

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STEVE DOOB, ALBERT DEVINE,
5 SALLY PALMER and PAUL SIMON,
6 *Petitioners,*

7
8 vs.

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10 JOSEPHINE COUNTY,
11 *Respondent,*

12
13 and

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15 GARY WALLACE,
16 *Intervenor-Respondent.*

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18 LUBA No. 2004-037

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20 FINAL OPINION
21 AND ORDER

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23 Appeal from Josephine County.

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25 Steve Doob, Merlin, Albert Devine, Sally Palmer and Paul Simon, Cave Junction,
26 represented themselves. Steve Doob filed the petition for review and argued on his own behalf.

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28 No appearance by Josephine County.

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30 Duane Wm. Schultz, Grants Pass, filed the response brief and argued on behalf of
31 intervenor-respondent.

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33 BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision.

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35 REMANDED

06/16/2004

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

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NATURE OF THE DECISION

Petitioners appeal the county’s approval of a tentative subdivision plan.

MOTION TO INTERVENE

Gary Wallace (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor’s property is located near Cave Junction and consists of two tax lots totaling 42.6 acres. The property is zoned Serpentine, which is a peculiar Josephine County natural resource designation that nonetheless allows for residential development with five-acre minimum lot sizes. Intervenor’s tentative plan proposes to subdivide the property into eight lots of approximately five acres each. The planning commission approved the application, and petitioners appealed that decision to the board of county commissioners. The board of county commissioners affirmed the planning commission, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

Josephine County Rural Land Development Code (RLDC) 51.050 provides the review criteria for tentative subdivision plan approval. RLDC 51.050.A requires compliance with “this code and all applicable rules, resolutions, ordinances, codes, technical manuals, and policies of the county.” Petitioners argue that “policies of the county” includes the policies of the Josephine County Comprehensive Plan (JCCP). As petitioners succinctly state, “[t]his assignment of error is based entirely upon the county’s failure to comply with JCCP’s Goal 10, Policy 4.” Petition for Review 7. JCCP Goal 10 provides:

“Goal 10: To depict a land use pattern to guide future uses, to implement the desires of the county and to meet the requirements of the state of Oregon.

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‘POLICIES:

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“2. The Forest, Agriculture, Serpentine and Aggregate Resource designations shall be considered as natural resource designations.

“3. The County shall protect and conserve its natural resources by placing a Comprehensive Plan resource designation on all lands that do not have an exception to State Goals in the form of an urban growth area, committed exception, need exception or are proven to be a non-resource area.

“4. The Comprehensive Plan resource designation shall afford equal protection for the full range of resources and will show the predominant resource potential for the area. Therefore an area of land may have agriculture uses and a forest plan designation because the area has a predominant forest potential based on the location and physical attributes.”

Although petitioners raised the issue of compliance with JCCP Goal 10, Policy 4 below, the county did not address the issue in its decision. The only mention of the review criteria involving compliance with comprehensive plan policies is as follows:

“* * * the request to subdivide the subject 42.6-acre tract into an eight-lot subdivision, with the creation of a Rural Residential Road is in compliance with the county land development code, rules, and policies of the county.” Record 4.

Petitioners argue that because the county has placed a resource designation on the property, it is required to protect and conserve the property’s natural resources.¹ Intervenor responds that JCCP Goal 10, Policy 4 is not an applicable criterion and that we can infer from the lack of any discussion in the findings that the county did not consider it to be one.

Whether a plan policy is an approval standard depends upon the wording and context of the plan provision. *Bennett v. City of Dallas*, 17 Or LUBA 450, 456 (1989), *aff’d* 96 Or App 645, 773 P2d 1340 (1989). We tend to agree with intervenor’s interpretation that JCCP Goal 10,

¹ JCCP Goal 10, Policy 1.C describes the Serpentine zone as:

“Lands that are underlain with Serpentine rock and have very limited resource and development potential. Because of the unusual characteristics associated with Serpentine areas, the county shall create a special zoning category encompassing a majority of lands underlain by Serpentine materials which severely limit farm or forestry uses. * * * This zoning category shall be designed to ensure that land development activities in Serpentine lands are consistent with its capabilities.”

1 Policy 4 appears to describe the county’s resource designations, which include the Serpentine
2 designation, and does not appear to be a tentative subdivision plan approval criterion. However, we
3 do not agree with intervenor that the county adopted this interpretation of JCCP Goal 10, Policy 4.
4 The county did not consider this policy, let alone render any interpretation of it.² Petitioners raised
5 the issue of compliance with JCCP Goal 10, Policy 4 below, and the county was obligated to
6 respond to that issue and explain in its decision the extent to which that policy applies to the
7 decision, if at all.³ *Hixson v. Josephine County*, 26 Or LUBA 159, 162 (1993).

8 The first assignment of error is sustained.

9 **SECOND ASSIGNMENT OF ERROR**

10 RLDC 51.050.H requires that the “proposed development is compatible with the existing
11 land use pattern in the area.” Petitioners argued below that the proposal was not compatible and on
12 appeal that the city’s decision does not demonstrate that it is. The city’s only finding regarding this
13 criterion is that:

14 “The proposed subdivision is compatible with the existing land use pattern in the
15 area in that zoning is serpentine and the proposal is to subdivide the tract for
16 residential development as permitted by the [RLDC].” Record 5-6.

17 Intervenor argues that despite the brevity of the county’s finding, the record establishes that
18 the proposal is compatible with the existing land use pattern. Intervenor cites Record 22 and 139
19 as evidence of compatibility. Those citations, however, only list the zoning designations of adjoining
20 properties and show a map of parcels in the vicinity. Neither citation provides any discussion, let
21 alone analysis, of how the proposal is compatible with the existing land use pattern. To the extent

² Intervenor’s brief argues that the county specifically interpreted JCCP Goal 10, Policy 4 not to be an applicable approval criterion. At oral argument, intervenor expanded his argument to include an assertion that the county also rendered an *implicit* interpretation that the disputed policy is not an applicable approval criterion. We do not agree that merely ignoring a comprehensive plan policy when that policy is specifically raised by a party below, in itself, constitutes an implicit interpretation.

³ At oral argument, intervenor argued that requiring a local government to speculate about every potentially applicable comprehensive plan provision in its findings and explain why each plan provision does not apply is oppressively burdensome. Regardless of the merits of that argument, requiring a local government to respond to an argument that a specific policy applies, as in the present case, is not oppressively burdensome.

1 the county's finding addresses the issue, the fact that a proposal is consistent with the permitted uses
2 in that zone does not demonstrate that it is compatible with the existing land use pattern. Where a
3 local code requires that a proposed development be compatible with some aspect of the
4 surrounding area, the local government must explain why the proposed development will be
5 compatible. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98, 115 (1992).

6 The second assignment of error is sustained.

7 The county's decision is remanded.