa Industries Corp. v. City of
Salem, 14 Or LUBA 159, 1666 (1985).