

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GARY PARMENTER, RAMON PARMENTER,)
5 and WGK DEVELOPMENT CORPORATION,)
6 an Oregon corporation,)

7)
8) LUBA No. 91-064

9)
10) FINAL OPINION
11) AND ORDER

12 WALLOWA COUNTY,)
13)
14) Respondent.

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16
17 Appeal from Wallowa County.

18
19 D. Rahn Hostetter, Enterprise, filed the petition for
20 review and argued on behalf of petitioners. With him on the
21 brief was Mautz Hallman.

22
23 Mary A. Grote, Enterprise, filed the response brief and
24 argued on behalf of respondent.

25
26 HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,
27 Referee, participated in the decision.

28
29 REMANDED 08/23/91

30
31 You are entitled to judicial review of this Order.
32 Judicial review is governed by the provisions of ORS
33 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a county decision amending the
4 Wallowa County Land Development Ordinance (WCLDO) to define
5 "Utility Facility," and to allow such facilities as a
6 conditional use in all zones.

7 **FACTS**

8 Prior to the challenged amendment, utility facilities
9 were allowed as outright permitted uses in the county's
10 Rural Residential (R-2) and Rural Service (R-3) zones. The
11 Exclusive Farm Use (EFU), Timber Grazing (TG), Commercial
12 Recreation (CR-2) and Timber Commercial (T-C) zones allowed
13 utility facilities necessary for public service as a
14 conditional use.¹ The county's remaining zoning districts
15 did not list utility facilities as permitted or conditional
16 uses.

17 In the challenged decision, the county took three
18 actions. First, it adopted the following definition of
19 "Utility Facility":

¹ORS 215.213(1)(d) and 215.283(1)(d) provide that counties may allow the following utility facilities in Exclusive Farm Use zones:

"Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over two hundred feet high."

Prior to the challenged amendment, the WCLDO provisions allowing utility facilities in the county's EFU and TG zones included language identical to that contained in ORS 215.213(1)(d) and 215.283(1)(d), quoted above. WCLDO §§ 15.020.13 and 16.020.4.

1 "An installation central to the provision of
2 utility service to the general public. 'Utility
3 Service' is to be construed to mean the production
4 and/or distribution of electric, communication,
5 sewage, transportation, gas or water service or
6 the like, and not to include store-front
7 distribution."² Record 2.

8 Second, the decision amends the WCLDO to provide that
9 utility facilities, as defined above, be allowable as a
10 conditional use in all zones. Finally, the decision
11 provides that "[w]hen the siting of a utility facility is
12 permitted, a dependent network of local distribution lines
13 shall be permitted outright in all zones." Id.

14 **FIRST ASSIGNMENT OF ERROR**

15 "The Wallowa County Court failed to comply with
16 ORS 197.763(5)."

17 Petitioners contend the county failed to observe
18 certain procedural requirements of ORS 197.763. However,
19 the statutory procedural requirements of ORS 197.763 are
20 expressly limited to "quasi-judicial land use hearings."
21 The challenged decision amends the list of uses allowed
22 conditionally and outright in all of the county's zones. In
23 other words, the challenged decision amends the county land
24 use standards which will be applied to future land use
25 decisions and is, therefore, a legislative land use
26 decision. See Strawberry Hill 4-Wheelers v. Benton County,
27 287 Or 591, 602, 601 P2d 769 (1979); Fasano v. Washington

²Prior to adoption of the challenged decision, the WCLDO included no definition of "utility facility."

1 Co. Comm., 264 Or 574, 507 P2d 23 (1973); Estate of Paul
2 Gold v. City of Portland, 87 Or App 45, 740 P2d 812, rev den
3 304 Or 405 (1987).

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 "Respondent's notice of public hearing did not
7 comply with Section 8.030, WCLDO."

8 WCLDO § 8.030 requires, among other things, that the

9 "[n]otice of public hearing before the Planning
10 Commission for the purpose of considering an
11 amendment [to the comprehensive plan or WCLDO map
12 or text] shall be published in the newspaper of
13 general circulation for three consecutive weeks
14 prior to the hearing date." (Emphasis added.)
15 WCLDO § 8.030(1).

16 There is no dispute that the three notices required by WCLDO
17 § 8.030(1) for the county planning commission public hearing
18 in this matter were given. Petitioners argue the county
19 erred by not also providing notices for three consecutive
20 weeks prior to the county court's public hearing in this
21 matter.

22 WCLDO § 8.030(1) only applies to the planning
23 commission's public hearings. It does not apply to the
24 county court's public hearing, and petitioners cite no
25 requirement in the WCLDO that notice be provided for three
26 consecutive weeks prior to the county court's public
27 hearing.

28 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 "Initiation of the Ordinance Amendment Process did
3 not comply with Sections 8.015 and 8.020, WCLDO."

4 WCLDO § 8.015 specifies that amendments to the WCLDO
5 may be initiated by the county court, the planning
6 commission, the planning director or by petition. WCLDO §
7 8.020 requires that requests for WCLDO amendments identify
8 the party initiating the request.³ Petitioners contend that
9 nowhere in the record is the person who initiated the
10 challenged WCLDO amendment identified.

11 Although petitioners are correct that the record does
12 not explicitly identify who initiated the challenged WCLDO
13 amendment, we believe it is sufficiently clear that the
14 amendment was initiated by the planning commission.
15 Although the county may have committed procedural errors in
16 not requiring that the planning commission be clearly
17 identified as the applicant, in accordance with the above
18 cited WCLDO sections, petitioners do not explain how their
19 substantial rights were prejudiced by such errors. See
20 Simonson v. Marion County, ___ Or LUBA ___ (LUBA No. 90-171,
21 June 21, 1991), slip op 7; Olsen v. Columbia County, 8 Or
22 LUBA 152, 159-60 (1983).

³In addition WCLDO § 8.030, discussed above under the second assignment of error, requires that the notice of the planning commission public hearing identify the party initiating the amendment.

1 The third assignment of error is denied.⁴

2 **FOURTH ASSIGNMENT OF ERROR**

3 "In making its decision, the Wallowa County
4 Planning Commission and Wallowa County Court gave
5 no consideration to planning goals and guidelines
6 nor to other elements of the Wallowa County land
7 use plan as required by Section 8.025, WCLDO."

8 **FIFTH ASSIGNMENT OF ERROR**

9 "Both the Wallowa County Planning Commission and
10 Wallowa County Court failed to adopt findings of
11 fact as required by Section 8.035, WCLDO."

12 **SIXTH ASSIGNMENT OF ERROR**

13 "The decision violates Statewide Planning Goal
14 11."

15 **SEVENTH ASSIGNMENT OF ERROR**

16 "The decision violates Statewide Planning Goal
17 14."

18 WCLDO § 8.025 requires that proposed WCLDO amendment be
19 reviewed for conformance with the statewide planning goals
20 and applicable provisions of the county comprehensive plan.⁵
21 WCLDO § 8.035(4) requires that the county court adopt
22 findings showing the proposed amendment complies with the

⁴Because we remand the challenged decision on other grounds, if we are wrong about the planning commission being the initiator of the challenged amendment, the county can assure on remand that the initiating party is among those entitled to initiate such an amendment under WCLDO § 8.015 and is identified as required by WCLDO §§ 8.020 and 8.030.

⁵This requirement is also imposed by statute. ORS 197.175(2); 197.835(5). See 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 97, 718 P2d 753, rev den 301 Or 445 (1986); DLCD v. Yamhill County, ___ Or LUBA ___ (LUBA No. 91-044, August 14, 1991); Wyatt v. Cannon Beach, 10 Or LUBA 217, 220 (1984).

1 goals and applicable provisions of the comprehensive plan.
2 Petitioners contend neither the planning commission nor the
3 county court adopted findings addressing applicable
4 comprehensive plan or statewide planning goal requirements
5 and this failure requires remand so that the county may
6 adopt the required findings. Petitioners go on to argue
7 that the challenged decision violates Goal 11 (Public
8 Facilities and Services) and Goal 14 (Urbanization).

9 The Goal 11 and 14 "guidelines" cited by petitioners in
10 their brief in support of assignments of error six and seven
11 are "advisory" rather than "mandatory" approval standards.
12 ORS 197.015(9); Downtown Community Assoc. v. City of
13 Portland, 80 Or App 336, 722 P2d 1258, rev den 302 Or 86
14 (1986). However, Goal 11 requires that public facilities be
15 "limited to the the needs and requirements of the urban,
16 urbanizable and rural areas to be served." Similarly, Goal
17 14 requires that urban uses not be allowed outside urban
18 growth boundaries, unless an exception to the Goal can be
19 justified. 1000 Friends of Oregon v. Curry County, 301 Or
20 447, 724 P2d 268 (1986). The challenged decision would
21 allow sewerage facilities in all of the county's zoning
22 districts. Sewerage facilities, and the higher
23 developmental densities such facilities allow, are one of
24 the clearer indicia of urban, as opposed to rural,
25 development. Id. at 505.

26 The definition of "utility facility" adopted by the

1 county is broad and without any express limitation on the
2 size or scale of utility facilities that may be allowed.⁶
3 Therefore, it appears that the challenged amendment could
4 allow sewerage facilities and other urban public facilities
5 outside urban growth boundaries in violation of Goal 11,
6 which in turn may support or allow urban level development
7 of rural land in contravention of Goal 14.

8 We agree with petitioners that the county's decision
9 must be remanded so that the county may adopt findings
10 identifying and addressing relevant comprehensive plan and
11 statewide planning goal requirements and demonstrating that
12 those requirements are met. DLCD v. Yamhill County, supra,
13 slip op at 8-9. If such findings cannot be adopted in
14 support of the challenged WCLDO amendment, the county may be
15 able to adopt appropriate revisions and explain why the
16 proposed amendment, as revised, comply with applicable Goal
17 and the comprehensive plan requirements.⁷

⁶If there are other WCLDO or comprehensive plan provisions which would limit utility facilities that would be allowable under the challenged amendment to the type and scale of utility facilities appropriate for the areas to be served, respondent does not identify them, other than to cite the county's general conditional use standards. Although the general conditional use requirement of WCLDO § 9.020(1) that a conditional use "be consistent with the purpose of the zone in which the use [is] proposed" might in some circumstances provide such a limitation, we cannot assume it would do so in all circumstances and zones.

⁷As guidance on remand, we also note the county's definition of "utility facility" appears to encompass utility facilities beyond those allowable in exclusive farm use zones. See n 1, supra; see also McCaw Communications, Inc. v. Marion County, 96 Or App 552, 773 P2d 779 (1989). The county may not, consistent with Goal 3, allow uses in its exclusive

1 The fourth through seventh assignments of error are
2 sustained.

3 **EIGHTH ASSIGNMENT OF ERROR**

4 "The decision does not adequately describe what
5 provisions of the WCLDO are amended by the
6 decision."

7 WCLDO § 8.020(2) requires that a proposed amendment to
8 the text of the WCLDO identify "the portions [of the WCLDO]
9 that are to be deleted, if any, and the proposed replacement
10 or addition." Petitioners contend the challenged amendment
11 does not comply with WCLDO § 8.020(2), and that it is not
12 clear exactly how the WCLDO is amended by the challenged
13 decision.

14 Petitioners are correct that the challenged decision
15 does not precisely identify the language that is to be
16 deleted from the WCLDO or all of the language that is to be
17 added. It is clear that the new definition of "utility
18 facility" is to be added to the definition section at WCLDO
19 § 1.065. However, the county appears to intend that each
20 zoning district be amended to allow "utility facilit[ies]"
21 as a conditional use while dependent networks of
22 distribution lines would be allowed outright in each zone.
23 The precise language needed to make this change is not
24 supplied in the record or the decision. In addition, we
25 assume that, because the challenged decision defines and

farm use zone beyond those provided by statute. Newcomer v. Clackamas County, 92 Or App 174, 185-86, 758 P2d 450, modified 94 Or App 33 (1988).

1 adds "utility facilit[ies]" as a conditional use in all
2 zones, the county intended to delete all existing WCLDO
3 provisions concerning utility facilities, but the language
4 to be deleted is not specifically identified.

5 Because we remand the decision on other grounds, it is
6 unnecessary to consider whether the county's failures to
7 require that the application precisely identify the WCLDO
8 provisions to be added and deleted, or to identify such
9 provisions itself, also requires remand. On remand the
10 county can ensure that the exact language to be added to and
11 deleted from the WCLDO is identified in any future
12 application or decision.

13 The eighth assignment of error is denied.

14 The county's decision is remanded.