BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RALPH BAXTER and JANETTE BAXTER,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

INDIAN POINT, INC.,
Intervenor-Respondent.

LUBA No. 2008-219

OREGON SHORES CONSERVATION COALITION,
LARRY VONDERLIN, DAWN VONDERLIN and
CARYN FIEGER,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

INDIAN POINT, INC.,
Intervenor-Respondent.

LUBA No. 2008-221

FINAL OPINION
AND ORDER

Appeal from Coos County.

Ralph Baxter and Janette Baxter, Bandon, filed a petition for review and Janette Baxter argued on her own behalf. Ralph Baxter represented himself.

Courtney Johnson, Portland, filed a joint petition for review and argued on behalf of petitioners Oregon Shores Conservation Coalition, Larry Vonderlin and Dawn Vonderlin.

With her on the brief were CRAG Law Center and Reid A. Verner.

Reid A. Verner, Bandon, filed a joint petition for review and argued on behalf of petitioner Caryn Fieger. With him on the brief were Courtney Johnson and CRAG Law Center.

No appearance by Coos County.

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

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

REVERSED 04/30/2009

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 appeal a decision by the county approving a conditional use permit for a Recreational Vehicle Park.

MOTION TO STRIKE

Intervenor moves to strike the petition for review filed by Ralph and Janette Baxter (Baxter). Intervenor asserts that the Baxter petition for review fails to comply with OAR 661-010-0030(2)(b) because it is 52 pages long and no request to file an overlength brief had been filed when Baxter filed the petition for review.[1] Petitioners respond that the Baxter petition for review complies with OAR 661-010-30(2)(b) because the brief contains 50 pages of text and the first two pages contain the table of contents. We agree with petitioners. Intervenor's motion to strike is denied.

FACTS

The challenged decision is the board of commissioners' decision on remand from our final opinion in *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545, *aff'd* 219 Or App 428, 182 P3d 325 (2008) (*Indian Point I*). In *Indian Point I*, we described the property and the proposed uses of the property as follows:

> "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. 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-

[1] OAR 661-010-0030(2)(b) provides in relevant part:

> "(2) Specifications of Petition: The petition for review shall:
>
> "* * *
>
> "(b) Not exceed 50 pages, exclusive of appendices, unless permission for a longer petition is given by the Board[.]"

> 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. Each Park Trailer RV would connect to utilities and include water, sewer, and electricity hookups." 55 Or LUBA at 547-48 (record citations and footnotes omitted).[2]

As we discuss in greater detail below, we remanded the county's initial decision approving the conditional use permit after we determined, as relevant, that 1) the proposed development was an urban use of rural land that was prohibited without an exception to Statewide Planning Goal 14 (Urbanization) (Goal 14), and 2) the proposed method for disposing of wastewater generated by the development constituted a "sewer system" as defined in OAR 660-011-0060(1)(f) on land outside of an urban growth boundary and was prohibited without an exception to Statewide Planning Goal 11 (Public Facilities) (Goal 11).[3] 55 Or LUBA at 557, 562.

Following our remand, intervenor proposed modifications to the RV Park, including a condition of approval limiting the time that any person could stay in an RV space to 45 days, and a reduction in the number of RV spaces from 170 to 153 spaces.[4] Remand Record 371. The county approved the applications, and imposed conditions of approval that 1) limited the time that any person could stay in the RV park to 45 days in any six month period, 2) prohibited proportional ownership of RV spaces or Park Trailers, 3) required the RV Park to contain at least 35% open space area, and 4) limited the RV Park to an overall density of six RV spaces per acre. Remand Record 6. This appeal followed.

---

[2] In *Indian Point I*, we explained that the portion of the property on which the RV Park is proposed to be located is zoned Qualified-Recreation (Q-REC) on the county's zoning maps. RV Parks are allowed as a conditional use in the REC zone, and the "Q" designation imposes additional approval criteria for development in the zone, one of which is that any development of the property must maintain the land as "rural land." *Id*. at 549.

[3] We also sustained another assignment of error that challenged the county's reliance on intervenor's expert's testimony that had been called into question by opponents of the project. *Id*. at 566.

[4] The parties disagree as to whether other elements of the original proposal were modified, but agree that the two modifications discussed above modified the original proposal.

FIRST ASSIGNMENT OF ERROR (OREGON SHORES)/FIRST, THIRD, AND FOURTH ASSIGNMENTS OF ERROR (BAXTERS) (GOAL 14)

A. *Indian Point I*

As noted above, in *Indian Point I*, we concluded that the proposed use of the subject property was prohibited by Goal 14. In addressing the Goal 14 issues, we explained:

> "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). * * * 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." 55 Or LUBA at 549-50.

We identified several reasons the proposed development was an urban use of rural land under the first *Curry County* factor. Taking all of the factors into account, we concluded:

> "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."[5] *Id.* at 556.

[5] Under the second *Curry County* factor, we concluded that the proposed development was an urban use based on the development's location approximately one mile from the city of Bandon's urban growth boundary and its likelihood of becoming a magnet attracting people from outside the rural area to the development and from the development to the urban area. *Id.* at 555. Under the third *Curry County* factor, we concluded that the proposed on-site community sewer and water systems were the functional equivalents of the types of systems that provide urban services and tended to support the conclusion that the proposed development was an urban use. *Id.* at 556.

B. The County's Decision on Remand

1. Intervenor's Modified Proposal

In portions of these assignments of error, petitioners argue that the modifications to the proposed development are not sufficient to overcome the concerns we identified in *Indian Point I* that led to our conclusion that the proposed development constitutes an urban use of rural land in violation of Goal 14 and the county's "Qualified" zoning designation. *See* n 2. On remand, intervenor proposed a modified site plan that reduced the number of RV spaces to 153 and proposed conditions limiting the length of occupancy by users of the park. However, the continuous placement of Park Trailers in the park remains an integral part of intervenor's modified proposal. Intervenor specifically requested that any length of stay limits not apply to the placement of RVs in the park and confirmed that the proposed RV Park would continue to include Park Trailers stationed in permanently occupied spaces. Remand Record 372. As noted above, the county imposed occupancy limits and density limits and concluded that those limits meant that the development is not residential, and thus is not an urban use.

2. The First *Curry County* Factor

a. Continuous Placement of Park Trailers/Residential Use Issue

In *Indian Point I*, the petitioners challenged the county's reasoning in its initial decision that the density of the development was not at urban levels because a condition of approval prohibited residential use of the property. The petitioners argued that the proposed development was similar to a high-density residential subdivision with a density that was urban in scale. In agreeing with petitioners that the county's condition of approval prohibiting residential use was not sufficient to answer the question of whether the proposed use was urban or rural under the first *Curry County* factor, we explained:

> "[W]e 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 on 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." 55 Or LUBA at 554.

Although we addressed the parties' arguments regarding whether the proposed development was similar to a residential subdivision, that discussion was part of the more general discussion regarding whether the density of the project meant that it was urban or rural under the first *Curry County* factor. We did not suggest that whether the development is determined to be residential provides the single, dispositive answer as to whether the development is an urban use of rural land under that *Curry County* factor. We ended our analysis of that *Curry County* factor by concluding that the semi-permanent nature of the Park Trailers and their apparent continuous occupancy meant that the proposed density of the development was urban rather than rural. *Id.* at 556.

The continuous placement of the Park Trailers in the park remains a key component of the proposal. Petitioners argue that under the revised proposal, the fact that the Park Trailers will remain where they are sited for an unlimited amount of time means that the proposed development, considering all the *Curry County* factors, is an urban use of rural land. In *Indian Point I*, we discussed the relevance of the continuous placement of the Park Trailer RVs:

> "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." *Id.* at 553-54.

Petitioners devote a significant portion of the discussion in their briefs to arguing that the modified development continues to be a residential development, even with the county's condition of approval limiting personal occupancy of Park Trailers, because the Park Trailers will not be sited on a "temporary" or "seasonal" basis. However, the possibility of residential use of the trailers was one, but certainly not the only, factor we identified that led us to conclude in *Indian Point I* that an exception to Goal 14 was needed.

In the above-quoted passage, we explained that the continuous placement of the Park Trailers and the lack of limits on occupancy made the proposal more closely resemble residential occupancy rather than temporary or seasonal occupancy, when reviewed in light of the definitions of Recreational Vehicle Park and Park Trailer in the CCZLDO, both of which include references to "temporary" occupancy. We did not intend to suggest that as long as the Park Trailers are not used as residences, they can remain sited where they are sited on a continuous basis and still maintain the land as rural land. As we discuss below, we conclude that even with the minor modifications to the proposal, the proposed development continues to be an urban use of rural land under the *Curry County* factors. As such, we need not address all of the parties' arguments regarding whether the development proposes "residential" uses.

As in the first decision, the county relied on Oregon Administrative Rules and companion Coos County Zoning and Land Development Ordinance (CCZLDO) provisions that classify Park Trailers as a type of "Recreational Vehicle" to conclude that the continuous placement of the Park Trailers did not affect the analysis under the first *Curry County* factor:

> "* * * We can find nothing in [the CCZLDO], [the OARs] or state statutes that prohibit the long-term presence of RVs at RV parks or that allow us to preclude similar use by park trailer RVs in an RV Park, so long as the RVs are occupied only for temporary or seasonal vacation use. * * *

> " * * * when the state administrative rules are followed, park trailer RVs are not 'permanently' installed in an RV space. They retain their ability to be quickly moved. We are not prepared to say that what LUBA describes as the semi-permanent nature of park trailer RVs categorically prohibits their use, as envisioned by the OARs, in rural recreational RV Parks so long as their use is temporary or seasonal and for vacation purposes." Record 24.

First, the cited OARs were promulgated by the Oregon Department of Consumer and Business Services' Building Codes Division for the purpose of establishing minimum safety standards for the design and construction of "Recreation Parks," as defined in the rules, of which RV Parks are a particular type along with "campgrounds" and "picnic parks." *See* OAR 918-650-0005(17); OAR 918-650-0010. However, the same section of the OARs contains a provision stating that the regulations of the planning authority having jurisdiction over the property continue to apply. OAR 918-650-0025(1)(a). We do not think that the fact that certain OARs classify a Park Trailer as a type of Recreational Vehicle is dispositive of the Goal 14 question presented in the present appeal.

Second, petitioners point out that the CCZLDO 2.1.200 definition of "Recreational Vehicle Park" includes the defined term "Recreational Vehicle Site."[6] A Recreational Vehicle Site is defined as "a plat of ground within a recreational vehicle park designed *to accommodate a recreational vehicle on a temporary basis*." (Emphasis added.) Both definitions focus on the mobility of the Recreational Vehicle, not the mobility of the person occupying the vehicle. When read in context, the definitions strongly suggest that Recreational Vehicles in the development must be sited on a temporary basis in order to qualify the development as a Recreational Vehicle Park. That context does not support the

---

[6] "Recreational Vehicle Park" is defined in CCZLDO 2.1.200 as:

> "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.)

See 55 Or LUBA at 553 (quoting the definition).

county's conclusion that nothing in the CCZLDO precludes continuous placement of park trailers in an RV park. When a Recreational Vehicle such as a Park Trailer continuously occupies a space, that space does not qualify as a Recreational Vehicle Site, and consequently the development is something other than a Recreational Vehicle Park.

For the foregoing reasons, we agree with petitioners that when analyzed in the context of the first *Curry County* factor, the continuous placement of the Park Trailers indicates that the proposed development continues to fail to qualify as a rural use of land, notwithstanding the length of stay limits.

b. Density

In *Indian Point I*, we concluded that a density of seven to twelve spaces per acre was "* * * 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." 55 Or LUBA at 554. On remand, the county imposed a density limit of six recreational vehicle spaces per acre. The county concluded that that density is below the average density of other RV parks located on rural land and significantly lower than the average density of urban area RV parks, and found:

> "* * * an RV Park with an overall density of approximately six spaces-per-acre is more typical of a rural use, especially when visitor lengths of stay are limited to temporary use in a way that precludes residential use of the RV Park as is the case here. There is no evidence in the record that establishes that a rural RV park must have fewer than six spaces per acre." Record 23.

In determining that a density of six Park Trailers per acre is a rural use, the county relied on its faulty conclusion that personal occupancy limits mean the park is occupied on a "temporary or seasonal" basis. As we explain above, the continuous placement of the Park Trailers in the park is not "temporary or seasonal." In *Indian Point I*, we focused our analysis on a density of seven to twelve spaces per acre because that is the range of what was proposed; we did not mean to suggest that a unit density slightly below seven units per acre is a rural density. As in *Indian Point I*, we think that a density of six spaces per acre, only slightly lower than the seven spaces per acre we identified as an urban density, is almost

certainly an urban density, particularly where the vehicle occupying the space remains in the space on an unlimited basis. The county erred in concluding otherwise.

3. The Remaining *Curry County* Factors

The proposed sewer and water services remain a key component of the proposal, and the development is located in close proximity to the city of Bandon's urban growth boundary. *See* n 5. As such, the park proposes a density that is urban in scale, with services that are urban in nature in a location approximately one mile from the city of Bandon's urban growth boundary. Under the *Curry County* factors, the proposed development continues to be an urban use of rural land that is prohibited by Goal 14.

These assignments of error are sustained.

SECOND ASSIGNMENT OF ERROR (OREGON SHORES)/FIFTH ASSIGNMENT OF ERROR (BAXTERS) (GOAL 11)

We described the proposed wastewater treatment facilities for the development in *Indian Point I*:

> "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. 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." 55 Or LUBA at 558-59

We next analyzed the proposed development according to the Goal 11 rules:

> "Goal 11 and OAR 660-011-0060 prohibit a 'sewer system' from being established on land outside urban growth boundaries without an exception. OAR 660-011-0060(1)(f) defines 'sewer system' as:
>
> > "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. * * *
>
> "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. * * *
>
> " * * * * *
>
> " * * * 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." *Id.* at 559-62 (emphasis in original, footnotes omitted).

We concluded that, based on several characteristics of the proposed development, the proposed development was properly characterized as a RPUD under CCZLDO 2.2.100, and was therefore also a "planned unit development" under OAR 660-011-0060(1)(f).

On remand, the county revisited the Goal 11 issue and concluded that the new condition of approving limiting the length of stay by visitors to the park means that the use is not "residential," and thus found "* * * it is simply not possible to conclude that, under the provisions of the CCZLDO, the approved RV Park represents a * * * residential planned unit community." Remand Record 31.

After concluding that the development is not a RPUD under the county's code, the county also concluded that the proposed development is not a "planned unit development" within the meaning of OAR 660-011-0060(1)(f). In reaching that conclusion, the county

relied on legislative history provided by intervenor to conclude that the undefined term "planned unit development" focuses on residential uses and densities in rural areas.

In these assignments of error, petitioners argue that the county erred in approving the proposed development under Goal 11 and argue that the decision should be reversed. OAR 661-010-0071(1)(c). First, petitioners argue that notwithstanding the condition limiting the length of stay, the proposed development continues to be a RPUD under the county's code. Petitioners also argue that the length of stay limits did not change the proposal significantly enough to allow the county to reinterpret the CCZLDO definition of RPUD and conclude that the proposed development is not a RPUD. Finally, petitioners argue that the county's conclusion that the development is not a "planned unit development" as used in OAR 660-011-0060(1)(f) because the rule focuses only on residential uses is not supported by the text of the rule or the legislative history cited by intervenor and relied on by the county.

The condition limiting the length of stay by visitors to the park makes the question of whether the proposal qualifies as an RPUD under the CCZLDO a closer question than in *Indian Point I*. However, our conclusion that the development was properly characterized as a RPUD as defined in the CCZLDO did not exclusively depend on whether the Park Trailers could be used as permanent residences:

> "* * * [T]he 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 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." 55 Or LUBA at 562.

We tend to agree with petitioners that the new condition of approval is not significantly different than the previous condition. However, we note that the relevant question continues to be whether the proposed development is a "planned unit development"

under the Goal 11 rule definition of "sewer system," not whether the development constitutes a RPUD as that term is defined in the county's code. The county found that the development is not a "planned unit development" under the rule because it found that the rule is focused on residential uses and the proposed development is not residential. In making that determination, the county first looked at other terms in the definition that are defined in other statutes:

> "[W]e conclude that the Goal 11 rule uses the terms 'lot,' 'parcel,' 'condominium' and 'PUD' in the residential context that they are generally used in the statutes and the relevant administrative rules." Remand Record 33.

The county also relied on the legislative history provided by intervenor to conclude that "the focus of the definition of 'sewer system' is on limiting residential uses * * *." Remand Record 33.

We are not persuaded by the county's reasoning. First, the definitions for "lot," "parcel" and "condominium" are not specific to residential developments. *See* ORS 92.010(4),(6); ORS 100.005(9). Non-residential lots, parcels, and condominiums, as well as non-residential planned unit developments, are possible and certainly existed at the time the cited definitions were adopted and exist today. Second, the legislative history relied on by the county does indicate that the drafters discussed rural residential development, but nothing cited to us suggests that the drafters believed that the rule applied *only* to residential development. Indeed, the drafters also discussed "commercial and industrial" uses and areas on rural land. Remand Record 523, 531 ("For commercial and industrial areas, local governments must limit the intensity and types of new or expanded uses consistent with the requirements of Goal 14"). The proposed development could easily be characterized as a "commercial" planned unit development, even if there were a basis to conclude that no

"residential" use occurs.[7] For the reasons set forth above, we disagree with the county's conclusion that the definition of "planned unit development" does not include the proposed development. We conclude, as we concluded in *Indian Point I*, that the development proposes a "sewer system" as that term is used in OAR 660-011-0060(1)(f), and it is prohibited by Goal 11 and OAR 660-011-0060(2).

These assignments of error are sustained.

REMEDY

OAR 661-010-0071(1)(c) provides that LUBA shall reverse a decision that is "* * * prohibited as a matter of law." For the reasons explained above, the proposed development is prohibited by Goal 14 and Goal 11.[8] Accordingly, the county's decision is reversed.[9]

[7] We note that the proposed development appears to function much like a hotel, motel or vacation lodging, with permanent structures that are intended to be available for rent to both transient and longer term occupants.

[8] Intervenor could apply for an exception to those goals. Taking an exception to those goals will require a demonstration of compliance with additional standards and criteria, including without limitation OAR 660-014-0040(2) and (3) (criteria for a Goal 14 exception) and OAR 660-011-0060(9) (criteria for a Goal 11 exception).

[9] Because the decision is prohibited as a matter of law, we need not address the remaining assignments of error.