BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLIANCE FOR RESPONSIBLE LAND USE IN DESCHUTES COUNTY and 1000 FRIENDS OF OREGON, Petitioners, vs. DESCHUTES COUNTY, Respondent, and JAMES GARDNER, MICHAEL HUMPHREYS, and EAGLE CREST PARTNERS, LTD., Intervenors-Respondent.	LUBA Nos. 92-045, 92-046, 92-047 and 92-048 FINAL OPINION AND ORDER

Appeal from Deschutes County.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioners.

Bruce W. White, Bend, filed a response brief and argued on behalf of respondent.

William F. Gary and Glenn Klein, Eugene, filed a response brief and William F. Gary argued on behalf of intervenors-respondent Gardner and Humphreys. With them on the brief was Harrang, Long, Watkinson, Arnold & Laird.

Robert S. Lovlien, Bend, represented intervenor-respondent Eagle Crest Partners, Ltd.

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

AFFIRMED -- LUBA Nos. 92-045 and 92-048
REMANDED -- LUBA Nos. 92-046 and 92-047 07/14/92

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

Opinion by Sherton.

NATURE OF THE DECISIONS

Petitioners appeal four ordinances concerning destination resorts adopted by the Deschutes County Board of Commissioners.

MOTION TO INTERVENE AND MOTION FOR EXTENSION OF TIME

On June 17, 1992, we issued an Order on Motion to Intervene and Motion for Extension of Time granting intervenors-respondent Gardner and Humphreys' (intervenors') motions to intervene and to file their response brief six days after the date the respondents' briefs in this consolidated proceeding were due. In that order, we concluded intervenors failed to file their motion and brief within the time required by our rules, but those failures are technical violations which we may overlook because they did not affect "the substantial rights of the parties * * *." OAR 661-10-005.

Petitioners request that we reconsider that decision. Petitioners contend that among the substantial rights of the parties referred to in OAR 661-10-005 is the right to a reasonable period of time in which to prepare and submit their case. Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095 (1988). Petitioners state they received intervenors' motion and brief only one week prior to the date set for oral argument in this appeal. Petitioners argue intervenors' untimely filing of their motion to

intervene and response brief interfered with petitioners' preparation for oral argument in that petitioners' attorney was required to spend time preparing responses to intervenors' motions and to the arguments in intervenors' brief.

According to petitioners, this Board has previously denied motions to intervene in similar circumstances. Petitioners cite Great American Development Co. v. City of Milwaukie, 18 Or LUBA 896 (1989) (denying motion to intervene filed over two weeks after respondents' briefs due), and Knapp v. City of Jacksonville, 20 Or LUBA 189 (1990) (granting motion to strike intervenor-respondent's brief filed 21 days after respondents' briefs due and less than one full day before oral argument).

Intervenors' brief responds to petitioners' assignments of error and does not raise new issues which would warrant the filing of a reply brief by petitioners. Petitioners received intervenors' motion and brief one week before the scheduled oral argument. We do not believe that having one week to prepare to respond to an additional response brief at oral argument and to intervenors' motions constitutes prejudice to petitioners' substantial right to prepare and submit their case.[1] See Rhyne v. Multnomah County, ___

[1]We note this Board routinely schedules oral arguments as soon as one week after the date respondents' briefs are due. Additionally, the cases cited by petitioners are distinguishable. In Knapp, the petitioners received the intervenor's brief less than one full day before the oral

Or LUBA ___ (LUBA No. 92-058, Order on Motion to Intervene, June 12, 1992) (no prejudice to petitioners' substantial rights where motion to intervene and intervenor's brief filed three days after respondents' briefs due and eight days before oral argument).

We adhere to our previous decision granting intervenors' motion to intervene and motion for extension of time.

FACTS

The decision challenged in LUBA No. 92-048 (Ordinance No. 92-001) amends the Deschutes County Year 2000 Comprehensive Plan (plan) to add goals, policies and other text concerning the siting of destination resorts. The decision challenged in LUBA No. 92-047 (Ordinance No. 92-002) amends the plan to add a map entitled "Deschutes County Comprehensive Plan Destination Resort Map and Zoning Map of Destination Resort Combining Zone" (destination resort map). The decision challenged in LUBA No. 92-046 (Ordinance No. 92-003) amends the Deschutes County Zoning Ordinance (DCZO) to map, as subject to the Destination Resort (DR) overlay zone, the areas designated as available for destination resorts on the destination resort map. The decision challenged in LUBA No. 92-045 (Ordinance No.

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argument. In Great American Development Co., the intervenor's brief was not filed with the untimely motion to intervene and, therefore, the Board could not determine that additional time for the filing of a reply brief would not be required if intervention and the filing of an intervenor-respondent's brief were allowed.

92-004) amends the DCZO to (1) add definitions concerning destination resorts, (2) add a new DR overlay zone chapter establishing procedures and criteria for the approval of destination resorts, and (3) add or delete destination resorts as a conditional use subject to the requirements of the DR overlay zone in various zoning districts.

FIRST ASSIGNMENT OF ERROR

> "The county erred by failing to determine which lands in Deschutes County are ineligible for destination resort siting because they are within three miles of high value crop areas."

SECOND ASSIGNMENT OF ERROR

> "The county erred by designating as available for destination resort siting lands within three miles of high value crop areas."

In 1984, the Land Conservation and Development Commission (LCDC) amended Statewide Planning Goal 8 (Recreational Needs) to provide that local government comprehensive plans and implementing regulations may provide for the siting of "destination resorts"[2] on rural lands without taking exceptions to Goals 3 (Agricultural Lands), 4 (Forest Lands), 11 (Public Facilities and Services) and 14

[2]"Destination resort" is defined by the goal as "a self-contained development providing visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities." The goal definition also includes detailed standards concerning size, amount of open space, cost of improvements, quantity of visitor accommodations and other factors, which a proposed development must meet to qualify as a destination resort.

(Urbanization).[3] These Goal 8 provisions state that "to assure that [destination] resort development does not conflict with the objectives of other Statewide Planning Goals, destination resorts * * * shall not be sited in" certain types of areas. (Emphasis added.) The goal's list of six types of areas ineligible for destination resort siting includes areas "within three miles of farm land within a High Value Crop Area * * *." The goal defines "High Value Crop Area" as:

> "[A]n area in which there is a concentration of commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year. These crops and products include field crops, small fruits, berries, tree fruits, nuts, or vegetables, dairying, livestock feedlots, or Christmas trees as these terms are used in the 1983 county and State Agricultural Estimates prepared by the Oregon State University Extension Service. The High Value Crop Area Designation is used for the purpose of minimizing conflicting uses in resort siting * * *." (Emphasis added.)

Finally, Goal 8 provides that comprehensive plans which allow for the siting of destination resorts shall include implementing measures which "[m]ap areas where * * * destination resorts are permitted," i.e. areas not within any of the six listed types of areas where destination resorts are excluded.

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[3]Goal 8 provides an alternative means of siting destination resorts on rural land without following the Goal 2 (Land Use Planning) exception process. Local governments continue to have the option of siting a destination resort on rural land where required exceptions to Goals 3, 4, 11 and 14 are taken.

In 1987, the legislature enacted statutory provisions concerning the siting of destination resorts virtually identical to those added to Goal 8 in 1984.[4] 1987 Or Laws, ch 886, §§ 2 through 8. Like Goal 8, ORS 197.455 lists six types of areas where destination resorts cannot be sited, including areas "within three miles of a high value crop area." ORS 197.455(2). ORS 197.435(2) contains a definition of "high value crop area" identical to that in Goal 8. ORS 197.465(1) provides that a comprehensive plan that allows for siting destination resorts shall include implementing measures which "[m]ap areas where a destination resort * * * is permitted pursuant to ORS 197.455."

The destination resort map adopted as part of the county's plan by one of the challenged ordinances purports to be the map showing where destination resorts are permitted, as required by ORS 197.465(1) and Goal 8. The areas designated as available for destination resorts on the challenged destination resort map (areas to which the county has consequently applied its DR overlay zone) include areas within three miles of the county's boundaries. Addressing the requirement of ORS 197.455(2) and Goal 8 that destination resorts cannot be sited within three miles of high value crop areas, the findings supporting the

[4]The statute also includes provisions concerning the siting of "small destination resorts." Similar provisions were subsequently added to Goal 8. However, these provisions concerning "small destination resorts" are not at issue in this appeal.

challenged destination resort map state:

> "By definition High Crop Value [sic] areas consist of a concentration of farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year. The Board [of Commissioners] finds that no such areas exist in Deschutes County." (Footnote omitted.) Record 24-25.

Based on this finding, the county concluded that no areas in Deschutes County need be excluded from the destination resort map on the basis of being located within three miles of a high value crop area.

Petitioners do not contest the county's determination that there are no high value crop areas in Deschutes County. However, petitioners contend the county improperly failed to determine that the areas within three miles of the county's borders designated on the destination resort map as available for destination resort siting, are not within three miles of a high value crop area in neighboring counties. Petitioners also argue there is evidence in the record that there is a high value crop area in Jefferson County that is within 200 yards of the Deschutes County border. Record 392.

Petitioners contend the language of ORS 197.455 and Goal 8 is "eminently clear and should be given its full effect." Petition for Review 8. Petitioners argue both the statute and Goal 8 provide that a destination resort cannot be sited within three miles of a high value crop area, and make no mention of the location of county borders.

Therefore, according to petitioners, a county cannot map an area near its borders as available for destination resort siting, without considering whether lands within three miles of that area, including land in neighboring counties, are high value crop areas.

Petitioners further argue that the county's interpretation of the statute and goal is inconsistent with the statutory and goal purpose for the high value crop area exclusion. Petitioners point out Goal 8 provides that the purpose for the exclusion of certain types of land from destination resort siting, including areas within three miles of high value crop areas, is "[t]o assure that [destination] resort development does not conflict with the objectives of other Statewide Planning Goals." The objective of Goal 3 is "[t]o preserve and maintain agricultural lands." According to petitioners, the exclusion of destination resorts from a three mile area around these particularly valuable agricultural areas clearly serves this purpose. To allow the required three mile area to be cut short by a county border would not serve the purpose of Goal 8 and ORS 197.455(2).

Petitioners also argue that the administrative history of the Goal 8 destination resort provisions supports their interpretation. Petitioners contend this history demonstrates that the intended purpose of the high value crop area exclusion is to provide a buffer to protect

valuable agricultural areas from the impacts of destination resort development. Petition for Review App. G-4, J-4, K-2 to K-3. Petitioners contend this purpose would be defeated if destination resorts could be sited near county borders without regard to nearby high value crop areas in neighboring counties.

The county concedes it did not consider land outside its borders in identifying high value crop areas. However, the county contends coordination of planning activities is required only between units of local government within individual counties. ORS 197.190(1). The county argues nothing in the language of ORS 197.435 to 197.465 or Goal 8 explicitly states that a county must inventory high value crop areas outside its own borders. According to the county, absent explicit authority to do so, it has no authority to regulate outside its boundaries.

The county also argues that this Board should consider the practical ramifications of an interpretation of the statute and Goal 8 to require that a county inventory high value crop areas outside its borders. The county contends such an interpretation would result in troublesome issues of coordination between adjacent counties.[5] According to the

[5]According to the county, coordination of planning activities between counties is voluntary, not required. The county cites ORS 197.190(2), which provides:

county, identifying high value crop areas in a neighboring county would involve subjective and potentially inconsistent judgments as to what constitutes a "commercial farm" and what constitutes a "concentration" of such farms. The county believes neighboring counties could reach different conclusions with regard to identification of high value crop areas.

Intervenors contend the administrative history of the Goal 8 destination resort provisions demonstrates it was (1) recognized that counties would have flexibility in identifying high value crop areas, and (2) assumed that each county would determine which lands within its own borders would be designated as high value crop areas. Intervenors cite statements in LCDC meetings and DLCD staff reports that "[c]ounties would identify [high value crop] areas in their plans" and "mapping of high value crop areas would have to be done by [c]ounties in amendments to their comprehensive plans." Intervenors-Respondent's Brief App. 3-19, 4-2, 5-3. According to intervenors, because adjacent counties have not designated any lands as high value crop areas,[6] and the

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> "For the purposes of carrying out ORS chapters 196 and 197, counties may voluntarily join together with adjacent counties as authorized in ORS 190.003 to 190.620." (Emphasis added.)

As noted in our discussion in n 7, infra, we do not agree with the county's assertion that coordination of planning activities between counties is voluntary.

[6]The destination resort map designates areas which are within three miles of the county's border with Jefferson, Crook or Klamath County as

county made an unchallenged determination that no land within its borders should be so designated, the county did not err by failing to exclude areas from destination resort siting availability on the basis of being within three miles of high value crop areas.

We agree with petitioners that both the statute and Goal 8 mandate that land within three miles of a high value crop area, regardless of the location of county boundaries, not be available for destination resort siting under Goal 8 and ORS 197.435 to 197.465. This interpretation is consistent with the purpose expressed in Goal 8 for the listing of excluded areas (to prevent conflicts with the objectives of other statewide planning goals) and the statutory and goal statement in the definition of "high value crop areas" that this "designation is used for the purpose of minimizing conflicting uses in [destination] resort siting * * *." ORS 197.435(2). It would be inconsistent with this purpose to ignore the requirement that destination resorts not be sited within three miles of a high value crop area simply because the high value crop area is near a county border and within a county that has not yet amended its plan and land use regulations to provide

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available for destination resort development. The parties are in agreement that neither Jefferson nor Crook County has amended its plan and land use regulations to provide for the siting of destination resorts pursuant to ORS 197.435 to 197.465 and Goal 8 and, therefore, that neither has identified high value crop areas within its borders. The status of Klamath County's planning for destination resorts is unclear.

for the siting of destination resorts.

Additionally, there is nothing in the administrative history of the Goal 8 destination resort provisions cited by the parties to support the county's and intervenors' positions that a county may designate land near its borders as available for destination resorts, without considering whether there are high value crop areas in neighboring counties within three miles of such land. The administrative history materials simply indicate that counties, as opposed to LCDC or some other agency, such as the U.S. Soil Conservation Service, will identify high value crop areas and map them in county plans. They do not address the issue presented here.

There is no dispute that the challenged destination resort map designates as available for destination resort siting and, consequently, the DR overlay zone is applied to, areas within three miles of the county's borders. There is also no dispute that the county failed to determine whether those areas are within three miles of high value crop areas located in the neighboring county. Accordingly, the county has failed to demonstrate compliance with the requirement of ORS 197.455 and Goal 8 that land within three miles of high value crop areas not be included on the map as available for destination resort siting.[7]

[7]It appears that Deschutes County will be required to determine in the first instance whether there are high value crop areas in the relevant

The first and second assignments of error are sustained. This requires that we remand the ordinances challenged in LUBA Nos. 92-046 and 92-047 which adopt the destination resort map and apply the DR overlay zone to the areas designated on that map. However, the county argues that petitioners' assignments of error, even if sustained, provide no basis for reversing or remanding the ordinances challenged in LUBA Nos. 92-045 and 92-048 which amend the plan and DCZO text with regard to siting destination resorts.

We agree with the county. Petitioners' assignments of error do not challenge any provision adopted as part of the plan and DCZO text by Ordinances No. 92-001 and 92-004.[8]

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portions of the neighboring counties, as those counties have not yet identified such areas. However, we disagree with the county's position that coordination of planning activities between counties is not required. Goal 2 provides that "county * * * plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties * * *." It also provides that "[e]ach plan and related implementation measure shall be coordinated with the plans of affected governmental units." Thus, if the neighboring counties had already identified high value crop areas in their plans as part of a destination resort siting planning process, we believe Deschutes County would be required to coordinate its plan with those of the neighboring counties.

[8]A finding stating the destination resort map adopted by Ordinance No. 92-002 satisfies the requirements of Goal 8 that certain resource areas not be mapped as available for destination resort siting is included in the findings adopted in support of Ordinances No. 92-001 and 92-004. Record 15, 66. Our determination above with regard to petitioners' assignments of error means that this finding is incorrect. However, this finding is not required to support the county's adoption of plan and DCZO text provisions concerning destination resort siting and, therefore, its inaccuracy provides no basis for reversal or remand of Ordinances No. 92-001 and 92-004. Marson v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-134, December 23, 1991), slip op 4; Moorefield v. City of Corvallis, 18 Or LUBA 95, 101 (1989).

Ordinances No. 92-002 and 92-003 (LUBA Nos. 92-046 and 92-047) are remanded. Ordinances No. 92-001 and 92-004 (LUBA Nos. 92-045 and 92-048) are affirmed.