1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 MARK FURLER,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CURRY COUNTY,) LUBA No. 94-059
11)
12 Respondent.) FINAL OPINION
13) AND ORDER
14 and)
15)
16 IRA J. CREE, WILLIAM H. CREE,)
17 and CREE INVESTMENTS CO., a)
18 California partnership,)
19)
20 Intervenors-Respondent.)
21
22
23 Appeal from Curry County.
24
25 Mark Furler, Gold Beach, filed the petition for review.
26 Neil S. Kagan, Portland, argued on behalf of petitioner.
27
28 No appearance by respondent.
29
30 Michael E. Farthing and David A. Stanley, Eugene, filed
31 the response brief. With them on the brief was Gleaves
32 Swearingen Larsen Potter Scott & Smith. Michael E. Farthing
33 argued on behalf of intervenors-respondent.
34
35 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
36 Referee, participated in the decision.
37
38 REMANDED 07/11/94
39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving a
4 dwelling in conjunction with forest use (forest dwelling).

5 **MOTION TO INTERVENE**

6 Ira J. Cree and William H. Cree, the applicants below,
7 and Cree Investments Co., move to intervene in this
8 proceeding on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 The subject property is a vacant 40-acre parcel
12 designated for forest use by the Curry County Comprehensive
13 Plan (plan) and zoned Timber. The property is within a
14 designated Sensitive Big Game Habitat Area. U.S. Forest
15 Service land adjoins the subject property to the east.
16 Privately owned Timber-zoned properties adjoin the subject
17 property to the north, west and south. The property is
18 located approximately six miles southeast of the urban
19 growth boundary (UGB) of the City of Gold Beach.

20 Intervenors submitted their forest dwelling application
21 to the county planning department on September 25, 1992.
22 Record 41. The application was initially reviewed by the
23 county planning commission.[1] The board of county

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[1]No documents pertaining to the planning commission's review are found in the record submitted by the county. The board of commissioners' decision to reject the planning department's staff report to the planning

1 commissioners conducted a de novo review of the application
2 and, after a public hearing, issued an order approving the
3 application on March 21, 1994. This appeal followed.

4 **FOURTH ASSIGNMENT OF ERROR**

5 **A. Rejection of Planning Commission Documents**

6 At the February 15, 1994 public hearing before the
7 board of commissioners, petitioner sought to introduce into
8 the record the planning department staff report to the
9 planning commission on the subject application (staff
10 report) and the planning commission's final order on the
11 subject application (planning commission order). The
12 motions to accept these documents failed, and the documents
13 were rejected. Record 22-23. According to the minutes of
14 the hearing, after the board of commissioners' votes to
15 reject the planning commission order and staff report,
16 county counsel explained the board of commissioners' actions
17 to petitioner as follows:

18 "[T]he Board [of Commissioners] rejected the Final
19 order because it related to the decision of the
20 Planning Commission. [W]hatever the Planning
21 Commission did before was irrelevant to this
22 hearing, and it's as if the hearing before the
23 Board [of Commissioners] was the first hearing.
24 [I]f there was anything in particular in the Final
25 Order [petitioner] wanted in the record, he could
26 submit it in a different way.

27 "* * * * *

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commission and the planning commission's decision is challenged by petitioner under the fourth assignment of error, infra.

1 "[I]f there were anything substantive that related
2 to the exhibits rejected, [counsel] would invite
3 [petitioner] to submit them. [I]t could be
4 excerpts or things like that, just nothing that
5 related to the [planning commission] decision
6 itself." (Emphases added.) Record 23.

7 Petitioner contends both the staff report and planning
8 commission order contained evidence or argument relevant to
9 the board of commissioners' decision on the subject
10 application. We understand petitioner to argue his
11 substantial right to introduce evidence was prejudiced by
12 the board of commissioners' refusal to accept these
13 documents.

14 Intervenors argue the county counsel sufficiently
15 explained the basis for the board of commissioners' decision
16 not to accept the disputed documents into the record.
17 Intervenors further argue petitioner was not prejudiced by
18 the board of commissioners' refusal to accept the disputed
19 documents, because petitioner had ample opportunity to
20 submit excerpts from the documents into the record, but
21 chose not to do so.[2] Intervenors point out the hearing
22 record was left open for seven days, until February 22,
23 1994, for submittal of additional information. Record 30.

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[2]Intervenors also object to references to and quotes from the disputed documents included in the petition for review, as well as to Appendices 3 to 5 of the petition for review, on the grounds that the disputed documents and appendices are not part of the record. Because the disputed documents and appendices are not in the record, we do not consider references to or quotes from these documents. Mannenbach v. City of Dallas, 25 Or LUBA 136, 138, aff'd 121 Or App 441 (1993); Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 78, aff'd 89 Or App 40 (1987).

1 It appears from the record that in conducting a de novo
2 review of the subject application, the board of
3 commissioners intended to consider the application anew, as
4 if no decision had previously been rendered by the planning
5 commission. See Strawn v. City of Albany, 20 Or LUBA 344,
6 351 n 8 (1990) (discussion of different types of "de novo"
7 proceedings). No party challenges the board of
8 commissioners' authority to conduct such a de novo review.
9 Petitioner does contend, however, that the staff report and
10 planning commission decision contain evidence and argument
11 relevant to the subject application and that the board of
12 commissioners erred by refusing to accept these documents
13 into the record.[3] We agree with petitioner.
14 Petitioner has a substantial right to submit evidence
15 in a quasi-judicial land use proceeding. Fasano v.
16 Washington Co. Comm., 264 Or 574, 588, 507 P2d 23 (1973);
17 Muller v. Polk County, 16 Or LUBA 771, 775 (1988). This
18 right was prejudiced by the board of commissioners' refusal
19 to accept the disputed documents. The county counsel's
20 invitation to petitioner to submit certain excerpts from
21 these documents into the record "in a different way" does
22 not eliminate this prejudice to petitioner's substantial
23 right. Based on the record before us, petitioner could not

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[3]We do not understand petitioner to contend these documents must be given any special weight as evidence or argument. Rather, petitioner argues simply that they are relevant.

1 determine what portions of the disputed documents might be
2 considered acceptable or in what "different way" than
3 submitting the document itself petitioner should submitted
4 such portions of the documents.

5 This subassignment of error is sustained.[4]

6 **B. Incomplete Application**

7 Petitioner contends the county violated CCZO 2.060 by
8 accepting an incomplete application.[5] According to
9 petitioner, as of September 25, 1992, the date the county
10 determined the application was filed, the application lacked
11 a completed forest dwelling plan and contained insufficient
12 information on water availability and compliance with road
13 standards. Petitioner argues the county improperly allowed
14 intervenors' application to be supplemented with information
15 the county received on February 2, 1994.

16 Intervenors contend the application submitted on

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[4]Sustaining this subassignment of error means the challenged decision must be remanded to the county, and the evidentiary record must be reopened, at least for the purpose of accepting and considering the staff report and planning commission order. Therefore, addressing petitioner's contentions under the first and third assignments of error that the county's determinations of compliance with plan Section 5.12F Policy 6 and Curry County Zoning Ordinance (CCZO) 3.042(8)(c) and (d) are not supported by substantial evidence in the present record would serve no useful purpose. We address the remainder of petitioner's arguments only to the extent they raise legal issues, the resolution of which would aid the parties on remand.

[5]CCZO 2.060 provides:

> "An application shall be complete, contain the information required by these regulations and address the appropriate criteria for review and approval of the request."

September 25, 1992 was not incomplete. Intervenors also argue that even if the initial application was incomplete, petitioner fails to demonstrate the county's acceptance of a supplement to the application on February 2, 1994 prejudiced petitioner's substantial rights.

Omission of information required by the local code from a development application is a harmless procedural error if the required information is located elsewhere in the record. McConnell v. City of West Linn, 17 Or LUBA 502, 525 (1989); Dougherty v. Tillamook County, 12 Or LUBA 20, 24 (1984). Thus, in order for a petitioner to obtain reversal or remand of a challenged decision because information required by the local code is missing from an application, petitioner must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. Murphy Citizens Advisory Comm. v. Josephine County, 25 Or LUBA 312, 325 (1993).

Here, petitioner either concedes the information allegedly missing from the original application was submitted at a later date or fails to explain why the information missing from the application prevents a determination of compliance with an applicable approval standard. Even if petitioner is correct that the forest dwelling plan initially submitted by intervenors is

incomplete and the initial application lacks required information on water availability and compliance with road standards, that, in itself, does not provide a sufficient basis for reversal or remand of the challenged decision.

This subassignment of error is denied.

C. Other Procedural Issues

The remainder of petitioner's arguments under this assignment of error are insufficiently developed to warrant a response.

The fourth assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR

Petitioner contends the county incorrectly interpreted two plan section 5.12F policies concerning water. Before turning to the interpretations of the individual water policies expressed in the challenged decision, we note the following statement in the decision regarding interpretation of plan policies in general:

> "[G]eneral [plan] policies do not mandate a particular course of action with respect to a particular development, so long as that development meets specific comprehensive plan and zoning provisions that do control individual developments * * *." Record 9.

A. Plan Section 5.12F Policy 3

Plan Section 5.12F Policy 3 provides:

> "Due to questionable availability of surface water and groundwater in some parts of the county, residential development should only be encouraged in areas which are known to have adequate supplies of potable water."

With regard to this policy, the challenged decision states:

> "* * * Policy [3] contains a general policy objective based on the language that residential development should only be encouraged * * * in areas which are known to have adequate supplies of potable water. Nevertheless the Board [of Commissioners] finds that there will be adequate potable water. * * *" (Emphases added by county.) Record 10.

The first sentence quoted above, together with the general interpretation of the applicability of plan policies previously quoted, indicate the county interprets plan Section 5.12F Policy 3 to be a general plan objective that is not an approval standard for a particular development application.[6] This interpretation is well within the interpretive discretion afforded the county by ORS 197.829 and Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).[7]

This subassignment of error is denied.

B. Plan Section 5.12F Policy 4

Plan Section 5.12F Policy 4 provides:

> "Potential conflicts between identified water resources and other uses have been addressed and

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[6]We also agree with intervenors that in view of the county's interpretation of Policy 3, the second sentence of the finding quoted above is mere surplusage.

[7]Under ORS 197.829(4), we are not required to defer to a local government's interpretation of its plan or regulations if that interpretation is contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. However, petitioner does not contend the county's interpretation of plan Section 5.12F Policy 3 is inconsistent with a statute, goal or rule implemented by this policy.

resolved so that these resources are utilized to the optimal benefit of the resource through the implementation of the comprehensive plan."

With regard to this policy, the challenged decision states:

> "* * * Policy 4 reflects a general statement of the County's intention to see that water resources are utilized to the maximum benefit of the resource through implementation of the comprehensive plan. It states that potential conflicts * * * have been addressed and resolved, rather than that they will be addressed and resolved [in acting on a particular development application]. * * *" Record 10.

Once again, the interpretation quoted above, together with the previously quoted general plan policy applicability interpretation previously quoted, indicates the county interprets plan Section 5.12F Policy 4 not to be an approval standard for individual development applications. This interpretation is also well within the discretion afforded by ORS 197.829 and Clark v. Jackson County, supra.

This subassignment of error is denied.

The first assignment of error is denied, in part.[8]

SECOND ASSIGNMENT OF ERROR

A. CCZO 3.042(8)(b)

CCZO 3.042(8)(b) establishes the following approval standard for the proposed forest dwelling:

"It must comply with the suggested dwelling unit

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[8]As explained in n 4, supra, we do not address petitioner's contentions under this assignment of error that the county's determinations of compliance with plan Section 5.12F Policy 6 and CCZO 3.042(8)(c) are not supported by substantial evidence in the record.

density guidelines for 'sensitive' and 'peripheral' big game habitat defined by the Oregon Department of Fish and Wildlife as big game habitat on the comprehensive plan inventory maps[.]"

There is no dispute that the subject property is within an identified sensitive big game habitat area. The parties also agree that CCZO 3.042(8)(b) refers to the following provision of the January 13, 1981 ODFW Wildlife Protection Plan for Curry County (ODFW plan):

> "In nonexclusive [plan and zoning] classifications, development should be low density, allowing for normal agricultural and forest uses. Residential densities should generally not exceed 1:80 acres on major deer and elk ranges where lands are sparsely developed and recreational opportunities are maximal. * * * It should be emphasized that [ODFW's] recommendations relate to overall residential density and not minimum lot size." Record 130.

The challenged decision interprets the above provision of the ODFW plan, made applicable by CCZO 3.042(8)(b), as follows:

> "a) [I]t is <u>not</u> a minimum lot size requirement[.]
>
> "b) [R]esidential densities should <u>generally</u> not exceed 1 per 80 acres on major deer or elk ranges; * * * a greater density could be authorized if it could be shown that wildlife was adequately protected[.]
>
> "c) [T]he residential density [standard] should be applied to a 1 mile grid centered on the subject parcel.
>
> "d) [T]he 1 mile grid could include both public and private lands.

1 "* * * Public lands can be included, as wildlife
2 do not know the difference between public and
3 private lands, and the purpose of the zoning
4 requirements is to apply an overall dwelling
5 [density] requirement for the protection of
6 wildlife." (Emphases in original.) Record 12.

7 The decision also states the ODFW plan "was accompanied [by]
8 a map broken down into 1 mile (640 acre) grids." Id.

9 The decision goes on to determine that within a one
10 mile grid centered on the subject property, including
11 adjacent U.S. Forest Service land to the east, there are
12 only two existing dwellings and a potential for two
13 additional dwellings based on the subject application and a
14 similar application filed for an adjoining property.
15 Therefore, the decision concludes approval of the subject
16 application will result in, at most, a density of one
17 dwelling per 160 acres, only half the residential density
18 allowed under the ODFW plan. Id.

19 Petitioner contends the above described interpretation
20 and application of the ODFW plan is erroneous because the
21 county applies the ODFW plan's residential density standard
22 to a one mile grid centered on the property and includes
23 public land in that one mile grid.[9] Petitioner also argues

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[9]Petitioner also challenges county findings, such as finding "b" quoted above, that state a residential density greater than one dwelling per 80 acres could be approved in sensitive big game habitat areas in certain circumstances. However, in this case, the county determined the subject application complies with the one dwelling per 80 acres residential density limitation. Consequently, the findings petitioner seeks to challenge in this regard are surplusage, and we do not consider this issue.

1 the county erred by refusing to adhere to an interpretation
2 of the ODFW plan residential density limitation previously
3 used by the county in denying the "Hunt" application for a
4 forest dwelling. Record 135-39.

5 We have reviewed the ODFW plan. Record 128-30.
6 Petitioner's arguments provide no basis for concluding the
7 county erred by interpreting the plan to allow use of a one
8 mile grid centered on the subject property to calculate
9 residential density, or by considering public land included
10 within that one mile grid.

11 Finally, it appears the Hunt application concerned a
12 proposed forest dwelling in a sensitive big game habitat
13 area, and the county found noncompliance with
14 CCZO 3.042(8)(b) simply because the proposed forest dwelling
15 would be located on a parcel of less than 40 acres, without
16 considering the dwellings in a one mile grid centered on the
17 subject property. Record 139. However, we have explained
18 on several occasions that when this Board reviews land use
19 decisions for compliance with relevant approval standards,
20 it does not matter whether the challenged decision is
21 consistent with prior decisions, so long as the decision
22 correctly interprets and applies the applicable standard.
23 Reeder v. Clackamas County, 20 Or LUBA 238, 244 (1990);
24 Okeson v. Union County, 10 Or LUBA 1, 5 (1983). Therefore,
25 even if there is an inconsistency between the county's
26 interpretation and application of the ODFW plan's

residential density limitation in the Hunt order and in the challenged decision, that in itself does not provide a basis for reversal or remand.

This subassignment of error is denied.

B. Plan Section 5.12D Policy 3

Petitioner contends the challenged decision does not establish compliance with plan Section 5.12D Policy 3, which provides:

> "Private lands also provide habitat areas for wildlife but land use conflicts often arise between human uses and the wildlife resource; Curry County has identified these conflicts and established a process to resolve them which will protect the significant habitats in accordance with ODFW guidelines through the dwelling and land division standards of the [CCZO] for the applicable resource zones." (Emphasis added.)

The challenged decision indicates the county interprets the above policy to be a general policy statement that is implemented by the forest dwelling approval standard established by CCZO 3.042(8)(b) discussed in the preceding subassignment of error. Record 10. We agree. Plan Section 5.12D Policy 3 does not impose any approval standard on the subject application in addition to that of CCZO 3.042(8)(b).

This subassignment of error is denied.

The second assignment of error is denied.

The county's decision is remanded.