BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TERRY WOLFGRAM and NANCY WOLFGRAM,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

WILDWOOD ESTATES, LLC,
Intervenor-Respondent.

LUBA Nos. 2006-165 and 2006-207

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Irving & Stotter LLP.

No appearance by Douglas County.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich & Aitken, P.C.

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

LUBA NO. 2006-165	AFFIRMED	04/05/2007
LUBA NO. 2006-207	DISMISSED	04/05/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

In LUBA No. 2006-165, petitioners appeal a decision by Douglas County approving an eight-lot subdivision. In LUBA No. 2006-207, petitioners appeal a Land Use Compatibility Statement (LUCS) issued by the county in connection with the subdivision.

FACTS

Intervenor applied for Subdivision and Technical Review approval for an eight-lot subdivision on approximately 16.97 acres of property located in Douglas County. The property is zoned Rural Residential and is subject to a Beaches and Dunes Overlay. Clear Creek runs along the eastern boundary of the property and is crossed by two roadways. The property is adjacent to the Oregon Dunes National Recreation Area on the west, and adjacent to petitioners' property on the north. Wildwood Drive, a county road, runs along the property's eastern boundary.

The planning director approved the application with conditions, and one of the petitioners appealed the decision to the Douglas County Planning Commission. The planning commission held hearings on the appeal and affirmed the planning director's decision. Petitioners sought further review of the decision by the board of commissioners. On August 31, 2006, the board of commissioners issued an order declining to review the planning commission's decision. Petitioners appeal that decision in LUBA No. 2006-165.

In October, 2006, the county issued a LUCS in connection with the proposed subdivision. Petitioners appeal that decision in LUBA No. 2006-207.

LUBA NO. 2006-207

In October 2006, the planning department issued a document entitled "Memorandum," with a two page LUCS attached, and that document is the subject of LUBA

1 No. 2006-207.[1] Petitioners argue that the October, 2006 LUCS must be remanded because it
2 is not supported by adequate findings.[2]
3 As we noted in *Wolfgram I*, the LUCS form explains that a LUCS "is the process
4 used by the [Oregon Department of Environmental Quality (DEQ)] to determine whether
5 DEQ permits and other approvals affecting land use are consistent with local comprehensive
6 plans."[3] *Wolfgram I* at 3. On the second page of the LUCS form, the county is directed to
7 answer the following question: "Does the activity or use comply with all applicable local
8 land use requirements * * *?" That question is followed by two boxes. The box labeled
9 "Yes" is followed by the instruction: "* * * you must complete below or attach findings to
10 support the affirmative compliance decision." The box labeled "No" is followed by the
11 instruction: "* * * you must complete below or attach findings for noncompliance and
12 identify requirements the applicant must comply with before LUCS compatibility can be
13 determined."
14 However, instead of checking the "Yes" or "No" box, the county chose a third path.
15 Below the box for "No," the county drew in a box, checked it, and hand wrote "See attached
16 informational memo." The referenced informational memo from a planning technician in the
17 county's planning department to DEQ states in its entirety:

18 "The above referenced property is planned for rural residential use and is
19 currently zoned Rural Residential-2 (RR2). It has been tentatively approved

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[1] In *Wolfgram v. Douglas County*, __ Or LUBA __ (LUBA No. 2006-073, September 14, 2006) (*Wolfgram I*), we remanded a county decision issuing a LUCS because the decision did not include adequate findings in support of the decision that the county made in that LUCS. As far as we can tell, the LUCS that is the subject of the appeal in LUBA No. 2006-207 is not the same as, or even a revised version of, the LUCS issued by the county in LUBA No. 2006-073.

[2] Neither the county nor intervenor filed a response brief.

[3] In *Wolfgram I*, the requirement for the LUCS arose as a result of DEQ's determination that a National Pollutant Discharge Elimination System (NPDES) permit was needed in connection with ground disturbance activities on the subject property. The record in LUBA 2006-207 consists of three pages, and it is not clear from the record whether the required permit covers the same activities as the NPDES permit at issue in *Wolfgram I*.

1 for an 8-lot subdivision by Douglas County (Planning Department File 05-
2 338). This file is currently under appeal to the Land Use Board of Appeals
3 (LUBA). Residential uses and a subdivision are permitted under applicable
4 land use regulation." Record 1.

5 In *Wolfgram I*, we noted that there were three questions that needed to be answered in
6 order to decide the issues presented. The first question, and the one that is relevant here, was
7 whether that LUCS was a land use decision. We concluded that it was, because the county
8 affirmatively answered the question of whether the proposed activities to be conducted under
9 the NPDES permit "compl[ied] with all applicable local land use requirements." *Wolfgram I*
10 at 6-7. We rejected the intervenor's argument that the challenged LUCS decision qualified
11 for one or more of the exceptions to the ORS 197.015(11)(a) definition of "land use
12 decision" that are provided in ORS 197.015(11)(b), because it was not possible to discern
13 from the challenged decision what activities the county thought its LUCS approval
14 authorized, or what land use standards, if any, applied to those activities. *Id.*

15 However, the LUCS that is the subject of this appeal did not affirmatively (or
16 negatively) decide whether the proposed activities to be conducted under the required permit
17 comply with all applicable local land use requirements. Instead, the county listed the
18 applicable zoning for the property, informed DEQ that the property has been *tentatively*
19 approved for a subdivision, referencing the applicable planning file number, noted that the
20 tentative subdivision approval has been appealed to LUBA, and confirmed that residential
21 uses are allowed in the applicable zoning district. The LUCS decision technically concerns
22 application of the county's zoning ordinance, and therefore would qualify as a land use
23 decision under ORS 197.015(11)(a) if one of the exceptions in ORS 197.015(11)(b) does not
24 apply.[4] However, the county merely stated certain facts about the property's zoning and the

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[4] ORS 197.015(11)(a)(A) defines a "land use decision" to include:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

1 status of the county's subdivision approval process to DEQ. Petitioners do not argue that
2 those statements of fact required the county exercise any policy or legal judgment, and we do
3 not see that they did. Therefore, we conclude that the LUCS that is the subject of the present
4 appeal falls under the ORS 197.015(11)(b)(A) exception to the definition of a "land use
5 decision," because it did not require interpretation or the exercise of policy or legal
6 judgment.[5]

7 Petitioners also argue that DEQ issued a permit in reliance on the LUCS. Whether
8 DEQ properly issued a permit in reliance on the LUCS has no bearing on whether the LUCS
9 is a "land use decision," as ORS 197.015(11) defines that term. For the reasons explained
10 above, we conclude that the LUCS is not a land use decision.

11 LUBA No. 2006-207 is dismissed.

12 **LUBA NO. 2006-165**

13 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

14 The Douglas County Coastal Resources Plan (DCCRP) is an element of the Douglas
15 County Comprehensive Plan (DCCP). One of the elements of the DCCRP is the Beaches
16 and Dunes Element. In their first and second assignments of error, petitioners argue that the
17 county failed to adopt adequate findings regarding the development's compliance with
18 General Policy 1 of the Beaches and Dunes Element of the DCCRP (hereafter DCCRP

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

[5] As relevant, ORS 197.015(11)(b)(A) provides that a "land use decision" does not include a decision of a local government:

> "That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment; * * *."

1 General Policy 1).[6] Petitioners also argue that the county's findings are not supported by
2 substantial evidence. DCCRP General Policy 1 provides:

3 "The County shall base decisions on * * * land use actions in beach and dune
4 areas, other than older stabilized dunes, on specific findings that shall include:

5 "(a) the type of use proposed and the effects it might have on the site and
6 adjacent areas;

7 "(b) temporary and permanent stabilization programs and the planned
8 maintenance of new and existing vegetation;

9 "(c) methods for protecting the surrounding area from any adverse effects
10 of the development; and

11 "(d) hazards to life, public and private property, and the natural
12 environment which may be caused by the proposed use."

13 In their first assignment of error, petitioners argue that the county failed to make adequate
14 findings regarding compliance with subsection (d) of DCCRP General Policy 1 in light of
15 evidence in the record that hazards such as earthquakes, tsunamis, liquefaction of soils,
16 landslides, and stream bank erosion could impact the property. In their second assignment of
17 error, petitioners allege that the county's findings regarding impacts of the development on
18 Clear Creek, which borders the eastern boundary of the property, are not supported by
19 substantial evidence in the record.

20 Intervenor's response to the first assignment of error is threefold. First, intervenor
21 argues that subsection (d) of DCCRP General Policy 1 only requires the county to identify
22 hazards, and does not require that the county mitigate the impacts of hazards as petitioners
23 assume. Second, intervenor responds that petitioners' arguments in support of its first two
24 assignments of error are better read as challenges to the county's findings under subsection
25 (c) of DCCRP General Policy 1, and that petitioners' failure to challenge the county's

[6] Douglas County Land Use and Development Ordinance (LUDO) Section 3.33.200 provides that approvals of uses on land designated on the DCCP map as "Beaches and Dunes" shall comply with the policies of the Beaches and Dunes element of the DCCRP.

findings under subsection (c) of DCCRP General Policy 1 is dispositive of the issues petitioners raise under the first and second assignments of error. Finally, intervenor argues that the hazards which petitioners identify are geologic hazards natural to the area, not hazards "caused by" the proposed use, as subsection (d) states. Intervenor's response to petitioners' second assignment of error points to evidence in the record that the county relied on to find that the development will not be a hazard to Clear Creek.

In determining whether the proposed subdivision complies with subsection (d) of DCCRP General Policy 1, the county adopted the following findings:

> "* * * The amount of vegetation removal will be restricted to minimize potential wind and water erosion and to keep the dune area stabilized. The development will be constructed in conformance with the recommendations of a geotechnical engineer to assure continued stability of the dune area. These steps will help prevent geologic or personal hazards to surrounding properties.
>
> "The geotechnical report recognized that exposed soils will increase erosion potential, the road construction requires the construction of some retaining walls to mitigate soil slumping and the report addresses storm water runoff from the roof tops, to the driveways, down collections systems onsite to either designed drywells or off site into existing road storm water collection systems.
>
> "* * * * *
>
> "The measures to control erosion, limit sedimentation, manage drainage, preserve natural vegetation to the maximum extent, and vigorously pursue revegetation reduce potential adverse effects of the development on the surrounding area to a negligible level. It is not anticipated that the proposed development will cause any hazards to life, public or private property, or the natural environment, including Clear Creek, its water quality and fish populations.
>
> "* * * * *
>
> "The actions proposed by the applicant, as stated in the findings, the geotechnical report, and conditions of approval, will not create any hazards to life, property, or the natural environment." Record 27-28.

We disagree with intervenor's suggestion that subsection (d) requires nothing more than identification of potential hazards caused by the development, because we think all of

DCCRP General Policy 1 must be read together in order to ascertain what is required by that subsection. Subsections (a) through (c), and (c) in particular, require the county to analyze stabilization programs and other methods of protecting surrounding areas from the effects of the development. It is reasonable to read subsection (d) as requiring something more than mere identification of potential hazards. However, the substantive standard imposed by DCCRP General Policy 1 (the something more) is admittedly not clearly stated in DCCRP General Policy 1.

The above-quoted findings are adequate to show that the county identified potential hazards caused by the proposed use, such as wind and water erosion, soil slumping, and sedimentation, and also identified mitigation measures to be undertaken by the applicant that led to the conclusion that the proposed subdivision satisfies DCCRP General Policy 1.[7] Evidence in the record that the applicant has agreed to implement mitigation measures recommended by geotechnical experts to limit erosion, soil slumping and sedimentation, and to limit the effects of the development on Clear Creek, supports these findings. Record 609-610. Further, the approved preliminary plan shows that no new dwelling will be constructed closer than 300 feet from the west bank of Clear Creek, and a condition of approval requires the developer to comply with mitigation measures suggested by the Oregon Department of Fish and Wildlife. The county reasonably concluded based on the evidence and a condition of approval that mitigation measures will limit any effect such hazards might have on "life, public and private property, and the natural environment."

The first and second assignments of error are denied.

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[7] We reject petitioners' argument that hazards such as earthquakes, tsunamis, landslides, and liquefaction of soils must be identified because, as intervenor correctly points out, such hazards are not "caused by" the proposed subdivision or the residential development that subdivision will allow.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

In their third and fourth assignments of error, petitioners challenge the adequacy of the county's findings that the proposed subdivision complies with DCCRP "Policies for Recently Stabilized Dune Forms" Policy 2 (hereafter DCCRP Policy 2), and argue that the findings are not supported by substantial evidence in the record. DCCRP Policy 2 states in relevant part:

> "Development shall not result in the clearance of natural vegetation in excess of that which is necessary for the actual structures, required access, fire safety requirements and the required septic or sewage system. Parcels which exhibit vegetation-free areas suitable for development should utilize such areas for the building site where feasible. Areas which exhibit excessive vegetation removal shall be replanted as soon as possible."

The county adopted the following findings regarding DCCRP Policy 2:

> "The project will limit the clearing of natural vegetation to that area required for building sites, septic systems, driveway, roadway, retaining walls and drainage systems.
>
> "The geotechnical report recognizes the need to protect ground cover. Vegetation removal will be restricted to minimize potential wind and water erosion and to assure continued stability of the dune area. All development will be conducted in conformance with the recommendations of the geotechnical report." Record 32.

Petitioners argue that the second sentence of DCCRP Policy 2 mandates that the applicant use vegetation free areas for development first, before using areas that will require removing vegetation, and that the county erred when it did not find that the subdivision complies with this mandatory criterion or require that subdivision development occur first on vegetation free areas. Intervenor answers, and we agree, that the second sentence of DCCRP Policy 2 does not mandate that development occur on vegetation free areas. That sentence uses the word "should," and comprehensive plan policies that are expressed as "shoulds" are not generally viewed as mandatory approval criteria. *Neuharth v. City of Salem*, 25 Or LUBA 267, 277-78 (1993); *McCoy v. Tillamook County*, 14 Or LUBA 108, 118 (1985).

1 Moreover, the findings quoted above are adequate to show that the county considered
2 the amount of proposed vegetation removal and was satisfied that either the proposed
3 dwelling sites contained little vegetation in their current condition, or that any removal of
4 vegetation would be limited. Record 366. Evidence in the record indicates that the applicant
5 agreed to comply with the recommendations of the geotechnical report to minimize
6 vegetation removal, and a condition of approval requires prompt revegetation. Record 40,
7 609-610.

8 The third and fourth assignments of error are denied.

9 **FIFTH ASSIGNMENT OF ERROR**

10 In their fifth assignment of error, petitioners argue that the county's findings failed to
11 adequately address the cumulative impacts of existing and proposed development on Clear
12 Creek, under DCCRP "Policies for Recently Stabilized Dune Forms" Policy 4 (hereafter
13 DCCRP Policy 4). DCCRP Policy 4 states in relevant part:

14 "In assessing new development, the cumulative effect of the combination of
15 existing development, along with that proposed, must be considered in
16 assessing the feasibility of the new development."

17 Intervenor's answer is twofold. First, intervenor argues that Policy 4 must be read in
18 context with (1) the general findings adopted by the county in support of the Coastal Plan for
19 Recently Stabilized Dune Forms, and (2) the other three policies of the "Policies for Recently
20 Stabilized Dune Forms."[8] Intervenor contends that the DCCRP Recently Stabilized Dune

[8] Policies 1-4 of the "Policies for Recently Stabilized Dune Forms" provide:

"1. Development shall result in the least topographic modification of the site that is reasonable and possible.

"2. Development shall not result in the clearance of natural vegetation in excess of that which is necessary for the actual structures, required access, fire safety requirements and the required septic or sewage disposal system. Parcels which exhibit vegetation-free areas suitable for development should utilize such areas for the building site where feasible. Areas which exhibit excessive vegetation removal shall be replanted as soon as possible.

1 Forms policies are focused on maintaining dune stability by minimizing topographic
2 modification, reducing vegetation clearance, and implementing sand stabilization measures.
3 Intervenor maintains that, when read in context with the other three policies and the county's
4 general findings in support of the DCCRP, the focus of DCCRP Policy 4 is to assess the
5 cumulative effects of existing and proposed development on dune stability and maintenance
6 of vegetative cover. In support of this contention, intervenor also notes that the effect of the
7 development on other resources is required to be assessed under the general policies of the
8 DCCRP, one of which is discussed above under the first and second assignments of error.

9 We agree with intervenor that DCCRP Policy 4 must be read in conjunction with the
10 other three policies that precede it, all of which are concerned with dune stabilization rather
11 than impacts of the proposed development on non-dune resources such as Clear Creek.
12 However, in finding compliance with DCCRP Policy 4, the county also adopted findings that
13 the proposed development would not impact Clear Creek. The findings demonstrate that the
14 county considered the impact of the proposed development on Clear Creek, and concluded
15 that it will not impact the creek. Record 34-35. The county reasoned that engineering
16 measures to prevent erosion and sedimentation, a vigorous revegetation program, the
17 location of the dwellings more than 300 feet from the creek, and the applicant's agreement to
18 comply with the best practices of the applicable Watershed Quality Management Plan led to
19 the conclusion that Clear Creek would not be impacted by the proposed development. Based
20 on that evidence, it was reasonable for the county to reach that conclusion.

"3. Sand stabilization is required of the developer or owner: (1) using temporary stabilization techniques during all construction phases; and (2) through an ongoing maintenance program, including preliminary revegetation with beach grass (or other species recommended by a recognized expert), fertilization and later plantings of appropriate secondary successional species at the appropriate time. Successional species reduce the extreme fire hazard associated with mature beach grass.

"4. In assessing new development, the cumulative effect of the combination of existing development, along with that proposed, must be considered in assessing the feasibility of the new development."

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

In their sixth assignment of error, petitioners argue that the county impermissibly deferred finding that the subdivision complies with the access criteria found at LUDO 4.100(5), which generally require a unit of land to have legal access over a public or private road. Access to the proposed subdivision is from Wildwood Drive, a minor county collector road, west onto a private road that crosses Lot 1 at the very northern tip, crosses Lot 2, and veers south on Lot 3 to serve it and the remaining 5 lots. During the proceedings below, petitioners claimed that a portion of the proposed access road is located on their property.[9] Recognizing the existence of the dispute, the county found:

> "* * * The preliminary plan shows an elevation contour paralleling the cut of the existing access road, but not the proposed access road, which is located in the appellant's property. There is no evidence that any part of the proposed development is located on the appellant's property. The appellant may have confused the elevation contour with the location of the proposed access road for the subdivision. In any event, the preliminary plan presents a detailed concept, not an as-built design. The ultimate location of the access road will be entirely upon the subject property, not on the appellant's property. The northeast corner of the subject property, which is the southeast corner of the appellant's property, has been monumented, and will provide a concrete reference point assuring that road construction activity occurs on the subject property." Record 13-14.

We disagree with petitioners' contention that the county deferred addressing the access criteria to the final subdivision plat stage. The county found that the proposed subdivision complies with the access criteria based on the submitted preliminary plan and other evidence in the record. Record 14. However, the findings also recognized that the applicant may be required to relocate the access to resolve a dispute. The county imposed a condition of approval requiring a formal survey of the subdivision to ensure that the access

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[9] Apparently a dispute may exist regarding the width of the county's right-of-way for Wildwood Drive, with petitioners arguing that the right-of-way for Wildwood Drive is 60 feet, rather than the 80 feet shown in the county records. Record 14. If so, petitioners argue, the private access road must extend an additional 20 feet to the east at an angle that may cause it to partially encroach on petitioners' property.

1 did not infringe on petitioners' property.[10] That is not the same thing as deferring
2 compliance to a later stage of the approval process. *See Friends of Collins View v. City of*
3 *Portland*, 41 Or LUBA 261, 275-77 (2002) (where a local government finds compliance and
4 imposes conditions to ensure compliance, that a condition of approval requires additional
5 review by local government staff does not mean the local government has "deferred" a
6 finding of compliance with an approval criterion). Petitioners do not attempt to explain how
7 the county's findings detailed above constitute an unlawful deferral of a finding of
8 compliance with the access criteria set forth in LUDO 4.100(5).
9 The sixth assignment of error is denied.
10 The county's decision in LUBA No. 2006-165 is affirmed.

[10] We note that LUDO 4.200(4) also requires a survey for approval of the final plat.