BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUSAN HOLLOWAY, CHARLES RULE
and JOHN McGOWAN,
Petitioners,

vs.

CLATSOP COUNTY,
Respondent,

and

BIG BEARS LLC and RICHARD CHARLTON,
Intervenor-Respondents.

LUBA No. 2006-044

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Jannett Wilson, Eugene, filed the petition for review. Rebecca J. Kammerling, Certified Law Student, argued on behalf of petitioners.

E. Andrew Jordan, Lake Oswego, filed a joint response brief on behalf of respondent. With him on the brief were Jordan Schrader PC, Steven W. Abel, Michelle Rudd and Stoel Rives LLP.

Steven W. Abel and Michelle Rudd, Portland, filed a joint response brief. With them on the brief were Stoel Rives LLP, E. Andrew Jordan and Jordan Schrader PC. Steven W. Abel argued on behalf of intervenor-respondents.

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

AFFIRMED 10/05/2006

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county ordinance that approves comprehensive plan and zoning map amendments.

RECORD

LUBA received a 457-page "Record of Proceedings" (Original Record) on April 3, 2006. Petitioners and intervenor objected to the Original Record. On May 16, 2006 LUBA received a 476-page "Amended Record of Proceedings" (Amended Record). That Amended Record was submitted by the city to take the place of the Original Record.

As we explained in our June 20, 2006 and June 22, 2006 Orders, the county thereafter submitted a number of additional pages that have been added to LUBA's copy of the Amended Record. All citations in this opinion to the record are to the Amended Record, as supplemented with the additional pages.

FACTS

Tax Lot 300 is owned by intervenor Big Bears LLC. Tax Lot 300 includes 10.9 acres. Tax Lot 300 lies approximately 4.5 miles south of the City of Warrenton urban growth boundary (UGB) and approximately 3 miles north of the City of Gearhart UGB. Tax Lot 300 is part of Surf Pines, a beach community that covers approximately one and one-half square miles. To the north of Tax Lot 300 is undeveloped land. To the east and south of Tax Lot 300 are a large number of developed residential lots, most of which are approximately one-acre in size. Amended Record 91-93. Tax lot 300 is separated from the Pacific Ocean to the west by Tax lot 302, which occupies 8.23 acres and is also owned by intervenor.[1]

[1] We have some unanswered questions about Tax Lot 302. Although the decision and the maps in the record indicate that Tax Lot 302 only includes 8.23 acres, Tax lot 302 appears to be about twice the size of Tax Lot 300, which would make Tax Lot 302 closer to 20 acres than 8.23 acres. Record 91. Also, without explanation, intervenor refers to Tax Lot 302 as Tax Lot 301. Respondent's Brief 1, 9. The possible significance of Tax Lot 301 is noted later in this opinion. It may be that what is now Tax Lot 302 was formerly Tax Lot 301, but neither petitioners nor intervenor offer any explanation for why that may be the case. All

Prior to the county's adoption of the ordinance that is before us in this appeal, the westerly 8.8 acres of Tax Lot 300 had a comprehensive plan designation of "Conservation-Other Resources" and a zoning map designation of Open Space, Parks, and Recreation (OPR). The easterly 2.1 acres of Tax Lot 300 had a comprehensive plan designation of "Rural Lands," and a zoning map designation of Coastal Beach Residential (CBR). The challenged ordinance changes the comprehensive plan designation for the westerly 8.8 acres to "Rural Lands," and changes the zoning to CBR.[2] As we note later, Tax Lot 300 is subject to overlay districts which were unaffected by the challenged ordinance. The challenged ordinance will allow the subject property to be divided into five two-acre lots and developed with single-family dwellings.

FIRST ASSIGNMENT OF ERROR

Under state and local law, the county is required to demonstrate that the disputed comprehensive plan and zoning map amendments are consistent with the statewide planning goals.[3] In their first assignment of error, we understand petitioners to contend that the five two-acre lots that Tax Lot 300 could be divided into under CBR zoning would result in urban development that Goal 14 (Urbanization) prohibits outside UGBs, unless an exception to Goal 14 is approved. OAR 660-014-0040. The county approved a Goal 14 exception for

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references in the record that we have found refer to Tax Lot 302 as Tax Lot 302. For lack of a better alternative, in this opinion we assume Tax Lot 302 is Tax Lot 302. We do not know where Tax Lot 301 is, because neither the county's decision nor the parties tell us where it is.

[2] There are places in the findings that were adopted to support the appealed ordinance that can be read to suggest that the entire 10.9 acres of Tax Lot 300 were already zoned CBR before the ordinance in this appeal was adopted by the county. Record 36 ("LWDUO [Land Water Development and Use Ordinance] 3.240 already includes Tax Lot 300 within the CBR zone."). But if the 8.8 acres are already zoned CDR and planned Rural Residential, there would be no reason to adopt the ordinance that is before us in this appeal.

[3] Under ORS 197.175(2), amendments to comprehensive plans must comply with the statewide planning goals. Under ORS 197.835(6) LUBA must reverse or remand a comprehensive plan amendment that "is not in compliance with the [statewide planning] goals." Under ORS 197.835(7), LUBA must reverse or remand an amendment to a land use regulation if the amendment does not comply with the comprehensive plan, or, in cases where the comprehensive plan does not include specific policies that "provide the basis for the amendment," if the amendment does not comply with the statewide planning goals. LWDUO 5.412(2) expressly requires that comprehensive plan and zoning map amendments must be "consistent with the statewide planning goals."

Surf Pines in 2003 to authorize one-acre lots. Although Tax Lot 300 is part of Surf Pines, it was not included in the 2003 Goal 14 exception area. Citing *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247, 256-57 (2002), petitioners argue the county may not assume that the five two-acre lots that the disputed ordinance potentially will allow are a rural rather than an urban use. Petitioners contend the county either should have approved an exception to Goal 14 or explained why an exception is unnecessary to approve the disputed ordinance. Petitioners argue the county's findings do not do so.

The county's Goal 14 findings are set out below:

> "The County's approval of the amendment will not involve existing or proposed urban growth boundaries. Rezoning Tax Lot 300 would allow the construction of a maximum of five dwelling units. *Any development would require compliance with the County's Goal 14 implementing standards and policies; thus the amendment is consistent with Goal 14*." Record 42 (emphasis added).

For purposes of applying Goal 14, determining whether residential development at a density of one dwelling per two acres is properly viewed as "urban" or "rural" is problematic. Plausible arguments are likely possible for either conclusion, depending on a variety of factors.[4] With one exception, we agree with petitioners that the county's findings are disjointed conclusions and do not provide a sustainable rationale for why the county does not believe the challenged ordinance will allow an urban level of development. The exception is petitioners' apparent understanding that the somewhat obscure sentence emphasized above was intended as a reference to Clatsop County Land Water Development and Use Ordinance

[4] We note that in our decision in *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97, 102-103 (2002) we observed that the Land Conservation and Development Commission (LCDC) has adopted OAR 660-004-0040 to provide standards for applying Goal 14 to certain rural lands that are planned and zoned for residential uses. While OAR 660-004-0040 did not apply directly in that case and apparently would not apply directly in this case either, we noted in *Friends of Yamhill County* that the rule's general approach of using a two-acre minimum lot size to distinguish between rural and urban residential development supported the county's position in that case that lots of more than two acres should not be viewed in isolation as an urban use. That rule similarly lends some support to the county's apparent view in this case that the five two-acre lots constitute a rural level of residential development.

(LWDUO) 3.248(1), which sets out minimum lot sizes in the CBR zone.[5] LWDUO 3.248(1) apparently was adopted as part of the exception to Goal 14 that the county approved for Surf Pines in 2003. Intervenors argue that the county's 2003 exception determined that a minimum lot size of two-acres for Tax Lot 300 is appropriate, and that petitioners may not now collaterally attack the now acknowledged 2003 exception in this appeal.

Intervenors attach an "excerpt" from Ordinance 03-11 which approved the Goal 14 exception that includes Surf Pines, and request that we take official notice of that ordinance excerpt.[6] Petitioners do not object to the request, and we take official notice of the ordinance excerpt. However, we note that Ordinance 03-11 adopts Exhibits A, B and C, but nothing that intervenors include in the excerpt is labeled as an Exhibit A, B or C. For lack of a better alternative, we will assume that the documents attached to intervenors' brief are Exhibits A, B, and C or parts of those exhibits. We also note that the Ordinance 03-11 indicates that those exhibits include maps that show the exception area. Those maps are not included in the excerpt and intervenors offer no explanation for why those maps were omitted. Given the obvious significance that Ordinance 03-11 plays in resolving petitioners' Goal 14 argument, we do not understand why intervenors omitted those maps and we do not understand why petitioners did not supply and ask that we take official notice of those maps

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[5] The relevant text of LWDUO 3.248 is set out below:

> "Development and Use Standards. The following standards are applicable to permitted uses in this zone:
>
> "1. Lot size
>
> "a. for residential uses: one (1) acre except for the following parcels which are not exceptions areas and therefore, require two (2) acres: * * * Tax Lot[s] 300 and 301.
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> "* * * * *." Petition for Review App 1, page 14.

[6] That excerpt includes the three-page Ordinance 03-11, a four-page document entitled "Exception to Goal 14 – Urbanization, CLATSOP PLAINS AREA," four pages that list the parcels that are included in the Goal 14 exception area, and LWDUO 3.240 through 3.250, which constitutes the county's CBR zone.

after intervenors failed to do so. At the very least, those maps presumably would allow us to locate Tax Lot 301 and might make Ordinance 03-11's intended action concerning Tax Lots 300 and 301 clearer than it is. With that uncertainty noted, we turn to intervenors' arguments regarding the 2003 exception.

Simply stated, we understand intervenors to argue that Ordinance 03-11 authorizes a two-acre minimum lot size for Tax Lot 300, even though (or perhaps because) Tax Lot 300 is part of Surf Pines but was not included in the Goal 14 exception area. Intervenors reach that conclusion based on LWDUO 3.248 which apparently was adopted by Ordinance 03-11 and establishes standards for the CBR zone. LWDUO 3.248(1)(a) expressly provides for a two-acre minimum lot size for Tax Lots 300 and 301. *See* n 5.

While it seems somewhat unusual for a Goal 14 exception document to establish minimum lot sizes for parcels that are not included in the geographic area for which the exception is approved, Ordinance 03-11 apparently did so. It also seems somewhat unusual that the vehicle for establishing a two-acre minimum lot size for Tax Lot 300 is the minimum lot size section of the CBR zone, since the CBR zone was applied to only 2.1 acres of Tax Lot 300. Nevertheless, on its face, LWDUO 3.248(1)(a) adopts a minimum lot size of two-acres for Tax Lot 300, and apparently does so *because* Tax Lot 300 was located outside the exception area.[7]

The inference we draw from the county's 2003 Goal 14 exception is that the county (and DLCD) apparently viewed that two-acre minimum lot size as appropriate for Tax Lots 300 and 301, because they were excluded from the Goal 14 exception, as opposed to the one-acre minimum lot size for properties that were included in the Goal 14 exception area.[8]

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[7] Intervenors attach to their brief an October 22, 2003 letter from the Department of Land Conservation and Development (DLCD) to the county that indicates the minimum lot size standard that was applied to land outside the Goal 14 exception area was applied at the direction of DLCD.

[8] While it may be that LWDUO 3.248(1)(a) should be interpreted to adopt a two-acre minimum lot size only for the portion of Tax Lot 300 that was zoned CBR, it is not expressly limited in that way, and petitioners

Stated differently, a two-acre minimum lot size was established for Tax Lot 300 and 301, rather than the one-acre minimum lot size that was applied to property inside the Goal 14 exception area to comply with Goal 14. If the two-acre minimum that was selected for Tax Lot 300 in 2003 was inadequate to ensure compliance with Goal 14, the time to raise that issue was before Ordinance 03-11 was acknowledged and became part of the county's acknowledged comprehensive plan. Petitioners' attempt to raise that issue now is an impermissible collateral attack on the county's acknowledged comprehensive plan. *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350 (1996).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under their second assignment of error, petitioners argue the challenged decision is inconsistent with Goal 11 (Public Facilities and Services) and LCDC's Goal 11 administrative rule. OAR 660-011-0065 governs extension of water service to rural lands. OAR 660-011-0065(2) provides:

> "Consistent with Goal 11, local land use regulations applicable to lands that are outside urban growth boundaries and unincorporated community boundaries shall not:
>
> "(a) Allow an increase in a base density in a residential zone due to the availability of service from a water system;
>
> "(b) Allow a higher density for residential development served by a water system than would be authorized without such service; or
>
> "(c) Allow an increase in the allowable density of residential development due to the presence, establishment, or extension of a water system."

Petitioner argues that the change in zoning from OPR to CBR increases the permissible density from "zero residential units per acre * * * to one unit per two acres[.]" Petition for Review 7. One of the approval criteria for approving a comprehensive plan and

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do not make that argument. As we have already noted, we do not know where Tax Lot 301 is located or whether any part of it was zoned CBR. If no part of Tax Lot 301 was zoned CBR, that more limited interpretation would appear to be inconsistent with LWDUO 3.248(1)(a).

zoning map amendment is that the "affected area will be provided with adequate public facilities and services including, but not limited to * * * '[w]ater and wastewater facilities.'" LWDUO 5.412(3)(D). Petitioners argue "[t]herefore, the increase in density is 'due,' at least in part, to the presence or extension of a water system, in violation of Goal 11 and OAR 660-011-0065(2)(c)." Petition for Review 8.

Intervenors respond that although the City of Warrenton community water system apparently can provide service to any lots that may result from a subdivision of Tax Lot 300 in the future, the number of lots that Tax Lot 300 can be divided into has nothing to do with whether those lots are served by community water or by individual wells.[9] The same number of lots is possible in either case. Intervenors appear to be correct. Petitioners cite nothing in the LWDUO that would allow division of Tax Lot 300 into more lots if those lots are served by a community water system than would be the case if those lots are served by individual wells.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners contend the disputed ordinance violates Goal 17 (Coastal Shorelands).[10] As directed by Goal 17, the county has adopted programs to

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[9] According to the challenged decision, any lots that result from subdivision of Tax Lot 300 would be served by community water from the City of Warrenton and by individual, private on-site sewage disposal systems. Record 23.

[10] Coastal Shorelands are defined as "[t]hose areas immediately adjacent to the ocean, all estuaries and associated wetlands, and all coastal lakes." Goal 17 provides, in part, that the purpose of the goal is"

> "To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and
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> "To reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands."

implement Goal 17. One of these programs is the county's Shoreland Overlay District (SOD). LWDUO 4.080 through 4.095. LWDUO 4.082 explains the purpose of the SOD:

> "The purpose of [the SOD] is to manage uses and activities in coastal shoreland areas which are not designated as a Shoreland Zone in a manner consistent with the resources and benefits of coastal shorelands and adjacent estuarine aquatic areas."

LWDUO 4.084 lists a total of ten different areas that may be subject to the SOD. Among the listed areas are "[a]reas of significant shoreland and wetland biological habitats whose habitat quality is primarily derived from or related to the association with coastal and estuarine areas." Attached to the petition for review are extracted pages of a document entitled "Significant Shoreland and Wetland Habitats in the Clatsop Plains." Petition for Review Appendix D. That document apparently either is the county's Goal 17 inventory of coastal shorelands or is part of that inventory. That inventory identifies the "[t]he fore-dunes between the Warrenton City Limits and Gearhart UGB" as "significant wildlife habitat." According to the inventory, that area encompasses approximately 650 acres.[11]

Apparently, based on the inventory, a portion of Tax Lot 300 is subject to the SOD. The challenged decision simply describes the area of Tax Lot 300 that is subject to the SOD as the "western edge of the property." The parties cite to nothing in the record or elsewhere that more precisely delineates the area of Tax Lot 300 that is subject to the SOD.

Goal 17 goes on to provide:

> "Programs to achieve these objectives shall be developed by local, state, and federal agencies having jurisdiction over coastal shorelands."

[11] The inventory includes the following "Management" recommendation for this area:

> "This area should be preserved as semi-natural grassland habitat. Apart from a limited number of access road[s] to the beach, this area is suitable for low-intensity recreation. Further development of housing on these dunes is likely to be incompatible with protecting their natural values. Off-road vehicle use of the area should be controlled to prevent the loss of vegetation cover."

The SOD places coastal shorelands into one of two categories, Category 1 or Category 2. LWDUO 4.086. Category 1 coastal shorelands include "Significant fish and wildlife habitat." LWDUO 4.086(1)(A)(3). Category 2 coastal shorelands are all shorelands that are not Category 1 coastal shorelands.[12] Under LWDUO 4.088, development within Category 1 coastal shorelands is significantly limited to low impact uses. Single-family dwellings are not allowed in Category 1 coastal shorelands. Under LWDUO 4.090, certain development is allowed in Category 2 coastal shoreland. Single-family dwellings are allowed in Category 2 coastal shorelands, but the dwellings must be located on a portion of the property that is located outside the coastal shoreland boundary if possible. Finally, LWDUO 4.090 also allows in Category 2 coastal shorelands all other uses that may be permissible in the base zone that the SDO is applied to, if the county finds that "such uses and activities are compatible with the objectives of the Comprehensive Plan to protect riparian vegetation and wildlife habitat." Intervenors cite to a planning staff statement in the record that Tax Lot 300 includes only Category 2 coastal shorelands. Amended Record 276. Petitioners take issue with that position. However, petitioners cite nothing in the record to support their position except the inventory, which they contend shows the shorelands on Tax Lot 300 should be considered Category 1 coastal shoreland.

While intervenors take no position regarding precisely what part of the Tax Lot 300 is subject to the SOD, intervenors do point out that approximately the western two-thirds of Tax Lot 300 is undevelopable, because it lies within the construction setback. That setback is depicted on the maps at Amended Record 82B and 219.[13] We understand intervenors to

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[12] The county has separate shoreland designations for the Columbia River Estuary. Those shoreland designations have no bearing on this case and we do not discuss those designations any further, to avoid making our discussion of the SDO more complicated than it already is.

[13] That construction setback line apparently is a function of both the Beaches and Dunes Overlay District (discussed later in this opinion) and a function of Clatsop County Development Standards S3.015, which requires that development be setback from the ocean. The setback is computed in different ways, depending on circumstances. S3.015(5)(C) provides "[i]f there are no legally constructed buildings within 200 feet of the

argue that whatever area is included in the "western edge" of Tax Lot 300 that is subject to the SOD, that area is also within the construction setback that encompasses the western two-thirds of Tax Lot 300 and single-family dwelling may not be constructed within the setback. That appears to be a reasonable argument, and petitioners offer no focused argument to the contrary.

In summary, some portion of Tax Lot 300 (the "western edge") is subject to the SOD. Notwithstanding the general admonition in the Goal 17 inventory that residential development in the 650 acres of foredunes between the cities Warrenton and Gearhart may be incompatible with the natural values of that area, only the western edge of the Tax Lot 300 is subject to the SOD. See n 11. There is some uncertainty whether the designated coastal shoreland on Tax Lot 300 is a Category 1 or 2 coastal shoreland. If it is a Category 1 coastal shoreland, residential development would not be allowed within the SOD portion of Tax Lot 300. If it is a Category 2 coastal shorelands, residential development is potentially allowable in the SOD, but must be limited to the part of the property that lies outside the SOD if possible. That is the county's Goal 17 program to protect the coastal shorelands on Tax Lot 300. Under that program, single-family dwellings might be allowed in the part of the property that is subject to the SOD, but those dwelling would have to be located outside the SOD if possible. However, notwithstanding that single-family development of Tax Lot 300 within the SOD might be possible under the county's Goal 17 program, the construction setback would preclude residential development in the area of Tax Lot 300 that is subject to the SOD. With this understanding of the county's Goal 17 program and the effect of the construction setback, we turn to the county's findings concerning Goal 17 and petitioners' arguments under this assignment of error.

The county adopted the following Goal 17 findings:

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exterior boundary * * * of the subject property, the oceanfront setback line for the subject property shall be established by the geotechnical report." The county apparently takes the position that pursuant to S3.015(5)(C), the oceanfront setback has been established to include the western two thirds of Tax Lot 300.

> "The County's approval of the zone designation amendment and other proposed amendments will not alter any of the County's Goal 17 implementing measures. Any development of Tax Lot 300 will be required to comply with Goal 17 as implemented by the Comprehensive Plan and LWDUO. Consequently, the County should find the proposed amendments consistent with Goal 17." Record 42.

After quoting the county's Goal 17 findings petitioners argue:

> "In light of the county's own Goal 17 inventory documents indicating that 'further development of housing on these dunes is likely to be incompatible with protecting their natural values, this casual dismissal of Goal 17 can not provide the basis for the rezoning decision." Petition for Review 10.

Paraphrasing the county's findings quoted above, the county found that the disputed comprehensive plan and zoning map amendments can be approved consistently with the county's acknowledged program to protect Goal 17 coastal shoreland resources, because that acknowledged Goal 17 program is unaffected by the amendment. While that finding could probably be challenged in several ways, the only challenge petitioners present is the above-quoted argument. The above-quoted argument is not sufficiently developed for review. Petitioners may have intended that the above argument should be read in concert with their earlier speculation in the petition for review that the former OPR zoning for the westerly 8.8 acres of Tax Lot 300 was intended "to effectuate the inventory management recommendations for the coastal foredunes, consistent with Goal 17." Petition for Review 9. However, petitioners cite nothing that would suggest the OPR zoning was applied for that purpose. Under the county's Goal 17 program it would appear that if the county had intended to preclude residential development of the western 8.8 acres of Tax Lot 300 to protect coastal shorelands under Goal 17, it would instead have applied the SOD to the 8.8 acres and designated that area a Category 1 coastal shoreland.

Petitioners next argue that "Goal 17 allows for residential development (non-water-dependent, non-water-related uses which cause a permanent or long term change in the features of ocean and coastal lake shorelands) only upon a demonstration of 'public need.'" Petition for Review 10. Petitioners contend the county "did not make any analysis or

findings regarding any 'public need' for additional housing outside the urban growth boundaries." *Id*.

The above argument presumably is based on the Goal 17 requirement that rural coastal shorelands be made available for uses that are not water dependent or water related "upon a finding by the county that such uses satisfy a need which cannot be accommodated on uplands or in urban and urbanizable areas or in rural areas built upon or irrevocably committed to non-resource use." As we have already noted, if the coastal shoreland in the SOD designated portion of Tax Lot 300 is a Category 1 coastal shoreland, residential development would be prohibited. Even if the coastal shoreland on Tax Lot 300 is a Category 2 coastal shoreland, any residential development on that portion of Tax Lot 300 would be required to be located outside the SOD if possible. Finally, the construction setback would preclude residential development in the SOD on Tax Lot 300 in any event. Given that residential development within the SOD portion of Tax Lot 300 could not occur under either the prior or the amended comprehensive plan and zoning map designations, we do not agree that the county erred by failing to adopt findings that establish that Tax Lot 300 is needed for residential development.[14]

Finally, citing *Brown v. Coos County*, 31 Or LUBA 142, 150 (1996), petitioners argue "the county must also establish that development permitted will not adversely affect

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[14] Intervenors point out that findings that residential development of Tax Lot 300 is needed will be required at the time Tax Lot 300 is subdivided. LWDUO 5.220(2) provides:

> "The applicant when applying for a subdivision or planned development in the Clatsop Plains Rural designation, shall show how the request addresses the NEED issue of the Clatsop Plains Community Plan below:
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> "'6. Clatsop County intends to encourage a majority of the County's housing needs to occur within the various cities' urban growth boundaries. Approval of subdivisions and planned developments shall relate to the needs for rural housing. Through the County's Housing Study, the County has determined the Clatsop Plains rural housing needs to be approximately 900 dwelling units for both seasonal and permanent by the year 2000."

the Goal 17 values on surrounding lands." Petition for Review 10. Petitioners do not further develop that argument.

We assume without deciding that Goal 17 imposes such a general finding requirement. It is not entirely clear to us whether the referenced properties to the north or some portion of those properties are subject to the SOD. We will assume that at least some part of those properties is subject to the SOD. The county's findings include findings that acknowledge the presence the undeveloped sensitive areas to the north. Amended Record 44. Those finding go on to conclude:

> "The proposed amendment to the comprehensive plan and zoning map will not result in overintensive use of the subject land, or the abutting properties. The maximum number of residential lots that could be created on the site is five, resulting in each lot approximately two [acres] in size. * * *" Record 44.[15]

The county also relied on intervenors' October 11, 2005 response to arguments that development of Tax Lot 300 would adversely impact undeveloped property to the north. Amended Record 31. In that response, intervenors argued that there was no evidence that development of five residences on two-acre lots would "encroach on still pristine land adjacent to the north." Amended Record 111. Absent a more fully developed argument, we conclude those findings are adequate to explain why dividing Tax Lot 300 into five two-acre lots for residential development would not have impacts on the properties to the north that would violate Goal 17.

The third assignment of error is denied.

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[15] In contrast, the county's findings note that several of the existing, developed residential lots in Surf Pines directly across the street from Tax Lot 300 "are one acre lots, with an average of 1.5 [acres]." Amended Record 44. Several of those lots abut the undeveloped properties to the north. Amended Record 91. While these findings apparently were focusing on possible impacts of a subdivision of Tax Lot 300 on the Surf Pines lots across the street to the east, they would appear to be equally applicable to potential impacts subdivision of Tax Lot 300 might have on the properties to the north.

FOURTH ASSIGNMENT OF ERROR

In their final assignment of error, petitioners argue the county failed to demonstrate that the approved amendments are consistent with Goal 18 (Beaches and Dunes). The county adopted the following findings regarding Goal 18:

> "The proposed amendments do not conflict with Goal 18 because Ordinance No. 02-05 previously amended the Goal 18 element of the County Comprehensive Plan to ensure consistency between the Statewide Planning Goal and the County's beach and dune policies." Amended Record 42.

The county's Beaches and Dunes Overlay District (BDOD) implements Goal 18. LWDUO 4.050 to 4.059. The BDOD applies to all of Tax Lot 300. The BDOD identifies three areas with very different restrictions on development within those three areas.

> "The BDOD includes the following beach and dune areas:
>
> "(1) The beach, which extends from extreme low tide landward to the Statutory Vegetation Line established and described in ORS 390.770, or the line of established upland shore vegetation, whichever is further inland;
>
> "(2) The dune hazard area, which extends from the Statutory Vegetation Line established and described by ORS 390.770 or the line of established upland shore vegetation, which ever is further inland, landward to the construction setback line.
>
> "(3) The construction setback line is established as follows:
>
> (A) A line 570 feet landward of the Statutory Vegetation Line established and described by ORS 390.770 for the area north of Surf Pines to the Columbia River south jetty.
>
> (B) The Pinehurst construction setback line, established and described in Ordinance 92-90; and
>
> "(C) *The Surf Pines construction setback line, established and described in Ordinance 83- 17 and extended north to include T7N, R10W, Section 16C, Tax Lot 300*.
>
> "(4) The dune construction area, which extends from the construction setback line as defined in the section above, landward to the eastern limit of Highway 101." LWDUO 4.052 (emphasis added).

The location of the construction setback line is important, because development is generally prohibited seaward of the line and development is generally allowed landward of the line. Petitioners contend that the construction setback line that LWDUO 4.052(3)(C) calls for extending north through Tax Lot 300 "corresponds fairly closely to the line of 'split zoning' on [Tax] Lot 300, with [CBR zoning] allowing for residential development, on the landward side, and [OPR zoning] limiting residential development, on the coastal side." Petition for Review 12. Petitioners contend the county erred by finding that the construction setback line is located further to the west, as depicted on the maps at pages 82B and 219 of the Amended Record. Petitioners contend the county erroneously assumed that a previously adopted ordinance, Ordinance 02-05, established that more westerly construction setback line.

> "* * * Ordinance 02-05 merely adopted the Horning Report, which set the 'active dune line' further west than originally mapped for Lot 300. Goal 18 applies not only to 'active dunes' but also to conditionally stable dunes and older stabilized dune forms. Thus Ordinance 02-05 did not in any way exempt Lot 300 from compliance with Goal 18[.]" Petition for Review 13 (record citation omitted).

In an appeal to LUBA that challenges a quasi-judicial land use decision, the issues that form the basis of the appeal must have been raised before the local government. ORS 197.763(1).[16] Issues must be raised with sufficient specificity to give the local government fair notice of those issues. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). LUBA's scope of review in considering an appeal of a quasi-judicial land use

[16] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals 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 and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

decision does not include issues that were not raised in accordance with ORS 197.763(1). ORS 197.835(3).[17]

Intervenors argue that petitioners waived the above Goal 18 argument, because it was not raised before the county during the proceedings that led to the challenged ordinance:

> "Petitioners allege that the County's determination of the construction setback line for Tax Lot 300 as depicted in the December 13, 2005 County-generated map is incorrect, relies on Ordinance 02-05 and is inconsistent with the text in LWDUO § 4.052. Petitioners' allegations were not raised below and are waived. ORS 197.763." Respondents' Brief.

Petitioners did not file a motion requesting permission to file a reply brief to respond to intervenors' waiver argument and did not otherwise respond to the waiver argument in writing.[18] Petitioners did attempt to answer intervenors' waiver argument at oral argument. If we understand petitioners' answer correctly, they contend that they are challenging *how* the county applied ordinance 02-05 and are not challenging Ordinance 02-05 *itself*. That answer is not responsive to intervenors' waiver argument. Intervenors accurately describe the issue that forms the basis of petitioners' fourth assignment of error and contend that petitioners did not raise that issue below. Because petitioners have not identified where that issue was raised below, the issue is waived. *Davenport v. City of Tigard*, 27 Or LUBA 243, 247 (1994); *Wethers v. City of Portland*, 21 Or LUBA 78, 92 (1991).

The fourth assignment of error is denied.

The county's decision is affirmed.

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[17] With exceptions that petitioners do not claim are relevant here, ORS 197.835(3) imposes the following limitation on LUBA's scope of review:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[18] The above-quoted waiver argument is included in respondents' brief, which was filed on August 3, 2006. Oral argument was not conducted until September 7, 2006. LUBA routinely allows reply briefs to respond to waiver arguments. *Robinson v. City of Silverton*, 37 Or LUBA 521, 525 (2000); *Glisan Street Associates v. City of Portland*, 24 Or LUBA 621, 622 (1993); *Caine v. Tillamook County*, 24 Or LUBA 627 (1993).