BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA LARSON and KENNETH LARSON, Petitioners, vs. MULTNOMAH COUNTY, Respondent, and DONNA MATRAZZO, STUART SANDLER, MELISSA MARSLAND, MARK VALESKE, JEROME DEGRAF, JACK SANDERS, SAUVIE ISLAND CONSERVANCY, and FRIENDS OF RETAINING CHANNEL ENVIRONMENT, Intervenors-Respondent.	LUBA No. 92-100 FINAL OPINION AND ORDER

Appeal from Multnomah County.

David B. Smith, Tigard, represented petitioners.

Peter Livingston, Assistant County Counsel, Portland, represented respondent.

Jeffrey L. Kleinman, Portland, represented intervenors-respondent.

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

AFFIRMED 03/09/93

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal a county decision denying their request for a (1) a goal exception, (2) comprehensive plan amendment, and (3) zone change, and (4) Willamette River Greenway permit, to allow the establishment of a marina.

MOTION TO INTERVENE

Donna Matrazzo, Stuart Sandler, Melissa Marsland, Mark Valeske, Jerome Degraff, Jack Sanders, Sauvie Island Conservancy, and Friends of Retaining Channel Environment move to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

The subject property consists of 21.8 acres on Sauvie Island adjacent to the Multnomah Channel of the Willamette River. Petitioners applied for an exception to Statewide Planning Goal 3 (Agricultural Lands), a comprehensive plan amendment from Agriculture to Multiple Use Agriculture, a zone change from Exclusive Farm Use (EFU) to Community Service Use, and a Willamette River Greenway permit, to allow construction of a marina.

The county planning commission held a hearing on the proposal and denied petitioners' applications. Petitioners appealed to the board of county commissioners. The board of county commissioners affirmed the planning commission's

decision, and this appeal followed.[1]

ASSIGNMENT OF ERROR

> "The respondent's denial of petitioners' marina application deprived the petitioners of all economically beneficial use of their parcel in violation of both Article I, Section 18 of the Oregon Constitution and the 5th and 14th Amendments to the US Constitution."

Petitioners claim the challenged decision constitutes a taking of their property in violation of Article I, section 8, of the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.[2]

Petitioners contend their constitutional claims are ripe for review, even though they began their local land development inquiries with an application for a plan and zone change, and did not request approval for any uses allowed outright or conditionally in the EFU zone. Petitioners argue that under the existing EFU zoning, it is futile for them to apply for any of the conditional uses allowable in the EFU zoning district because those uses are all economically infeasible. Petitioners argue this

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[1]This opinion reflects our decision in Larson v. Multnomah County, ____ Or LUBA _____ (LUBA No. 92-100, Order on Motion for Evidentiary Hearing, January 27, 1993).

[2]We understand this to be petitioners' shorthand way of claiming that none of the permitted or conditional uses allowable under the EFU zoning district provide either a "substantial beneficial use" or an "economically beneficial or productive use" of the subject property. These tests are derived from Fifth Avenue Corp. v. Washington Co., 282 Or 591, 609, 581 P2d 50 (1978), and Lucas v. South Carolina Coastal Council, 505 US ____, 112 S Ct 2886, 120 L Ed2d 798, 813 (1992), respectively.

allegation excuses them from having to seek permission from the county for any listed conditional use in the EFU zoning district. Petitioners also contend they are excused from having raised the "taking" issue below, because they could not have known that their property would be unconstitutionally taken until after the county made its decision on their rezoning proposal. Specifically, petitioners contend theirs is an "as applied" taking claim, and this means they were not required to raise below the issue raised here; that denial of the proposed goal exception/plan amendment/rezoning (hereafter rezoning), constitutes an unconstitutional taking of their property without compensation.

Respondent and intervenors-respondent (respondents) argue that petitioners are precluded by ORS 197.835(2) and 197.763(1) from raising their constitutional taking issue before this Board because they failed to raise that issue during the local proceedings below.[3] Respondents also

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[3]ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. * * *"

ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body * * *

contend that petitioners' taking claim is not ripe for review because petitioners have not sought approval for any of the numerous uses that are conditionally permitted in the county's EFU zoning district.

A. ORS 197.835(2)/197.763(1)

We have determined that where a petitioner could not reasonably have known the local government would adopt a particular interpretation of local ordinances, the petitioner is not required by ORS 197.835(2) and 197.763(1) to have challenged the interpretation during the local proceedings in order to challenge it before LUBA. Washington Co. Farm Bureau v. Washington Co., 21 Or LUBA 51, 57 (1991). However, we believe the instant situation is much different than that presented in Washington Co. Farm Bureau. The taking claim petitioners seek to raise in this proceeding is not, and was not, dependent upon the county's adoption of a particular interpretation of the ordinance provisions at issue in this proceeding. Petitioners' taking claim here depends solely on the county's denial of their application. Clearly, the possibility of a denial decision was reasonably foreseeable. Denial is at least equally as plausible, within the universe of possible dispositions of petitioners' application, as an approval decision or an

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and the parties an adequate opportunity to respond to each issue."

approval decision with limiting conditions of approval.

The county was entitled to know and respond to the fact that petitioners were poised to assert a taking claim against it if it denied the rezoning application. Nothing the county did in acting on petitioners' application changed what petitioners could have and should have argued below -- that a denial decision on their application for rezoning means there is no economically beneficial use of the property under the existing EFU zoning. We have stated a local government is not obliged to respond to a taking claim raised below. See Dodd v. Hood River County, 22 Or LUBA 711, 724-25, aff'd 115 Or App 139, review allowed 315 Or 271 (1992). However, this does not mean that a local government should not, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should at least have the opportunity, if possible, to adopt the interpretation that is constitutional. Accordingly, petitioners were required to raise their taking issue below. Because they failed to do so, petitioners waived their right to raise that issue before this Board.

B. Ripeness

Even if petitioners did not waive their right to raise their taking claim before this Board, we believe their taking claim is not ripe for review.

In Dunn v. City of Redmond, 86 Or App 267, 270, 739 P2d 55 (1987), the court determined that a petitioner's taking claim was not ripe for review because he failed to apply for conditionally permitted uses allowable under the applicable zoning district. In Joyce v. Multnomah Co., 114 Or App 244, 835 P2d 127 (1992), the Court of Appeals determined that a regulatory taking challenge to a land use decision denying approval of a nonresource dwelling in a resource zone was not ripe for review, where the applicant sought neither a plan and zone change nor conditional use approval, for uses other than a nonresource dwelling during the local proceedings. The court stated:

> "Petitioner also contends that it would be futile for him to seek a variance or a conditional use permit for other uses. He maintains that the grounds for the county's denial of his application for the dwelling are inconsistent with its approval of a variance under its ordinance standards and that the characteristics of the property together with the grounds for LUBA's and the county's decisions, preclude the approval of any uses for which he might apply. The particulars of petitioner's arguments, however, come to little more than a weighing of evidence that he anticipates would be produced against him in variance or permit proceedings that have not been held. We cannot say, on the basis of this record, the applicable county legislation preordains the outcome of those other possible proceedings." Joyce v. Multnomah Co., 114 Or App at 248.

In Dority v. Clackamas County, 115 Or App 449, ___ P2d _____ (1992), rev den 315 Or 311 (1993), the Court of Appeals again determined that a regulatory taking challenge

to a land use decision denying approval of a nonresource dwelling in a resource zone was not ripe for review. While there was no local variance procedure available to the petitioner in Dority, the petitioner could have applied for a plan amendment and zone change. Under these circumstances, the court refused to assume it would be futile for petitioner to seek such approvals.

The purpose of the requirement under applicable federal and state constitutions that a "taking" claim be ripe, is to allow the reviewing body to know "the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it * * *." MacDonald, Sommer & Frates v. Yolo County, 477 US 340, 106 S Ct 2561, 2567, 91 L Ed2d 285 (1986). In Suess Builders v. City of Beaverton, 294 Or 254, 262, 656 P2d 306 (1982), the Oregon Supreme Court stated:

> "* * * The significance of exhaustion is not to fix the time when the infringement of plaintiff's rights occurred. Rather, if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken. * * *"

Here, we realize that petitioners contend they are entitled to avoid the ripeness/exhaustion requirement because they allege the subject property cannot economically be used for the permitted and conditional uses listed by the EFU zone. However, that petitioners believe the county will deny proposed development because it might not meet various approval standards, does not excuse petitioners from giving

the county the opportunity to make that decision for itself. Joyce v. Multnomah Co., supra, 114 Or App at 248. A reviewing body "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." MacDonald, Sommer & Frates, supra, 106 S Ct at 2566.

Accordingly, we are unpersuaded that the futility exception excuses petitioners from making a good faith effort to secure approval for at least some of the conditional uses allowed by the EFU zoning district.

Petitioners' assignment of error is denied.

The county's decision is affirmed.