

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

COMMUNITY PARTICIPATION ORGANIZATION 4M,
SUE BEILKE, and JILL WARREN,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2021-002

FINAL OPINION
AND ORDER

Appeal from Washington County.

Kenneth P. Dobson filed the petition for review and argued on behalf of petitioners.

Jacquilyn E. Saito filed the response brief and argued on behalf of respondent.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

REMANDED 12/08/2021

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

NATURE OF THE DECISION

Petitioners appeal Resolution and Order 20-141, a board of county commissioners resolution adopting Habitat Assessment Guidelines for Significant Natural Resource areas.

FACTS

In October 2020, the board of county commissioners adopted Ordinance 869, which amended Washington County Community Development Code (CDC) 422 by, as relevant here, adopting CDC 422-3.5. That new CDC section required applications for development on sites containing or within 100 feet of mapped Significant Natural Resource (SNR) areas to submit “[a] Habitat Assessment that identifies the size, extent and type of wildlife habitat located in the field-verified Water-Related Fish and Wildlife Habitat and Upland/Wildlife Habitat. The Assessment will evaluate and rate the different habitat values using the methodology outlined in the Habitat Assessment Guidelines.” At the time that the county adopted Ordinance 869, the county had not yet adopted the referenced Habitat Assessment Guidelines (Guidelines). In a final opinion and order dated September 29, 2021, we remanded Ordinance 869. *Community Participation Organization 4M v. Washington County*, ___ Or LUBA ___ (LUBA No 2020-110, Sept 29, 2021) (*CPO I*), *rev pending*, CA A177088. On December 15, 2020, the county adopted the Guidelines via Resolution and Order 20-141 (Resolution). This appeal followed.

1 **MOTION TO TAKE OFFICIAL NOTICE**

2 After oral argument, the county submitted a motion to take official notice
3 of Washington County Code (WCC) 14.08, 14.12, and 15.08.¹ The county's
4 motion explains that it is intended to provide supplemental authority in support
5 of the county's position in the response brief that the Resolution is not a "land
6 use ordinance," as that term is defined in the Washington County Charter
7 (Charter), by demonstrating that "some decisions which affect the use of land do
8 not need to confirm to the requirements for land use decisions under" the Charter.
9 Petitioners do not object to the motion.

10 Under ORS 40.090(7), LUBA may take official notice of an "ordinance,
11 comprehensive plan or enactment of any county or incorporated city in this state,
12 or a right derived therefrom." LUBA routinely takes official notice of local
13 ordinances. *McNamara v. Union County*, 28 Or LUBA 722, 723 (1994) (citing
14 *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695, 698, *aff'd*, 101
15 Or App 458, *rev den*, 310 Or 243 (1990); *Murray v. City of Beaverton*, 17 Or
16 LUBA 723, 742 n 18 (1989)). The county's motion to take official notice is
17 granted.

¹ WCC 14.08 regulates swimming pools, WCC 14.12 regulates grading, and WCC 15.08 sets out road design and construction standards.

1 **JURISDICTION**

2 In its response brief, the county moves to dismiss the appeal, arguing that
3 LUBA lacks jurisdiction because LUBA remanded Ordinance 869 in *CPO I*.
4 According to the county, its action on remand of Ordinance 869 will cure any
5 defect in the process that the county used to adopt the Resolution because the
6 county’s action on remand will allow public comment on the Guidelines. The
7 response brief includes a declaration of the county’s attorney in support of the
8 motion to dismiss, declaring that the Long Range Planning Section of the
9 county’s Department of Land Use and Transportation “intends to process the
10 remand of Ordinance 869 in accordance with instructions set forth in [*CPO I*]
11 and that “publication of [the Guidelines] and opportunity for consideration of
12 such * * * shall be provided contemporaneously as scheduled for the Ordinance
13 869 remand proceedings.” Petitioners argue that the Resolution is a separate land
14 use decision over which LUBA has jurisdiction independent of the appeal of
15 Ordinance 869 that was at issue in *CPO I* or any remand proceedings on that
16 ordinance that the board of county commissioners may conduct in the future.

17 We agree with petitioners, and we find it difficult to understand the
18 county’s argument. The issues presented in this appeal are tangentially related to
19 the issues that were presented in *CPO I*, but our resolution of the issues in this
20 appeal is not contingent on the issues that we resolved in that final opinion and
21 order. Moreover, the decision that we remanded in *CPO I* was not a decision on

1 a permit, limited land use decision, or zone change and, accordingly, the deadline
2 in ORS 215.435(1) for taking action on remand does not apply.

3 Finally, it is the board of county commissioners, not the county's attorney
4 or long-range planning section, that will determine whether to take final action
5 on remand of Ordinance 869.² There is no requirement in statute that the county
6 take any action on remand of Ordinance 869, and the county has not cited any
7 provision of the Charter that requires such action.

8 For the above reasons, the county's motion to dismiss is denied.

9 **FIRST ASSIGNMENT OF ERROR**

10 In their first assignment of error, petitioners argue that the county "[f]ailed
11 to follow the procedures applicable to the matter before it in a manner that
12 prejudiced the substantial rights of the petitioner." ORS 197.835(9)(a)(B).
13 Petitioners argue that the county's procedure in adopting the Resolution failed to
14 comply with the provisions of the Charter that apply to "land use ordinances," as
15 defined in the Charter. The applicable provisions require consideration of a "land
16 use ordinance" at a minimum of one planning commission and two board of
17 county commissioners public meetings before adoption. Charter 104.³ Petitioners

² Given the absence of a deadline, the county can delay action on Ordinance 869 until resolution of this appeal if it wishes to consider any issues related to the Guidelines at the same time as it addresses Ordinance 869.

³ There is no dispute that the procedure that led to adoption of the Resolution did not comply with those procedures. The Guidelines were considered at one

1 argue that the county's failure to comply with those Charter provisions prejudiced
2 their substantial rights to participate in the proceeding. Petitioners argue that the
3 Guidelines are highly technical, that they required expert analysis and testimony,
4 and that the compressed time frame for their consideration at a December 2, 2020
5 planning commission meeting and a December 15, 2020 board of county
6 commissioners meeting did not allow petitioners to meaningfully review and
7 comment on them or seek the assistance of qualified experts to do so, thereby
8 prejudicing petitioners' substantial rights to meaningfully participate in the
9 legislative proceeding.

10 The Charter defines "land use ordinance" as follows:

11 "Land use ordinance" means one which adopts, amends, or repeals
12 a comprehensive plan, development or zoning code and related
13 maps, *or otherwise directly governs the use of land*. It does not
14 include such subjects as: financing public improvements, road
15 engineering and utility standards, building code, development fees,
16 sewer or septic regulations, or nuisance control." Charter 100(d)
17 (emphasis added).

18 Petitioners argue that the Guidelines qualify as a "land use ordinance" because
19 they "directly govern[] the use of land." Petitioners argue that the Guidelines are
20 substantive regulations that determine whether lands included in an application
21 for development are subject to the requirements in CDC 422 and, if so, whether
22 the application satisfies those requirements. The county disputes that the

planning commission meeting on December 2, 2020, and one board of county
commissioners meeting on December 15, 2020. Record 12.

1 Guidelines qualify as a “land use ordinance” and argues that they fall within the
2 non-exclusive list of exceptions to the definition of “land use ordinance.”

3 We agree with petitioners that the Guidelines are a “land use ordinance”
4 because they “directly *govern*[] the use of land.” (Emphasis added.) The
5 summary to the Guidelines explains:

6 “County staff will rely on the materials in the Habitat Assessment to
7 identify the location and attributes of the habitat and to determine
8 compliance with [CDC] 422 requirements, including the need for a
9 Preservation Area and any required planting plans. These technical
10 Guidelines are supplemental to general application instructions and
11 application submittal criteria in the CDC.” Record 28.

12 The Guidelines are the applicable criteria for determining the boundaries of lands
13 subject to CDC 422 and the level of enhancement required in preservation areas.
14 The provisions of CDC 422 that were adopted in Ordinance 869 require an
15 application for development to include, among other things, (1) a field
16 verification that identifies the limits of any applicable SNR areas located on the
17 site and (2) a habitat assessment that describes the size, extent, and type of habitat
18 located in those SNR areas and that evaluates the habitat values according to the
19 Guidelines. As such, the Guidelines are very different from the provisions of the
20 WCC setting out the building code and the road engineering and utility standards
21 that are excluded from the definition of “land use ordinance.” WCC 14.08, which
22 sets out construction and operational standards for certain swimming pools;
23 WCC 14.12, which regulates grading and excavation activity done pursuant to an
24 approved development application; and WCC 15.08, which sets out design and

1 construction standards for roads built pursuant to an approved development
2 application, reflect *how* land will be developed rather than *whether* it will be
3 developed and, therefore, differ in nature from the Guidelines. Accordingly, we
4 agree with petitioners that the county was required to enact the Guidelines in
5 accordance with Charter provisions that apply to the adoption and amendment of
6 land use ordinances. As noted, there is no dispute that the county failed to comply
7 with those Charter procedures.

8 Petitioners argue that the county's failure to comply with the Charter
9 procedures for the enactment of land use ordinances prejudiced their substantial
10 rights:

11 "Petitioners were prejudiced by the failure of the County to comply
12 with the County Charter's provisions relating to the adoption of land
13 use ordinances. Specifically, had the County followed the prescribed
14 procedures set forth in the County Charter, the earliest the
15 [Guidelines] could have been adopted would have been mid-
16 February 2021. This would have given Petitioners over two and a
17 half months to have reviewed the proposed rules and provide
18 comment. Instead, the public was given just over two weeks for
19 notice and comment. This rushed timeline for the adoption of the
20 [Guidelines] made it virtually impossible for Petitioners and other
21 members of the public to have the highly technical proposed new
22 rules reviewed by qualified experts." Petition for Review 16.

23 The county does not respond to petitioners' argument or take the position that
24 petitioners' substantial rights were not prejudiced by the county's failure to
25 follow the provisions of the Charter in adopting the Guidelines, and we conclude
26 that petitioners have established such prejudice.

1 The first assignment of error is sustained.

2 **SECOND ASSIGNMENT OF ERROR**

3 In their second assignment of error, petitioners argue that the county's
4 procedure failed to comply with Washington County Rural/Natural Resource
5 Plan Element Policy 2, which provides, in part:

6 "Comprehensive planning requires and depends upon informed
7 citizens and community members. For the plan to reflect the needs
8 and values of the residents of Washington County, public
9 participation is essential. This meaningful involvement is necessary
10 throughout the planning process and is an integral part of the
11 ongoing planning program."

12 ORS 197.835(7)(a) provides that LUBA will reverse or remand an amendment
13 to a land use regulation that is not in compliance with the comprehensive plan.
14 Petitioners argue that the county's procedure in adopting the Guidelines deprived
15 "the public" of the opportunity for meaningful involvement in the adoption of the
16 Guidelines, which petitioners argue are an amendment to the county's land use
17 regulations. Petition for Review 19.

18 The county responds by incorporating its responses to the first assignment
19 of error. However, petitioners' argument in this assignment of error is based not
20 on lack of compliance with the provisions of the Charter but on lack of
21 compliance with the county's comprehensive plan.

22 We conclude above that the Resolution is a "land use ordinance" as defined
23 in the Charter. Amendments to the county's land use regulations, including CDC
24 422, must comply with the county's comprehensive plan. ORS 197.175(2)(b):

1 ORS 197.835(7)(a). Absent any meaningful response to this assignment of error
2 from the county, we agree with petitioners that the county's procedure failed to
3 comply with Policy 2.
4 The second assignment of error is sustained.
5 The county's decision is remanded.