

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LINN COUNTY FARM BUREAU, CORY KOOS,
5 KIM KOOS, JOHN GALE SWATZKA ESTATE,
6 BETTY JO SMITH, MARY B. PARKER,
7 LONNIE L. PARKER, PETER BOUCOT,
8 JAN BOUCOT, MICHAEL GREIG, PRISCILLA GREIG,
9 TELLY WIRTH, CAROLYN JENKS OLSEN,
10 CINDY CLARK, ART MARTINAK,
11 JOYCE MARTINIAK, DEAN SCHROCK
12 and KATHY SCHROCK
13 *Petitioners,*

14
15 vs.

16
17 LINN COUNTY,
18 *Respondent.*

19
20 LUBA No. 2011-001

21
22 FINAL OPINION
23 AND ORDER
24

25 Appeal from Linn County.

26
27 William Kabeiseman, Portland, filed the petition for review and argued on behalf of
28 petitioners. With him on the brief were Jennifer Bragar, Carrie Richter, and Garvey Schubert
29 Barer.

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31 Todd S. Sadlo, Portland and Thomas N. Corr, Linn County Counsel, Albany, filed the
32 response brief and Todd Sadlo argued on behalf of respondent.

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

36
37 AFFIRMED

05/25/2011

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

NATURE OF THE DECISION

Petitioners appeal a decision on remand approving a conditional use application to establish a new county park, including a recreational vehicle (RV) campground, on a 175-acre tract zoned for exclusive farm use (EFU).

FACTS

We repeat the salient facts from the first appeal to LUBA, *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010) (*LCFB I*):

“The subject property consists of two tax lots totaling 175 acres in size, located at the intersection of Interstate Highway 5 and State Highway 34, in the western portion of the county. The property is located between the urban growth boundaries of the cities of Albany and Tangent, approximately two to three miles from each city’s urban growth boundary. Soils on the property are Class II-IV soils, identified as prime farmland in the county’s comprehensive plan. The property is currently under cultivation in perennial ryegrass.

“In 2007, the county purchased the subject property with the intent of developing a new county park. In 2008, the county parks and recreation department filed an application for a conditional use permit to establish a county park on the site. The application proposed a 60-acre ‘RV park’ area consisting of (1) a campground that at full build-out would feature 196 RV campsites, each served by sewer, water and electric hookups, (2) five restroom and shower buildings, (3) a camp store, (4) one or two enclosed shelters approximately 1,200 square feet in size, (5) a caretaker dwelling for a full-time park ranger, and (6) administrative office, shop, equipment storage building, etc. In addition, a 110-acre day use area would be constructed including picnic shelters, restrooms, trails, etc. Water for the proposed park will be supplied by on-site wells, distributed by a community water system. Treatment of sanitary waste will be provided by an on-site septic system capable of handling up to 25,000 gallons per day.” *Id.* at 325-26.

In *LCFB I*, the county board of commissioners approved the application, including septic facilities to accommodate the full build-out of 196 RV sites, but limited the campground to no more than 50 RV campsites pending further county approvals, and imposed a condition prohibiting RV stays in the park longer than seven days. On appeal, petitioners and the Department of Land Conservation and Development (DLCD), which filed a state agency

1 brief, argued that pursuant to OAR 660-034-0035 and OAR 660-034-0040, the state and
2 local park planning rules, the more intensive aspects of the park, specifically, the camp store,
3 clubhouses, and full hookups (septic, water, and electric) to individual RV camp sites could
4 be approved only with exceptions to Statewide Planning Goal 3 (Agricultural Land), and
5 could not be approved via a conditional use permit as a simple non-farm use that is allowed
6 in the EFU zone under ORS 215.203 or 215.283. After analyzing the relevant statutes, goals
7 and rules, LUBA agreed with petitioners and DLCD and remanded the decision for the
8 applicant parks and recreation department to either remove the camp store, clubhouses, and
9 the proposal to provide full hookups to individual RV camp sites, or to request an exception
10 to Goal 3 for those aspects of the proposal.

11 On remand, the parks and recreation department removed the camp store and
12 clubhouses from the proposal, and eliminated sewer hookups to individual campsites, and the
13 county board of commissioners approved the application with the use of central restrooms
14 and RV dump stations to meet sanitary sewerage needs. The county board of commissioners
15 re-approved providing water and an electrical outlet at each campsite, over petitioners'
16 objections. This appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 Petitioners argue that the county erred in concluding that it could approve the use of
19 RV dump stations and the provision of water and electric utilities to individual RV campsites
20 without taking an exception to Goal 3. According to petitioners, in *LCFB I* LUBA held that
21 providing “full hookups,” septic, water and electric, to individual campsites within a public
22 campground on EFU land requires an exception to Goal 3. Based on LUBA’s analysis in
23 *LCFB I*, petitioners argue that providing central RV dump stations, and water and electric
24 utilities to individual campsites also requires an exception to Goal 3.

25 In *LCFB I*, we analyzed the text and context of the park planning rules at OAR 660-
26 034-0035 and 0040. We need not repeat that analysis in detail here. It suffices to note that

1 under the park planning rules a specified list of park uses, including campgrounds, are
2 allowed in state and local parks on farm or forest land without taking an exception to the
3 applicable resource goals, if the state or local government has adopted a master park plan that
4 complies with the rule and goal. The county in the present case does not have an
5 acknowledged master park plan. In the absence of a master park plan, it is reasonably clear
6 under the rule that some of the park uses listed in OAR 660-034-0035 require a goal
7 exception, and cannot be approved in a state or local park without a statewide planning goal
8 exception. Unfortunately, the rule is silent as to which park uses require an exception in the
9 absence of a master park plan.

10 In *Rural Thurston, Inc. v. Lane County*, 55 Or LUBA 382 (2007), and to a greater
11 extent in *LCFB I*, we struggled to articulate some principled basis to determine which public
12 park uses require an exception to the applicable resource goal in the absence of a master park
13 plan. We held in *Rural Thurston, Inc.* that the public park uses that can be approved without
14 an exception in the absence of a master park plan are “passive, low-intensity uses similar to
15 those allowed in campgrounds in resource zones.” 55 Or LUBA at 399. As discussed in
16 more detail in *LCFB I*, the Goal 3 rule places specific limits on the intensity of uses allowed
17 in *private* campgrounds on EFU land, in OAR 660-033-0130(19). Specifically, OAR 660-
18 033-0130(19)(b) prohibits providing “[s]eparate sewer, water or electric service hook-ups” to
19 individual campsites in a *private* campground. However, we rejected petitioners’ argument
20 that the same specific limitations that apply to private campgrounds also apply to public
21 campgrounds. With respect to public parks, including campgrounds, the Goal 3 rule simply
22 provides for “[p]ublic parks including only the uses specified under OAR 660-034-0035 or
23 660-034-0040, whichever is applicable.” OAR 660-033-00130(31). As noted, however,
24 while the park planning rule strongly implies that in the absence of a master park plan an
25 exception to the resource goals may be necessary for some of the uses specified in OAR 660-
26 034-0035 or 660-034-0040, the rule does not indicate which uses require an exception.

1 In *LCFB I*, we considered all relevant statutory, goal and rule context, and found
2 nothing that definitively answered the question of which park uses require an exception in
3 the absence of a master park plan. The most useful context, we ultimately concluded, was
4 Goal 3 Guideline B.1, which states that “[n]on-farm uses permitted within farm zones under
5 ORS 215.213(2) and (3) and 215.283(2) and (3) should be minimized to allow for maximum
6 agricultural productivity.” We noted that goal guidelines are simply advisory and do not
7 constitute mandatory standards, but cited *Utsey v. Coos County*, 176 Or App 524, 573, 32
8 P3d 933 (2001) (Deits, dissenting), for the proposition that Guideline B.1 is a contextual
9 indication that Goal 3 is concerned with limiting the nature and intensity of park uses on
10 agricultural land. From that slim foundation, we extrapolated the principle that, where
11 possible, Goal 3 requires that the scope of permanent development, services and
12 infrastructure for non-farm uses should be minimized to preserve the potential for
13 agricultural use. We concluded:

14 “As applied to park uses, this suggests that in circumstances where there is
15 more than one way to provide a particular type of park development or
16 service, one that involves significant permanent, high-intensity development
17 or infrastructure and another that involves less permanent or intense
18 development or infrastructure, Guideline B.1 would encourage local
19 governments to minimize loss of potential agricultural productivity by
20 choosing the less developed or land-intensive option. That is consistent with
21 the policies in ORS 215.243 and other context discussed above. For lack of a
22 better textual or contextual guidance, we will apply that understanding of
23 Goal 3 in determining what disputed park uses or facilities require an
24 exception, in the absence of a master park plan.” 61 Or LUBA at 338.

25 We then analyzed the disputed park uses: the camp store, clubhouses, and full hookups to
26 individual RV camp sites, and as noted ultimately concluded that those facilities required an
27 exception to Goal 3 in the absence of a master park plan.

28 On remand, the county eliminated the proposed individual septic hookups to
29 individual camp sites, and proposed to meet septic disposal needs for campers via central
30 restrooms and RV dump stations. However, the county re-approved the provision of water
31 and electric utilities to individual camp sites. The county explained:

1 “14. The county board concludes that the main service that may be
2 inconsistent with Goal 3 under LUBA’s analysis is the provision of individual
3 sewer service to each RV campsite. Such a system would require more sewer
4 infrastructure than less intensive, centralized bathrooms and/or sewage pump-
5 out stations. Removal of such a system would be at least marginally more
6 difficult in the event the campground were to be returned to agricultural use,
7 for whatever reason. Conveniently placed septic dump stations and restrooms
8 as necessary to serve the number of spaces constructed or anticipated, is
9 significantly less ‘intense’ and ‘invasive’ than providing individual sewer
10 service to each of the 50 campsites approved herein.

11 “15. The same is not true for individual water and electric service. These
12 services are typically delivered by systems that deliver a level of service far
13 below that of standard residential electric and water services. The limited
14 water and electric services provided to RV spaces could be easily removed, if
15 necessary, for whatever reason. They are therefore less ‘permanent’ than a
16 sewer system serving individual campsites. * * *

17 “16. The Board finds and concludes that the provision of electric service to
18 individual RV campsites as allowed by its approval does not implicate Goal 3
19 and does not require an exception to Goal 3. The electric wires that would be
20 necessary to provide a standard electric socket for use by an RV can be
21 installed overhead or underground with minimal intrusion, and such hook-ups
22 are common in Linn County and many other public park camping facilities.
23 Individual, limited electric sockets for use by RVs serve temporary, camping
24 uses, and are not of an intensity or permanency to implicate Goal 3.

25 “17. The Board finds and concludes that the provision of water service to
26 individual RV campsites as allowed by its approval does not implicate Goal 3
27 and does not require an exception to Goal 3. The pipes that would be
28 necessary to provide a standard hose outlet for connection of a standard RV
29 water service hose is not significantly more intrusive than providing more
30 centralized water access spigots to serve the campsites. Individual campsite
31 water service is common in county park camping facilities. Such service
32 facilities could be removed with little effort or disruption to farm soils, if
33 necessary, if for whatever reason, the campground were to be returned to
34 agricultural use.

35 “18. The Board finds and concludes that the provision of water and electric
36 service to individual RV campsites as allowed by its approval does not, in
37 combination, rise to a level of intensity or intrusiveness to implicate Goal 3,
38 or to require that the county take an exception to Goal 3 or any other goal. * *
39 * It is necessary for the Parks Department to install electric service and water
40 service for campground lighting and restrooms in the campground, and
41 providing individual hook-ups of these services does not significantly increase
42 the levels of intensity or intrusiveness that would otherwise occur in providing
43 basic, anticipated services to campers.” Record 24-25.

1 Petitioners argue that the above findings fail to address the critical question under
2 LUBA’s analysis in *LCFB I*, which is whether there is a less intensive type of infrastructure
3 possible that would provide septic, water and electric services to campers than the
4 infrastructure proposed. If so, petitioners argue, Goal 3 obligates the county to choose the
5 less intensive infrastructure.

6 With respect to septic service, petitioners argue that the county did not downsize the
7 25,000-gallon septic system needed to serve the campground at full capacity, but simply
8 substituted the central restrooms proposed in the original application and central RV dump
9 stations to replace individual sewer hook-ups. It is possible, petitioners argue, to minimize
10 the necessary infrastructure even further, by eliminating the RV dump stations and relying
11 solely on centrally located restrooms.

12 With respect to water and electric utilities, petitioners similarly argue that it is
13 possible to minimize the infrastructure further by eliminating all water and electric service to
14 individual camp sites, and rely solely on central water spigots and electric outlets provided at
15 centrally located restrooms. Because a less intensive infrastructure is possible than the
16 approved hookups to provide septic, water and electric services to campers, petitioners
17 contend, the city has not demonstrated that no Goal 3 exception is necessary to approve the
18 application.

19 Petitioners read far more into Goal 3 and into our decision in *LCFB I* than is
20 warranted. As noted, the park planning rule in OAR 660-034-0035 and 0040 is profoundly
21 silent regarding which listed park uses require a goal exception, in the absence of a master
22 park plan. To resolve the issues in that appeal, we had to glean from relevant context some
23 indication of which types of park uses or infrastructure LCDC intended will require a Goal 3
24 or 4 exception, in the absence of a master park plan. In our view, that exercise took us to the
25 outer limits of LUBA’s authority to interpret the relevant rules, statutes and goals, beyond
26 which LUBA would trespass into the legislature’s authority, or its delegated authority to

1 LCDC, to promulgate the law. At some point, interpreting legislation in an attempt to fill
2 wide gaps or silences in that legislation is no longer interpretation, but instead an
3 impermissible act of lawmaking.

4 In *LCFB I*, the relevant issue was whether the provision of “full hookups” to
5 individual RV camp sites in a public park/campground required an exception to Goal 3, in
6 the absence of a master park plan. We did not consider whether provision of specific
7 utilities, specifically water and electric, to individual campsites, requires an exception. We
8 ultimately determined that providing “full hookups” to individual RV camp sites does require
9 an exception to Goal 3, and remanded to the county to either eliminate the provision of “full
10 hookups” to individual RV camp sites or take exceptions to Goal 3. On remand, the county
11 did eliminate the proposal for “full-hookups,” by eliminating the provision of septic service
12 to individual sites, but allowed provision of water and electric services to individual sites.
13 That is consistent with the literal terms of our remand. On appeal of the decision on remand,
14 the “full hookup” issue has become split and refined into minute parts, and petitioners
15 essentially ask us to determine whether the following features of a public campground
16 require an exception to Goal 3: (1) providing one or more central RV dump stations, (2)
17 providing a water spigot to individual RV camp sites, and (3) providing an electrical outlet to
18 individual RV camp sites. Petitioners argue that Goal 3 prohibits providing each of these
19 services, or any combination thereof, because it is possible to meet the basic sanitary and
20 other needs of campers with less intense development or infrastructure.

21 Although there is language in *LCFB I* that supports that argument, we disagree with
22 petitioners that Goal 3, Guideline B.1 or any of the other text or context discussed in our
23 opinion compels the conclusion that providing the above services in a public campground
24 requires a Goal 3 exception, in the absence of a master park plan. Stated differently, we
25 disagree that Goal 3, Guideline B.1 or other relevant text or context requires the county to
26 choose the most *minimally* intensive infrastructure that is possible in approving a park use in

1 a public park, under OAR 660-035-0035 and 0040. Taken to an extreme, petitioner's
2 argument would require the county to mandate use of portable toilets rather than central
3 restrooms connected to septic fields, or hand-drawn water wells rather than electrically
4 pumped wells. We do not think Goal 3, Guideline B.1 or other relevant text or context
5 compels such results, and to the extent we suggested otherwise in *LCFB I*, we disavow the
6 suggestion.

7 Turning to the specific utilities and findings at issue, the county is generally correct in
8 viewing the provision of septic hookups to individual RV camp sites as being the most
9 problematic aspect of the originally proposed "full hookups." Providing community septic
10 service to individual sites in a relatively high intensity development on rural resource land
11 can potentially run afoul of one or more statewide planning goals, largely because it can
12 potentially support higher density residential or quasi-residential development than permitted
13 on rural resource land without an exception to the applicable goals. *See, e.g., Oregon Shores*
14 *Conservation Coalition v. Coos County*, 55 Or LUBA 545, *aff'd* 219 Or App 429, 182 P3d
15 325 (2008) (conditional use permit to construct 179-space RV campground permanently
16 occupied by park model trailers connected to community septic, water and electric utilities is
17 inconsistent with Goals 11 and 14). The county attempted to avoid that potential problem by
18 proposing instead to meet the campground's septic requirements via a combination of the
19 previously approved central restrooms and one or more central RV dump stations. The
20 county found, and there is no dispute, that the infrastructure necessary for central RV dump
21 stations is significantly less than needed for individual septic hookups. Although the record
22 does not include evidence of the infrastructure needed for the RV dump stations, without
23 such stations the size and number of restrooms needed to serve the campground would
24 almost certainly have to be increased, presumably offsetting the reduction in infrastructure
25 gained by not providing RV dump stations. Petitioners have not demonstrated that the

1 county erred in concluding that a Goal 3 exception is not necessary to approve RV dump
2 stations in the proposed campground.

3 With respect to providing electrical and water service to individual RV camp sites,
4 the county found that providing such services is less problematic with respect to potential
5 goal compliance issues than providing individual septic hookups, and we generally agree
6 with that observation. Under the Goal 11 rule, for example, LCDC has chosen to regulate
7 sewer service on rural lands more rigorously than water service on rural lands. *Cf.* OAR
8 660-011-0060 and 660-011-0065. The county found, and there is no dispute, that the
9 physical infrastructure for water and electric service is much less intensive than that needed
10 for septic service. The county also found that the infrastructure needed to provide a water
11 spigot and an electrical outlet to individual sites is not significantly greater than the
12 infrastructure needed to provide centralized water spigots and campground lighting.
13 Petitioners argue that there is no site plan or other evidence in the record showing the extent
14 of the water and electrical infrastructure, with and without service to individual camp sites,
15 so there is no evidence supporting that finding. However, that argument is influenced by the
16 position, rejected above, that Goal 3 obligates the county to choose the most minimal
17 possible infrastructure necessary to provide basic services at the campground. We do not
18 think Goal 3 or any other goal is particularly concerned with how many water spigots or
19 electrical outlets are provided in a public campground. We do not understand petitioners to
20 dispute that the county can approve an electrical grid dispersed throughout the campground
21 to provide lighting for roads, paths, driveways, restrooms, etc. If so, it is difficult to
22 understand why the county requires a goal exception to approve short connections to that
23 grid to provide electrical service to individual RV camp sites.

24 In sum, the interpretational difficulty presented in this appeal stems from a park
25 planning rule that (1) provides that *some* park uses, which are otherwise allowed in a public
26 park pursuant to a master park plan *without* an exception to Goals 3 or 4, nonetheless do

1 require an exception in the absence of a master park plan, but (2) does not provide any clue
2 as to which park uses require goal exceptions without a master park plan. LUBA has gone as
3 far as it can legitimately go to resolve that interpretational difficulty, and any further
4 guidance or resolution will have to come from LCDC or the legislature. For the reasons set
5 out above, petitioners have not demonstrated that a public campground on EFU land that
6 provides central RV dump stations, and electric and water service to individual RV camp
7 sites, requires an exception to Goal 3 in the absence of a master park plan.

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 The second assignment of error is derivative on the first. Petitioners contend that if a
11 goal exception is needed to approve the park/campground, the county must amend its
12 comprehensive plan through a post-acknowledgment plan amendment process, which will
13 trigger an obligation to consider whether the plan amendment complies with the
14 Transportation Planning Rule, at OAR 660-012-0060. Because we deny the first assignment
15 of error, the second assignment does not provide a basis for reversal or remand.

16 The second assignment of error is denied.

17 The county's decision is affirmed.