BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON SHORES CONSERVATION
COALITION and RALPH JOHN BAXTER,
Petitioners,

and

DAWN VONDERLIN and LARRY VONDERLIN,
Intervenor-Petitioners,

vs.

COOS COUNTY,
Respondent,

and

INDIAN POINT, INC.,
Intervenor-Respondent.

LUBA No. 2007-118

FINAL OPINION
AND ORDER

Appeal from Coos County.

William Hugh Sherlock, Eugene, filed a joint petition for review and argued on behalf of petitioners. With him on the brief were Jannett Wilson, Goal One Coalition and Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, PC.

Jannett Wilson, Eugene, filed a joint petition for review and argued on behalf of intervenor-petitioners. With her on the brief were Goal One Coalition, William Hugh Sherlock and Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, PC.

No appearance by Coos County.

Daniel A. Terrell, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REMANDED 01/14/2008

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

Petitioners and intervenor-petitioner (together, petitioners) appeal a decision by the county approving conditional use permit and site plan applications for a recreational vehicle park and accessory uses.

FACTS

The subject property is located approximately one mile north of the city of Bandon and consists of four parcels totaling 42.84 acres, the majority of which are the site of a former lumber mill.[1] In 2007, intervenor applied for a conditional use permit to site a 179-space Recreational Vehicle Park (RV Park), a convenience store, a caretaker's residence, a recreation center, and other accessory buildings on a parcel that is entirely zoned Qualified-Recreation (Q-REC). Intervenor proposes to place in each RV Park space a type of Recreational Vehicle (RV) known as a "Park Trailer." Park Trailer RVs resemble small cabins with sloping roofs, windows, decks or porches, and are mounted on a trailer. Record 804-812. [2] Each Park Trailer RV would connect to utilities and include water, sewer, and electricity hookups. Record 677.

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[1] In 2006, intervenor sought and received approval to rezone a portion of the property from Industrial to Qualified-Recreation (Q-REC), and as part of the rezoning the county took an exception to Statewide Planning Goal 4 (Forest Land).

[2] "Park Trailer" is defined in Coos County Zoning and Land Development Ordinance (CCZLDO) 2.1.100 as a type of "Recreational Vehicle":

> "RECREATIONAL VEHICLE (OAR 918-650-0005): A vehicular type unit primarily designed *as temporary living quarters*, which has its own motor power or is mounted on or drawn by another vehicle, and *that is intended for human occupancy for vacation and recreational purposes, but not for long term residential purposes*, and may be equipped with plumbing such as a sink or toilet. The basic entities are:
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> "* * * * *
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> "v. park trailer – vehicle built-on single chassis, mounted on wheels, designed to provide *seasonal or temporary living quarters* which may be connected to utilities or operation of installed fixtures and appliances, of such a construction as to permit set-up by persons without special skills using only hand tools which may include lifting,

The proposed development also includes a boat launch, fishing piers, a floating dock and a tackle/rental shop on a parcel zoned Q-REC and Coquille River Estuary Management Plan – Industrial (CREMP-IND), Shoreland Segment 16 and Aquatic Segment 17. Record 675. In a separate application, intervenor also applied to site an emergency access road to serve the development on an adjoining parcel zoned Exclusive Farm Use (EFU), and proposed, at least potentially, to irrigate that adjoining parcel with effluent from the RV Park's on-site mechanical sewage treatment facility. Record 662-64.

The planning commission held multiple hearings on the applications and approved them. Petitioners appealed to the board of commissioners, and the board affirmed the planning commission's decision and imposed several conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners argue that the decision violates Statewide Planning Goal 14 (Urbanization) because the proposed development is an urban use of rural land and cannot be approved without an exception to Goal 14. Petitioners also argue that the decision violates a provision of Coos County Ordinance 04-05-006-PL, which contains a similar requirement that any development of intervenor's Q-REC zoned land must maintain the land as "rural land."[3] Intervenor maintains that the county correctly found that the

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> pulling and supporting devices and a gross trailer area not exceeding 400 square feet when in the set-up mode." (Emphases added.)

[3] Coos County Ordinance 04-05-006-PL (Qualification Ordinance) rezoned the property to Q-REC and imposed a set of conditions (Qualifiers) on future development of the subject property, including in pertinent part:

> " * * * * *
>
> "2. The proposed rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the Oregon Statewide Planning Goals and are consistent with all other applicable goal requirements;
>
> " * * * * *
>
> "4. The proposed rural uses, densities, and public facilities and services are compatible with adjacent or nearby resource uses; and

proposed development is not an urban use of the property, and that consequently no exception to Goal 14 was required.

Goal 14 prohibits urban uses on rural land without an exception to Goal 14. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 477, 724 P2d 268 (1986). Qualifier 2 requires that "the proposed rural uses, density, and public facilities and services will maintain the lands as 'Rural Land' as defined by the Oregon Statewide Planning Goals." *See* n 3.[4] In *Curry County*, the Supreme Court indicated that certain factors could be considered in determining whether a use is urban or rural: (a) the size of the area in relationship to the developed use (density); (b) its proximity to an acknowledged UGB and whether the proposed use is likely to become a magnet attracting people from outside the rural area; and (c) the types and levels of services which must be provided to it. *Id*. at 505, 507.

During the proceedings below, intervenor provided the county with an analysis as to why the proposed development is not an urban use under the *Curry County* factors. Based on that analysis, intervenor argued to the county that an exception to Goal 14 was not required.

"5. The proposed rural uses will not seriously interfere with permitted uses on other nearby parcels."

Record 78, 626.

[4] The Statewide Planning Goals define "Rural Land" as:

"Land outside urban growth boundaries that is:

"(a) Non-urban agricultural, forest or open space,

"(b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or

"(c) In an unincorporated community."

The county adopted that analysis in its decision.[5] Therefore, in this opinion, when we refer to the county's decision we necessarily refer to intervenor's analysis found at Record 681-84.

As explained above, the *Curry County* decision identified several factors to consider in order to determine whether a proposed use of rural land is an urban use. Regarding the first *Curry County* factor, the size of the area in relationship to the developed use (density), petitioners argue that the proposed development is in reality a residential subdivision with a density that is urban in scale (between 7.7 and 12 Park Trailers per acre) Petitioners dispute the county's determination that the proposed use is not "residential," and argue that "the fact that a residence is used only for recreational or vacation purposes does not make it any less a residence * * *." Petition for Review 7.

Intervenor's analysis found at Record 681-84 argues that because no "residential" uses are proposed for the parcel, the first *Curry County* factor weighs less heavily in the calculation than if the proposed development was a residential development. Intervenor supports its argument by pointing to a condition of approval that prohibits residential use of the RV Park. According to intervenor, the question of whether this condition may be violated in the future is an enforcement question rather than an issue that should lead to reversal or remand of the decision. Intervenor's analysis found at Record 681-84 also asserts that because Parcel 3, the parcel on which nearly all of the development is to be located, is a large parcel containing approximately 21.6 acres, the uses are rural uses.

In addition to adopting intervenor's analysis found at Record 681-84, the county found that the proposed use is not residential because CCZLDO 2.1.100 defines Park Trailer RVs as a type of RV allowed in RV Parks, and because the conditions of approval require

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[5] The county found in relevant part that:

> "* * * the Board follows the Planning Commission in adopting the applicant's analysis of the proposal with regard to the factors presented in [*Curry County*]." Record 13.

The applicant's analysis of the *Curry County* factors is found at Record 681-84.

that the Park Trailers should "* * * remain[] mobile and, therefore, temporary," Record 12. In order to justify the proposed density of between 7.7 and 12 Park Trailer units per acre, the county adopted the following findings:

> "* * * the density of the proposed RV park is consistent with the RV park density guidelines provided by LUBA in the *Donnelly v. Curry County* [33 Or LUBA 624 (1997)] case for rural lands that have received an exception to the resource goals. * * *" Record 13.

Petitioners challenge the county's reliance on *Donnelly*. *Donnelly* involved a challenge to a county determination that a proposed 51-space RV Park on a 12-acre forest parcel qualified as a "campground" that is conditionally allowed in a forest zone under Goal 4. In approving the proposed development in *Donnelly*, the county had relied in part on evidence that four other RV Parks along the same river had densities of between 8.5 to 13 units per acre to conclude that the proposed development was not more dense than those other recreation sites and not an urban use.

LUBA found in relevant part that the county's decision incorrectly equated prohibited levels of intense development under Goal 4 with urban levels of development under Goal 14:

> "The county board's approach essentially conflates Goal 4 and Goal 14, with the result that a campground is not too 'intensively developed' for purposes of Goal 4 when its level of development is anything short of urban-style intensity. The question under Goal 4 is not whether a campground on forest lands is appropriately rural (*i.e.* non-urban) in intensity, but whether the campground's intensity of development is 'appropriate in a forest environment.'" *Id*. at 633.

LUBA also held "* * * [the county's] conclusions regarding density for purposes of compliance with [the Goal 4 rules and the local code provision implementing those rules] are inadequate to constitute findings that [the local code provision requiring an exception to Goal 14 for urban uses on rural land] either is inapplicable or is satisfied." *Id*. at 639.

We agree with petitioners that *Donnelly* is inapposite. The issue that was before us in *Donnelly* was not whether an RV Park with a density of 8.5 to 13 units per acre was an urban use, and we did not hold or intend to suggest than an RV Park with such densities is

inherently rural and not urban. Contrary to the county's understanding, *Donnelly* did not provide "density guidelines * * * for rural lands that have received an exception to the resource goals" for purposes of determining whether an exception to Goal 14 is required.

We also agree with petitioners that the proposed use is more similar to a high-density residential subdivision than to the limited types of rural residential uses allowed in the REC zone. The REC zone implements the county's open space comprehensive plan designation, and development in the REC zone "* * * shall be oriented to the open space nature of the land." CCZLDO 4.1.100(A)(16). Although the REC zone allows some residential uses, such as Recreational Planned Unit Developments, it does not allow residential subdivisions or residential planned unit developments. CCZLDO 4.2.200 Table 4.2.a.

RV Parks are allowed in the Q-REC zone, subject to compliance with the provisions of CCZLDO 9.2.[6] RV Park is defined in CCZLDO 2.1.100:

> "[a] lot, parcel or tract of land upon which two (2) or more recreational vehicle sites are located, established or maintained for occupancy by recreational vehicles of the general public *as temporary living quarters for recreational or vacation purposes*." (Emphasis added).

The definitions for RV Park, RV, and Park Trailer found in CCZLDO 2.1.100 are virtually identical to the definitions found in OAR 918-650-0005. The code and rule definitions make it clear that RVs sited in an RV Park must be for "temporary living quarters for recreational or vacation purposes," and, specifically in the case of Park Trailers, "designed to provide *seasonal or temporary* living quarters * * *."[7] *Id.*

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[6] CCZLDO 9.2 provides:

> "Recreational Vehicular Park and Campground Review. Notwithstanding any other Ordinance provision, Recreational Vehicular Parks and Campgrounds shall be subject to requirements set-forth in Oregon Administrative Rule (OAR) 918-650-0000 through 918-650-0085. These standards shall apply in-lieu of the parent zoning district."

[7] OAR 918-650-0005(21) provides a definition for "temporary":

> "'Temporary,' as used in OAR Chapter 918, Division 650 in the definition of 'recreational vehicle,' means a time period of six months or less."

Intervenor proposes to place 179 Park Trailer structures in the development and attach them to water, sewer and electrical hookups. No provision of the CCZLDO or condition of the decision requires the Park Trailers to move after being located in an RV site, and intervenor plans to place the Park Trailers in designated spaces on a permanent basis. Record 677. Similarly, nothing in the CCZLDO or the decision precludes occupancy of the Park Trailers 365 days per year. That level of intensity of use of the property and the fact that the structures can remain where they are sited for an unlimited period of time and can be occupied for an unlimited period of time makes the proposal more closely resemble permanent residential occupancy rather "temporary" or "seasonal" use. In addition, a density of 7 to 12 units per acre is almost certainly an urban density for which an exception to Goal 14 would be required if the use is not in fact temporary or seasonal.

Moreover, we disagree with intervenor that the condition of approval that prohibits "residential use" of the trailers definitively answers the question or whether the proposed use is "residential." We do not think intervenor can rely on that condition of approval to argue that the approved use is not in fact residential. Neither the condition nor the decision makes any attempt to define what is meant by "residential" use. Given the semi-permanent nature of the trailers, the unlikelihood that they will be moved once placed, and the lack of any conditions or mechanism to ensure that their occupancy is in fact seasonal or temporary, a condition that merely prohibits "residential" use is not sufficient to ensure that the trailers will not be used for residences. Based the above, we think that the county erred in its conclusion under the first *Curry County* factor that the proposed development is not a residential development that is an urban use of the land.

Regarding the second *Curry County* factor, the site's proximity to an acknowledged UGB and whether the proposed use is likely to become a magnet attracting people from outside the rural area, petitioners argue that the proposed development is within such close proximity to the Bandon UGB (one mile) that it will function essentially as a high-density

residential suburb to the city, and undermine the function of the UGB to confine urban uses to urban areas. Petitioners cite to intervenor's stated purpose for the development to attract people from outside the rural area. Record 676. Intervenor acknowledges that the close proximity to the UGB "would seem to weigh the proposal towards an urban use classification." Record 683. However, intervenor argues, the proposed development would not attract people who would otherwise locate within the city of Bandon by offering similar amenities to the urban amenities found in the UGB because the focus of the development is on the recreational opportunities offered by the close proximity to the Coquille River, not on urban amenities offered on the property.

The second *Curry County* factor is related to the first factor discussed above, about which we concluded that proposed development more closely resembles a residential subdivision than a recreational use RV Park. As such, it will likely function more like a residential suburb that would undermine the effectiveness of the city's UGB to contain those types of intense residential developments within the UGB. *See Metropolitan Service Dist. v. Clackamas County*, 2 Or LUBA 300, 307 (1981) (noting that, "[o]f particular interest to us is whether these developments would contribute to a kind of sprawl or leap frogging development that might undermine the effectiveness of an urban growth boundary enacted to contain intense development"). There is also some likelihood that occupants of the Park Trailer RVs would frequent the City of Bandon to shop, eat at restaurants and otherwise avail themselves of the urban amenities located just one mile away from the proposed development. That likelihood tends to support petitioners' argument that the proposed development resembles a residential subdivision.

Regarding the third *Curry County* factor, the types and levels of services which must be provided to the proposed development, petitioners argue that because the proposed development will include on-site water and sewer systems, as well as a grocery store, it is an urban use. Intervenor responds that the county was correct in determining that because water

and sewer services are not extended to or from the property from another location and that all waste-water will be treated on the property, the proposed use is a rural use.

The community water and sewer facilities and the commercial building that will house a grocery store are designed to support a high intensity, dense collection of residential uses that will occur on the property. The water and sewer systems that are proposed to serve the proposed development are the functional equivalent of community water and sewer systems that commonly serve residential subdivisions and planned unit developments and, for all practical purposes, are urban services. The provision of such community services supports the conclusion that the proposed development is urban.

In reviewing the *Curry County* factors, we think that the Court intended those factors to be analyzed together rather than in isolation. In the present case, the proposed residential use of the property, at densities that are urban in scale, together with the intensely developed levels of water, sewer and community services and the proposed development's close proximity to the city of Bandon's UGB with its urban amenities lead us to conclude that the proposed development is an urban use of rural land that is prohibited by Goal 14, without an exception. The county erred in concluding otherwise.

Finally, petitioners argue that, to the extent the county's findings conclude that an exception to Goal 14 is not required because the property was already subject to an exception to Goal 4, that reasoning is incorrect. In determining that the proposed development was not an urban use, the county found:

> * * * the Board recognizes that there is a distinction between permitted uses on resource land and on lands that have received an exception to resource uses that will maintain the land as rural land. This distinction is recognized by case law and is important in our evaluation of the relevance of prior land use decisions. * * * The subject property is a former mill site and the level of development that is permissible and will still maintain the land as rural land is different than if the subject property were planned and zoned for EFU." Record 11-12.

Intervenor answers that the county relied on a distinction that the Supreme Court in *Curry County* recognized between resource rural lands and nonresource rural lands. *Curry County*, 301 Or at 498-99. Intervenor explains that the county determined that because the property has received a Goal 4 exception, a different, and presumably more intense, level of development that is nevertheless not urban development could be allowed on the property while still maintaining the land as rural land. According to intervenor, the type of permissible future development on the property should be viewed in light of the nature of the use that could have been developed under the former Industrial zoning and plan designations. Record 680-81.

To the extent the county found that the prior exception to Goal 4 authorized the proposed uses of the property, we reject that conclusion. The Goal 4 exception did not authorize urban use of the property or determine that the land is "suitable, necessary, or intended for urban use" under Goal 14. *VinCep v. Yamhill County*, 215 Or App 414, 426, __ P3d __ (2007); *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or at 500-501. The county erred in concluding otherwise.

In conclusion, we think that, in analyzing the proposal in light of all of the *Curry County* factors, the proposed development more closely resembles a high-density residential development with urban levels of services than a recreational use RV Park and in that regard, it is an urban use of intervenor's rural land. Such a development is prohibited on that land without an exception to Goal 14.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners maintain that the proposed development is not an "RV Park" because none of the sites in the development will be available for occupancy by the general public. Petitioners argue: "* * * an RV Park developed completely with units owned by the park's owners, operators, investors,

association members or any other group of people more limited than 'the general public' is not an RV Park and does not comply with applicable law." Petition for Review 9.

Intervenor responds first by alleging that no party raised the issue during the proceedings below, and therefore petitioners are precluded from raising the issue under ORS 197.763(1). At oral argument, petitioners cited to Record 588 and 595 to demonstrate that the issue had been adequately raised below.

However, intervenor also argues that even if the issue was raised below, it was not raised in the notice of local appeal and thus petitioners are precluded from raising it at LUBA under *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003). Petitioners have not responded to intervenor's argument under *Miles*.

CCZLDO 5.8.223(2) provides that for an appeal of a decision of the planning commission to the board of commissioners:

> "A Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee. The appellant may include written argument based on the record with the NOA. No new evidence may be submitted in an appeal on the record. Any legal issues not included in the NOA are considered waived by the appellant."

The notice of intent to appeal that petitioners Baxter and Oregon Shores Conservation Coalition filed contains a five-page attached "Statement of Reasons for Appeal" with attachments to the statement. Record 138-149. Nowhere in that statement of reasons is the issue presented in the second assignment of error referenced or mentioned. We agree with intervenor that petitioners are precluded from raising the issue under *Miles*.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioners argue that the proposed development cannot be approved without taking an exception to Statewide Planning Goal 11 (Public Facilities) because the proposed sewage treatment facility is a "sewer system" under OAR 660-011-0060.

The proposed RV Park includes a community wastewater treatment system. Intervenor proposed to dispose of wastewater either with a traditional septic tank and drainfield, or with a mechanical system that would treat the effluent in such a way that it could then be used to irrigate a stand of poplars to be planted on the adjacent EFU parcel. That septic system and drainfield or mechanical treatment system will receive the effluent from the 179 Park Trailer RV spaces.[8] In either case, the sewage treatment will occur entirely on the parcel that the RV Park spaces are located on, although in the case of a mechanical system treated effluent will be disposed of on the adjoining EFU parcel. Record 13, 677-78.

Goal 11 and OAR 660-011-0060 prohibit a "sewer system" from being established on land outside urban growth boundaries without an exception.[9] OAR 660-011-0060(1)(f) defines "sewer system" as:

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[8] The applicant's original narrative described the proposed methods of sewage disposal as follows:

> "The applicant proposes an on-site sewer system that will process all sewage produced from the different uses on the property. Attached as Exhibit H is an engineering soils study * * *. That study demonstrates that the soils on the site are capable of handling high volumes of sewer treatments using a traditional septic system. * * * After the study was conducted, the Applicant investigated more efficient, mechanical treatment systems. * * * The Applicant seeks approval for use of either a septic system or a mechanical treatment system, not necessarily limited to the Orenco AdvanTex system.
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> "The advantage to using a system like the Advantex system is that is would allow for greater sewer processing capacity in a substantially smaller footprint for the RV Park and would produce a useable outflow. * * * After processing through the * * * system, the outflow is suitable for ground discharge or for use as an irrigation source. Here, the Applicant proposes to use the outflow as a source of irrigation for agricultural property it owns to the immediate south of the subject property. * * *" Record 677-78.

[9] OAR 660-011-0060(2) provides in relevant part:

> " * * * a local government shall not allow:
>
> "(a) The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries;
>
> "(b) The extension of sewer lines from within urban growth boundaries or unincorporated community boundaries in order to serve uses on land outside those boundaries;

> "a system *that serves more than one lot or parcel, or more than one condominium unit or more than one unit within a planned unit development,* and includes pipelines or conduits, pump stations, force mains, and all other structures, devices, appurtenances and facilities used for treating or disposing of sewage or for collecting or conducting sewage to an ultimate point for treatment and disposal. * * *" (Emphasis added.)

There is no definition of "planned unit development" as that term is used in the rule. Perhaps due to that lack of a rule definition, petitioners argued during the proceedings below, and argue here, that the proposed development is a "Residential-Planned Unit Development" under CCZLDO 2.2.100.[10] Petitioners note that the proposed development includes a unified site design, multiple housing units, common open space, and a mix of building and land uses, all of which appear to qualify it as a residential-planned unit development under CCZLDO 2.2.100.[11]

In addressing petitioners' arguments below, the county found that the proposed sewage treatment facility is not a "sewer system" as defined in the rule because it serves only one parcel, the parcel on which the RV Park will be located. The county also rejected petitioners' argument that the proposed development is a "residential-planned unit

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> "(c) The extension of sewer systems that currently serve land outside urban growth boundaries and unincorporated community boundaries in order to serve uses that are outside such boundaries and are not served by the system on July 28, 1998."

[10] CCZLDO 2.2.100 defines "Residential Planned Unit Development" as:

> "RESIDENTIAL-PLANNED UNIT DEVELOPMENT: A form of development usually characterized by a unified site design for a number of housing units, clustered buildings, providing common open space, and a mix of building types and land uses. A PUD permits the planning of a project over the entire development, rather than on an individual lot-by-lot basis, but a Planned Unit Development does not exclude the sale of individual lots, but only after the development is planned as a single unit."

[11] It is not clear to us that a local code definition of "planned unit development" or similar terms necessarily has any direct bearing on the meaning or scope of the term "planned unit development" as that term is used in OAR 660-011-0060(1)(f), or vice versa. However, the parties and the decision generally approach the question in that manner, and consequently we also focus our analysis on the code definition.

development" under CCZLDO 2.2.100 because, it reasoned, residential uses are prohibited in the Q-REC zone and by a condition of approval.[12]

Petitioners do not challenge the county's conclusion that the proposed sewage treatment facility serves only one parcel, and therefore is not a "sewer system" under the first phrase of the rule definition. However, petitioners argue that the proposed development constitutes a "planned unit development" within the meaning of the rule and a "Residential-Planned Unit Development" as defined by the county code, and therefore the proposed community sewer system is a "sewer system" under that element of the rule definition.

We agree with petitioners that the county has not adequately established that the proposed development is not a planned unit development or a "residential-planned unit development" as defined by under CCZLDO 2.2.100. As we have already discussed above under the first assignment of error, the fact that a condition of approval in the decision prohibits "residential uses," without clearly defining that term, does not mean that residential uses are not in fact proposed for the property. Additionally, the definition of "residential-planned unit development" states that it is characterized by "housing units," rather than "residences" and at a minimum, the Park Trailer RVs will certainly be occupied as "housing units" by their occupants. Finally, as noted by petitioners, the proposed development

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[12] The county found:

> "[The board] disagrees with [petitioners] that an exception to Goal 11 is necessary. The proposed sewage facility does not meet the definition of a 'sewer system' and therefore does not run afoul of Goal 11 or [OAR 660-011-0060(1)(f)]. The proposed facility serves only a single parcel. Contrary to [petitioners'] assertions, the proposed use is not a residential planned unit development as defined by the CCZLDO. The Board interprets the CCZLDO's residential planned unit development standards to apply to what that express language states – to 'residential' developments. Residential uses are expressly prohibited by the Planning Commission's decision and are not permitted in the recreation zone. Additionally, the Board concludes that the proposed use does not meet the CCZLDO's definition of a Planned Community, which the definition states is synonymous with 'Planned Unit Development,' because the property is not subdivided or otherwise configured in the manner provided in that definition." Record 14.

As noted above in our discussion of the first assignment of error, the REC zone allows some residential uses. CCZLDO 4.2.200 Table 4.2.a.

includes most if not all of the identified characteristics of a "residential-planned unit development" as defined in CCZLDO 2.2.100 – a mix of building types and land uses, multiple housing units, and common open space. We agree with petitioners that the development qualifies as a "residential-planned unit development" under CCZLDO 2.2.100. Although we need not address the scope or meaning of the undefined term "planned unit development" as used in OAR 660-011-0060(1)(f), no party disputes that if the proposed development is a "Residential-Planned Unit Development" under CCZLDO 2.2.100, it is therefore also a "planned unit development" for purposes of the rule.

As explained above, intervenor proposes to install a community wastewater treatment system that will dispose of wastewater generated by all of the proposed uses and buildings in a development that is properly characterized as a planned unit development. In our view, that is a "sewer system" as that term is used in OAR 660-011-0060(1)(f), and it is prohibited by OAR 660-011-0060(2) without an exception.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

In their fourth assignment of error, petitioners argue that there is not substantial evidence in the record to support the county's determination that the proposed development is compatible with adjacent or nearby resource uses, and that it will not seriously interfere with permitted uses on other nearby parcels, as required by the Qualification Ordinance. *See* n 3. We understand petitioners to argue that wastewater discharge from the proposed development will impact both groundwater and adjacent properties that are residentially zoned in violation of Qualifier 4 of the Qualification Ordinance, *see* n 3, and that there is no substantial evidence in the record to support the county's finding that the proposal complies with Qualifier 4. Petitioners argue that the county erred in relying on evidence supplied by intervenor's expert regarding the amount of wastewater the project will generate and the ability of the proposed wastewater treatment facility to accommodate that wastewater, in

light of contradictory evidence supplied by petitioners' expert that casts doubt on the conclusions of intervenor's expert.

Intervenor's original proposal contemplated treating sewage either through a traditional septic system with a drainfield, or by using one of two types of mechanical systems. Record 677-78. *See* n 12. During the proceedings below, intervenor's expert conducted a soils study that concluded that only 1.8 acres of the property contained suitable soils for accepting septic tank effluent in a traditional drainfield, in a quantity of 10,000 to 20,000 gallons per day. Record 776. Thereafter, intervenor indicated that a mechanical system was preferable, and that the mechanical system would treat the effluent that the project would generate, and that treated effluent would be used to irrigate an approximately 5-acre poplar plantation that intervenor proposes to plant on the EFU-zoned parcel adjacent to the proposed RV Park. Record 330-31.

Petitioners' expert introduced evidence that the amount of effluent that the development would generate was approximately 70,200 gallons per day, well above the 10,000 to 20,000 gallons per day that the intervenor's expert concluded would be able to be accommodated with a traditional mechanical system. Petitioners' expert also questioned the effectiveness of surface application to land planted in poplars to dispose of the treated effluent due to the lengthy dormant seasons of fall, winter, and spring that would require storage of excess effluent during those periods. Finally, petitioners' expert concluded that a plantation approximately 13.5 acres in size would be required in order to function as proposed. Record 432.

Intervenor responds that petitioners' expert was responding only to the proposal to treat wastewater with a traditional septic system. Intervenor argues that, based on its expert's written and oral testimony at the planning commission hearing, the planning commission and the board of commissioners approved the application with the mechanical wastewater system shown on the approved site plan.

The county found:

> "The Board agrees with [intervenor] that the Planning Commission and the Board face a battle of the experts. We recognize that [intervenor's] expert concludes that a sewage processing and disposal can be implemented for the proposed use in a safe manner that protects groundwater and adjacent and nearby uses. This conclusion is based, in part, on that expert's soil studies conducted at the relevant sites on the subject property, on his familiarity with the proposal, with his experience with similar sized projects and facilities throughout the state, and on his calculated sewage volumes. We recognize that [petitioners'] expert reaches a different conclusion based on his analysis. We note that petitioners' expert analysis contains specific qualifying language, namely that the analysis was based upon existing soils data, that he had not conducted any field surveys or soils testing and that none were planned, and that the conclusions and conditions were generally made with an incomplete knowledge of the subsurface and historical conditions of the study area. *The Board also notes that there was disagreement as to the expected sewage volumes the proposed use would produce.*
>
> "Given these factors, the Board agrees with the Planning Commission that the [intervenor's] expert is more credible than [intervenor's] expert witness. The Board concurs with the Planning Commission that a sewage facility similar to the one proposed by the [intervenor] will likely receive DEQ approval and, if permitted, will protect surrounding uses and groundwater quality." Record 13-14 (Emphasis added).

First, we disagree with intervenor that petitioners' evidence is directed only towards a traditional septic system. The evidence is directed towards the projected volume of sewage produced by the development, evidence that is relevant to both types of systems, and to the adequacy of the proposed irrigation system that is relevant only with a mechanical treatment system. We also disagree that the decision approves or requires a mechanical sewage treatment system. The decision references "a sewage facility similar to the one proposed by the applicant* * *," and intervenor admits that several different treatment systems were proposed, including a traditional septic system.

However, even if the decision did require a mechanical treatment system, we disagree with the county's characterization of the issue as a typical "battle of the experts." Petitioners introduced evidence regarding the volume of sewage that would be generated by the proposed development and the adequacy of the size of the poplar plantation to dispose of

treated effluent from a mechanical system. Intervenor disagreed with petitioners' "characterization of the use" in calculating the projected volume. Record 178-79. The county's findings recognize the dispute. Record 13. However, intervenor did not refute or otherwise rebut petitioners' projection of the amount of sewage that would be generated by the proposed development, and does not cite to any evidence in the record regarding the treatment capacity of a mechanical system or whether it is adequate to treat 70,000 gallons of effluent per day, if that estimate of the amount of wastewater that must be treated proves to be factual. There remains a basic dispute as to the amount of sewage the proposed development will generate. Additionally, intervenor did not respond to or otherwise rebut petitioners' expert's conclusion that the proposed poplar plantation would need to be a minimum of 13.5 acres in size in order to be effective at disposing of the amount of projected effluent (70,200 gallons), or that it would not be as effective during the fall, spring, and winter dormant periods.

We are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

The applicant bears the burden of proof, and petitioners' evidence contradicted the applicant's expert's assumptions and conclusions regarding the projected volume of sewage

and the adequacy of the proposed treatment methods. Intervenor has not pointed to anything in the record that was submitted to rebut petitioners' evidence. We conclude that it was not reasonable for the county to rely on intervenor's evidence in light of petitioners' contradictory and unrebutted evidence. *See Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 276 (2006) ("the critical issue for the local decision maker will generally be whether any expert or lay testimony offered by * * * opponents raises questions or issues that undermine or call into question the conclusions and supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts").

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

In their fifth assignment of error, petitioners argue that the county's findings that the proposal complies with Coquille River Estuary Management Plan (CREMP) Policy 17, CCZLDO 4.1.100(D), and the Qualification Ordinance subsections 4 and 5, are inadequate.[13] *See* n 3. Petitioners argue that the county failed to address issues raised by the US Fish and Wildlife Service (USFWS) in a letter commenting on the proposed development, and that a condition of approval of the county's decision is inadequate to ensure compliance with those provisions. Specifically, petitioners argue:

> "The county cannot rely on these facially inadequate conditions of approval to address the myriad of problems posed by the proposed development. First, they do not address all of the issues raised by the [USFWS]. There are no protections for water quality, erosion control, sensitive wetlands, or the refuge's hydrology. Second, these conditions are inadequate even to address

[13] CREMP Policy 17 requires in relevant part that the local government protect "major marshes and significant wildlife habitat, coastal headlands, and exceptional aesthetic resources located within the Coquille River Coastal Shorelands Boundary unless exceptions allow otherwise." CCZLDO 4.1.100(D) requires that for properties within the CREMP Aquatic Segment 17, such as intervenor's parcel 2 that is zoned CREMP-IND, the stated purpose is "to conserve and enhance the natural resources of this intertidal area while allowing for the continuation of recreational and commercial docking facilities and maintenance dredging as necessary." *See also* n 3.

> the invasive species issues identified by the USFWS.* * *" Petition for Review 17.

Intervenor responds that the county adopted extensive findings regarding the proposal's compliance with the relevant provisions and in response to the USFWS comments, and note that petitioners have not challenged the county's findings. First, the county found that the proposed uses on parcel 2 include low and high density water dependent recreation uses that are permitted uses in the CREMP-IND zone. The county found that the proposed development posed a minimal risk of harm to estuary water quality and water quantity. Finally, the county found that there was no evidence in the record to demonstrate the potential impacts to the adjacent Bandon Marsh from lights, pets and invasive species. Record 16-18.

Petitioners argue that the conditions of approval that the county imposed are inadequate because the county cannot rely on a condition of approval as a substitute for findings. The county did not rely on conditions of approval as a substitute for findings. Rather, the county adopted findings that petitioners have not challenged. Absent a challenge to those findings, petitioners provide no basis for reversal or remand of the decision.

The fifth assignment of error is denied.

The county's decision is remanded.