

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

WILLIAM R. DYKE, SR., )  
 )  
 Petitioner, )  
 )  
 vs. )  
 ) LUBA No. 88-110  
 CLATSOP COUNTY, )  
 )  
 Respondent, ) FINAL OPINION  
 ) AND ORDER ON REMAND  
 )  
 and )  
 )  
 CLATSOP RESOURCES, INC., )  
 )  
 Intervenor-Respondent. )

Appeal from Clatsop County.

Vincent P. Salvi, Portland, represented petitioner.

No appearance by respondent.

Edward J. Sullivan, Portland, and W. Louis Larson,  
Astoria, represented intervenor-respondent.

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

REMANDED

02/08/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner seeks review of two Clatsop County Board of Commissioners' decisions. One of the challenged decisions, Ordinance 88-11, approves an exception to Statewide Planning Goal 4 (Forest Lands) to allow construction of a solid waste disposal site. The second decision, Resolution 88-11-9, approves a conditional use permit for the solid waste disposal site. Our prior decision rejecting petitioner's challenges to the county's decisions was remanded by the Court of Appeals. Dyke v. Clatsop County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-110, March 8, 1989)(hereafter Dyke I), remanded 97 Or App 70, rev den 308 Or 592 (1989).

FACTS

The relevant facts are stated in Dyke I as follows:

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

"On August 3, 1988, intervenor-respondent (intervenor) submitted an application for a conditional use permit and a Goal 4 exception to allow development of the proposed solid waste disposal site. On September 29, 1988, the planning commission approved the application \* \* \*.

"On November 9, 1988, the board of commissioners adopted Resolution and Order (Resolution) 88-11-9,

approving a conditional use permit 'for use of the \* \* \* property for a solid waste disposal site pursuant to Section 5000 of the [LWDUO] \* \* \*.' Also on November 9, 1988, the board of commissioners adopted Ordinance 88-11 amending the county's acknowledged plan to include an exception to Goal 4 for intervenor's property." (Citations to the record omitted.) Dyke I, slip op at 2-3.

In Dyke I, we rejected petitioner's first assignment of error challenging the Goal 4 exception. Our sole basis for rejecting the first assignment of error was our determination that petitioner's notice of intent to appeal identified only the conditional use permit decision as the subject of the appeal. Accordingly, we limited our review to the second assignment of error challenging the conditional use permit decision. We denied the second assignment of error, and affirmed the county's decision.

The Court of Appeals reversed and remanded our decision, concluding, "[t]he exception was a necessary part of the decision to allow the conditional use." Dyke v. Clatsop County, 97 Or App 70, 73, 775 P2d 331, rev den 308 Or 592 (1989). The court determined petitioner's notice of intent to appeal was sufficient to give this Board jurisdiction over the assignment of error challenging the adequacy of the county's exception to Goal 4. We turn to petitioner's first assignment of error.<sup>1</sup>

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<sup>1</sup>The portion of our decision rejecting the petitioner's second assignment of error concerning the conditional use permit was not challenged before the Court of Appeals. We, therefore, do not consider petitioner's second assignment of error in this opinion on remand.

FIRST ASSIGNMENT OF ERROR

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

The standards that must be addressed to approve an exception to the Statewide Planning Goals (Goals) are contained in statute, Goal 2 and administrative rules adopted by the Department of Land Conservation and Development. See ORS 197.732; Goal 2 Part II; OAR 660, Divisions 4 and 14. OAR 660-04-020(2) specifies four factors that must be addressed in approving an exception. Petitioner contends the county's decision fails to explain how it complies with the first of the four factors, OAR 660-04-020(2)(a), which provides as follows:

"'Reasons justify why the state policy embodied in the applicable goals should not apply': The exception shall set forth the the facts and assumptions used as the basis for determining that a state policy embodied in the goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land."<sup>2</sup> (Emphasis added.)

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<sup>2</sup>Petitioner's assignment of error and the argument presented in the petition for review clearly take the position that the evidentiary record shows only 60 acres is needed for the landfill. The assignment of error does not clearly state a challenge to the adequacy of the county's findings explaining its decision to approve an exception for 160, rather than 60, acres. However, we conclude, based on argument presented under the first assignment of error, that petitioner also challenges the adequacy of the county's findings. ("The County has nowhere justified why an exception was granted for 160 acres when the record and its findings are very clear that only 60 acres are required for the conditional use.") Petition for Review 6.

Petitioner argues the county found, and the record supports the finding, that only 60 acres are required for the approved landfill. Petitioner contends that because the county nevertheless approved an exception for 160 acres, the county's decision violates the requirement in OAR 660-04-020(2)(a) that the amount of land included within an exception be needed for the nonforest use.<sup>3</sup>

The portion of the county's decision including findings specifically addressing OAR 660-04-020(2)(a) states there is a critical need for a solid waste landfill in Clatsop County. the findings recite past efforts to locate alternative landfill sites as well as efforts to explore alternative means of disposal. The findings explain that currently there is no operating landfill in Clatsop County, and solid waste is now hauled to landfills outside the county at high cost. The findings note that incineration as an alternative presents a number of problems and would not eliminate the need for a landfill site in any event.

The findings go on to quote landfill siting criteria provided by intervenor as a basis for examining alternative solid waste disposal sites. Those criteria are as follows:

"(1) Size

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<sup>3</sup>Although the wording in OAR 660-04-020(2)(a) is not entirely clear on this point, we do not understand intervenor to dispute that the amount of land included within an exception must be needed for the use for which the exception is approved.

"A site of about 60 acres will be required for the landfill and associated borrow needs.

"(2) Topography

"A relatively flat site is preferred in order to minimize construction costs and reduce rainwater run-off from adjoining lands.

"(3) Groundwater

"A minimum separation of 10 feet between the floor of the landfill and the established groundwater level is required to meet state and federal standards.

"(4) Soils

"Preferred sites will contain deposits of soils suitable for use in the construction of the landfill and/or for use as cover.

"(5) Environmental Considerations

"Impacts upon recognized fish and wildlife, recreation, and scenic resources must be acceptable. The landfill must also be located at least 200 feet from any lake or surface stream.

"(6) Economics

"The site should be relatively close to the Astoria/Seaside market to reduce transportation costs and should be in close to a major roadway to avoid excessive road construction costs. A large single ownership parcel is preferred to reduce land costs.

"(7) Social

"A remote location is preferred with no residences within approximately one-half mile of the boundary of the project and with direct access to a major highway without intervening residential properties is preferred." Record 94-95.

Finally, the findings identify four sites, including the site ultimately approved in the challenged decision, for "detailed examination." Nowhere in the findings specifically addressing OAR 660-04-020(2)(a) does the county explain why 160 acres are needed to accommodate the approved landfill.

Petitioner notes that in the findings addressing one of the conditional use permit standards, the county stated:

"\* \* \* the proposed development site which has an overall area of about 160 acres, has more than adequate area for the minimal road and structural improvements which are proposed as well as all setbacks required by the conditions of this approval."<sup>4</sup> Record 74.

Petitioner contends this finding, as well as a number of other findings, recognize that only approximately 60 acres are needed for the landfill.<sup>5</sup> Petitioner contends the above quoted finding shows the county approved a site it knew exceeded the amount of land actually needed for the landfill.

Intervenor responds that the finding petitioner quotes

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<sup>4</sup>The conditional use permit standard to which the quoted findings are addressed is LWDUO Section 5.025(2)(d), which requires:

"The site has an adequate amount of space for any yards, buildings, drives, parking, loading and unloading areas, storage facilities, utilities, or other facilities which are required by this Ordinance or desired by the applicant."

<sup>5</sup>Petitioner also notes that a number of the alternative sites considered contain less than 60 acres. However, intervenor notes those alternative sites were rejected for other reasons, and the adequacy of their size was never addressed by the county.

is taken out of context and does not show the county approved a larger than needed site. Intervenor contends the references in the county's findings to "60 acres" all assume a usable site of 60 acres. Intervenor points to other findings suggesting 100 acres are needed. Record 96. Intervenor goes on to argue "the record is not 'clear' at all with respect to acreage needed \* \* \*." (Emphasis intervenor's.) Intervenor's Brief 7.

Intervenor points out the application notes a 20 year landfill would require 60 acres under perfect conditions and that the required land area could double. Intervenor then notes the record shows the site includes rights-of-way, a stream corridor buffer and a power line easement, as well as additional setbacks imposed by the county as a condition of approval. Intervenor also suggests that DEQ approval may well require additional acreage.

The county's decision states the proposed use is for a solid waste landfill "to handle Clatsop County's long-term (20-30 years) needs for solid waste disposal." Record 68-69. Intervenor cites evidence in the record suggesting that the life of the landfill may actually be 40 to 45 years and that jurisdictions outside the county may wish to use the landfill, which presumably would support a need for additional acreage for the landfill.

Intervenor quotes the following exchange between the county planning director and the applicant:



"There are a number of references within the application to 100 acres, 160 acres, 30-40 acres, 20-30 acres, 60 acres etc. that are used - it is not clear which figures represent the total amount of land being purchased, how much will be used for the landfill, how much for 'borrow', how long the intended landfill will last \* \* \*. The numbers seem to be intertwined at times." Letter dated August 17, 1988, from Curtis J. Schneider to Don Lampi. Record 377.

"A total area of 160 acres is being considered for purchase by Clatsop Resources, Inc. Of this total area, about 100 acres is considered to be usable. Given optimum soil conditions, 50 to 60 acres of the site may be developed to actually receive solid wastes. The design objective for the project is to provide a solid waste landfill with a 25 to 30 year life span." Response to August 17, 1988 letter from Curtis J. Schneider. Record 123.

Intervenor contends the above quoted response is adequate to answer this assignment of error, because it shows that only 100 acres are usable and that site limitations require that acreage to assure a landfill of 50 to 60 acres can be approved by DEQ.

We agree with intervenor that the evidentiary record does not support petitioner's position that no more than 60 acres are needed to construct and operate the landfill at the location approved. It appears from the record that somewhere between 40 and 60 acres are needed for the landfill itself. However, the record also suggests that additional acreage may be needed, perhaps as much as 40 acres (or a total of 100 acres) in view of site development constraints.

We believe OAR 660-04-020(2)(a) requires the county to adopt findings explaining why it approved an exception for 160 acres. See 1000 Friends v. Douglas County, 4 Or LUBA 148, 169 (1981) (exception for 1,100 acres of land to provide rural housing inadequate where acreage not shown to be needed); Abrego v. Yamhill County, 2 Or LUBA 101 (1980) (UGB amendment to include 18.8 acres remanded where record only showed 11 acres were needed). Although intervenor identifies evidence in the record that might provide a basis for such findings, the findings adopted by the county do not explain why 160 acres are needed. As noted above, the findings the county adopted specifically addressing OAR 660-04-020(2)(a) make no attempt to justify the inclusion of 160 acres in the exception, or the inclusion of any particular acreage for that matter. Although findings adopted by the county addressing other criteria apparently embrace the applicant's position that a site of approximately 100 acres is needed in view of site conditions, the findings do not explain why site limitations require inclusion of 100 acres in the exception.<sup>6</sup>

Intervenor's suggestion that the remaining 60 acres may be accounted for by rights-of-way, buffers, setbacks, a possibly longer life for the landfill or a need to

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<sup>6</sup>The above-quoted applicant's response to the planning director's inquiry concerning acreages does not appear to have been adopted by the county as part of its findings. Even if it had, the statement does not explain why site limitations require a 100 acre site.

accommodate waste from outside the county, all require speculation concerning the amount of acreage the county believes is required by each of these factors. We decline to engage in such speculation. The county must explain in its findings the reasons why it included 160 acres in the exception.<sup>7</sup>

We conclude the county's findings are inadequate to explain why an exception for 160 acres was approved.<sup>8</sup>

The county's decision is remanded.

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<sup>7</sup>We have some question whether all of the cited rights-of-way, buffers and setbacks necessarily must be included in the exception or whether the rights-of-way, buffer or setback areas would function equally well if left in their current planning and zoning designations and excluded from the exception. Intervenor suggests that areas affected by the buffer and setback conditions imposed by the county are equally protected for resource use as would be the case if the F-80 zoning were retained. Because the county does not address this issue in its findings and the parties do not argue the point in their briefs, we do not determine whether in this case rights-of-way, buffer and setback areas are properly included in the area for which an exception is approved under OAR 660-04-020(2)(a).

<sup>8</sup>Because we conclude the county has not adopted findings explaining why it approved an exception for 160 acres, no purpose would be served by reviewing the evidence cited by the parties to determine whether it supports findings that were not adopted. DLCD v. Columbia County, 15 Or LUBA 302, 305 (1987); McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986). Although ORS 197.835(9)(b) directs that we overlook defective findings where the evidence "clearly supports the decision," the evidence in this case does not clearly support a decision that 160 acres are needed. We express no position whether the evidence in the record cited by the parties could support findings that 160 acres are needed for a landfill at this location, but the evidence is sufficiently unclear on this point that we cannot supply the missing findings under ORS 197.835(9)(b).