

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

FEB 1 4 39 PM '84

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3 FLOYD MARSH,)
4) Petitioner,)
5) vs.)
6 WASCO COUNTY, a political)
7 subdivision of the State of)
8 Oregon, and ARTHUR WESLEY)
9 PULLEN,)
10) Respondents.)

LUBA No. 83-107
FINAL OPINION
AND ORDER

10 Appeal from Wasco County.

11 Gene E. Parker, The Dalles, filed a petition for review and
12 argued the cause for petitioner. With him on the brief were
13 Heisler & Heisler.

13 Wilford Carey, Hood River, filed a brief for Respondent
14 Wasco County.

14 Meredith D. VanValkenburgh, The Dalles, filed a brief and
15 argued the cause for Respondent Arthur Wesley Pullen. With him
16 on the brief were VanValkenburgh, Coats & Kelly.

16 KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee
17 participated in the decision.

18 REVERSED and REMANDED 02/01/84

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of Oregon Laws
21 1983, ch 827.

1 Opinion by Kressel

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the Wasco County Court. The
4 order imposes certain conditions on the development of a mobile
5 home park by Respondent Pullen.

6 FACTS

7 In August, 1983, Respondent Pullen applied to the Wasco
8 County Planning Commission for approval of a site plan to allow
9 expansion of Foley Lakes Mobile Home Park. In approving the
10 proposal, the planning commission imposed numerous conditions
11 on the development. Among them were two conditions relating to
12 traffic control on Foley Lakes Lane, a principal street serving
13 the site. One required that a 20 mile per hour speed limit be
14 established. The other prohibited the installation of speed
15 bumps.

16 Respondent Pullen appealed the planning commission's
17 decision to the Wasco County Court. The appeal was limited to
18 whether the above-described conditions should be imposed.
19 Petitioner, who resides on property adjacent to the mobile home
20 park and uses Foley Lakes Lane for access to his home, appeared
21 at the hearing and argued in favor of the conditions.
22 Respondent urged the county court to delete the conditions,
23 contending public safety would best be promoted by the
24 allowance of speed bumps and by a lower speed limit.

25 The county court resolved the dispute by modifying the
26 challenged conditions. The final order provided that the

1 property owner would be "allowed to place no more than six (6)
2 speed bumps on the requested road, with a maximum height of
3 three (3) inches, and that the property owner be allowed to
4 post the speed limit of ten (10) miles per hour on said road."

5 Petitioner presents three assignments of error, all
6 relating to the limitations imposed on the use of Foley Lakes
7 Lane.

8 STANDING

9 Respondents' brief challenged petitioner's standing to
10 appeal under 1983 Or Laws, ch 827, §31(3) (codified as ORS
11 197.830(3)). However, at oral argument the challenge was
12 withdrawn.

13 MOTION TO DISMISS

14 Respondents' brief includes a motion to dismiss this appeal
15 under the doctrine of res judicata. We deny the motion for the
16 reasons set forth below.

17 In Marsh v. Pullen, 50 Or App 405, 623 P2d 1078 (1981), rev
18 den, 290 Or 853 (1981), the individual parties to this appeal
19 litigated the question, among others not pertinent here,
20 whether the installation of speed bumps on parts of Foley Lakes
21 Lane obstructed an easement reserved to Marsh. The easement
22 was created in 1912, as part of the settlement of the estate of
23 Abel Marsh. By that settlement, part of a farm known as the
24 Marsh Home Place was sold and became known as the Foley Lakes
25 Property. The easement reserved a right of access to the Marsh
26 Home Place across what is now Foley Lakes Lane. The easement

1 required the purchaser to

2 "...permit the roadway or gateway heretofore used
3 by deceased and his family and the public to remain
4 and to be used as heretofore upon and across the said
5 premises furnishing a means of ingress and egress to
6 and from the main County Road to the Marsh Home Place,
7 until and unless the same shall be changed or vacated
8 in the manner provided by law...." 50 Or App at 407.

9 The Court of Appeals held that speed bumps, if limited in
10 size and placement, would not unreasonably interfere with use
11 of the easement. 50 Or App at 408.

12 Respondent contends that the ruling in Marsh v. Pullen,
13 supra, with respect to the lawfulness of installing speed bumps
14 on Foley Lakes Lane, should be given preclusive effect by this
15 Board. He argues the doctrine of res judicata applies because
16 this case "...concerns the same parties, the same factual
17 issues, the same legal issues, although, these legal issues are
18 now couched in a different context before the Land Use Board of
19 Appeals." Respondents' Motion to Dismiss at 2.

20 The elements of the res judicata doctrine have been stated
21 as follows:

22 "It is settled law in this state, as elsewhere, that a
23 judgment or decree rendered upon the merits is a final
24 and conclusive determination of the rights of the
25 parties, and a bar to a subsequent proceeding between
26 them upon the same claim or cause of suit, not only as
to the matter actually determined, but as to every
other matter which the parties might have litigated
and had decided as incident to or essentially
connected therewith, either as a matter of claim or
defense, but that when the action is upon a different
claim or demand the former judgment can only operate
as a bar or an estoppel as against matters actually
litigated or questions directly in issue in the former
action."

1 Grant v. Yok, 233 Or 491, 494, 378 P2d 962 (1963)
2 (citations omitted).

3 Our application of these elements results in denial of
4 respondents' motion because we find no identity of claims or
5 causes of action when we compare this appeal to Marsh v.
6 Pullen, supra. Indeed, the case before us raises legal and
7 factual issues wholly distinct from those resolved in the prior
8 litigation.

9 The tests of whether two suits are based on the same claim
10 or cause of action for res judicata purposes are (1) whether
11 the second suit is based upon the same transaction as the first
12 and (2) whether the evidence needed to sustain the second suit
13 would have sustained the first. Western Baptist Home Mission
14 Board v. Griggs, 248 Or 204, 433 P2d 252 (1967). The tests are
15 not met here. This appeal concerns the lawfulness of a county
16 court's order in connection with site plan review, a function
17 performed under the county's land use control ordinances. The
18 questions presented concern the county's authority, under those
19 ordinances and related state law, to impose certain traffic
20 control conditions on the proposed development. By contrast,
21 the questions resolved in Marsh v. Pullen, supra, concerned
22 property rights under an easement embodied in a private
23 agreement. The court's ruling in that litigation, and the
24 evidentiary basis for that ruling, related exclusively to the
25 terms of the easement. No zoning questions were presented.

26 Although the same property and the same parties may be

1 involved in this and the prior litigation,¹ there is clear
2 difference between the underlying transactions and the evidence
3 pertinent to each of them. Accordingly, res judicata does not
4 bar this appeal.² The motion to dismiss is denied. Western
5 Baptist Home Mission Board v. Griggs, supra.

6 FIRST ASSIGNMENT OF ERROR

7 Petitioner first contends the county's allowance of speed
8 bumps and the posting of a speed limit on Foley Lakes Lane
9 represents an "improper exercise of jurisdiction." Petition at
10 6. His argument is premised on the idea that although the
11 county's order applies to the entirety of Foley Lakes Lane,
12 only a portion of that lane is within the county's regulatory
13 authority. This is the portion which qualifies as a county
14 road under ORS 368.016(2)(c). According to petitioner, the
15 remainder of Foley Lakes Lane is a "public road" as that term
16 is defined in ORS 368.001(5). He argues that by virtue of
17 another statute, ORS 487.490(1), the state Speed Control Board,
18 rather than the county, has authority over that portion of
19 Foley Lakes Lane.

20 The jurisdictional significance of the dedicated
21 road/public road distinction made by petitioner is explained in
22 his petition as follows:

23 "In its order dated October 26, 1983, the county court
24 authorized Respondent Pullen to place no more than six
25 speed bumps with a maximum height of three inches upon
26 Foley Lakes Lane, and to post a 10 mile per hour speed
limit upon said road. (R-4). The county court did not
specify whether its order applied only to that portion
of Foley Lakes Lane which had been dedicated to the

1 public. In the absence of such a specification, the
2 county court must have assumed that the entire portion
of Foley Lakes Lane was a 'county road' subject to the
county court's authority.

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4 "However, the plat map and site plan map show that
Wasco County had not taken the steps required by ORS
368.016, 368.073, 368,096, and 368.106 to acquire
5 title to the entire portion of Foley Lakes Lane. To
the extent that the county court sought to exercise
6 authority over that portion of Foley Lakes Lane which
does not qualify as a 'county road' under ORS
7 368.001(1), the county court exceeded its jurisdiction
and violated several provisions of the applicable law,
8 including ORS 487.490 and 487.905." Petition at 8-9.

9 We do not accept petitioner's jurisdictional argument.

10 First, assuming petitioner is correct as to the statutory
11 authority of the Speed Control Board, his argument is grounded
12 on an assumption we find unsupported in the record, i.e., that
13 the undedicated length of Foley Lakes Lane is a "public road"
14 under ORS 368.001(5), rather than a private road.

15 The statute defines "public road" as a "...road over which
16 the public has a right of use that is a matter of public
17 record." The sole evidence petitioner relies on to establish
18 Foley Lakes Lane as a "public road" is the easement, quoted at
19 page 4 of this opinion, contained in the 1912 document severing
20 the Foley Lakes Property from the Marsh Home Place. That
21 easement did not create a public right of use of Foley Lakes
22 Lane. Rather, it created (or more precisely, it reserved)
23 private rights - the seller's rights to continue to use certain
24 property for access to the Marsh Home Place. The fact that the
25 easement describes the reserved property as "...the roadway or
26 gateway heretofore used by deceased and his family and the

1 public...." (emphasis added) does not indicate an intent to
2 dedicate the land to the public or to convert the private
3 rights involved into public rights. See, 11 McQuillin, Mun.
4 §33.29(3rd Ed) (1983).

5 Based on the record in this case, we conclude that the
6 undedicated portion of Foley Lakes Lane constitutes a private
7 road. As such, the road was subject to the land use regulatory
8 powers of the Respondent County, including the power to attach
9 reasonable conditions of approval, when it took up Respondent
10 Pullen's proposed site plan. See, ORS 368.106(1), stating that
11 unless otherwise provided by law "...the exercise of
12 governmental powers relating to a road within a county is a
13 matter of county concern." See also, ORS 215.416(4), which
14 allows a county to attach conditions to permit approvals. We
15 find no basis for the conclusion the Speed Control Board,
16 rather than the county, exercised regulatory authority over
17 this road.³

18 Even if our conclusion with reference to the legal status
19 of the undedicated portion of Foley Lakes Lane is incorrect, we
20 nevertheless reject petitioner's jurisdictional argument. This
21 is because the argument invites this Board to assume that the
22 county's order applies to the parts of the road over which the
23 county lacks regulatory authority. This invitation is implicit
24 in petitioner's statement that the order is defective only
25 "[t]o the extent that the county court sought to exercise
26 authority over the portion of Foley Lakes Lane which does not

1 qualify as a county road under ORS 368.001(5)...."
2 Petitioner's Brief at 9. (emphasis added). In other words,
3 petitioner believes that the order would not be defective if it
4 is read to apply to the dedicated portions of the road,⁴ but
5 he asks this Board to invalidate the order because it could be
6 read to apply to other portions of the road.

7 We note that the county's order does not identify or
8 mandate the precise locations for the approved speed control
9 measures. Under these circumstances, we assume that the
10 measures are intended to apply only to lands over which the
11 county could lawfully exercise authority. Petitioner asks us
12 to make a contrary assumption but he provides no supporting
13 authority for his position.

14 Since petitioner maintains that parts of Foley Lakes Lane
15 are subject to county authority with respect to speed control
16 and since the county's order is ambiguous with respect to where
17 the speed control measures may be placed, we decline to declare
18 the order invalid on this ground.

19 In light of the foregoing discussion, the first assignment
20 of error is denied.

21 SECOND ASSIGNMENT OF ERROR

22 Petitioner next urges the Board to remand this case on
23 grounds the county failed to adopt sufficient findings of fact
24 in support of its order. Explanatory findings are required, he
25 contends, because the county's proceeding was quasi-judicial in
26 nature. He criticizes the very general findings adopted by the

1 county as falling short of the standards enunciated in South of
2 Sunnyside Neighborhood League v. Board of County Commissioners
3 of Clackamas County, 280 Or 3, 21, 569 P2d 1063 (1977) and
4 related decisions by this Board.

5 Respondents do not contest the characterization of the
6 decision as quasi-judicial. They meet petitioner's criticism
7 of the findings by making the following points: (1) no findings
8 were required because the reasonableness of the adopted
9 conditions had already been established in prior litigation,
10 (2) no findings were required because no decision was made --
11 the county's order merely "acknowledged" the ruling in Marsh v.
12 Pullen, supra, that speed control measures would be reasonable,
13 and (3) if findings were required, very general findings would
14 be acceptable because petitioner, having been a party to the
15 prior litigation, "...already had a full understanding of the
16 grounds for the county's decision...." Respondent's Brief at
17 5-6.

18 The county adopted the following findings in support of its
19 order:

- 20 "1. Proper notice was given and the hearing held in
21 accordance with procedural rules for
22 administrative actions in Wasco County, Oregon
23 and in conformity with said administrative
24 requirements as set forth in the comprehensive
25 plan and Wasco County's Land Use Ordinances.
- 26 "2. All members of the county court were qualified to
sit as decision makers, after full disclosure was
made and the matter of qualifications was
discussed by the court.
- "3. In making its decision, the court recognizes the

1 procedural and legal requirements of the existing
2 plan and subdivision ordinances and weighed fully
3 each requirement in arriving at its decision."
4 Record at 4.

5 The findings are not adequate to permit review by this
6 Board. Hoffman v. Dupont, 49 Or App 699, 705-706, 621 P2d 63
7 (1980), rev den 290 Or 651 (1981). They contain general
8 recitations that all applicable laws have been followed, rather
9 than the kind of fact-specific statements and justifications
10 which must accompany quasi-judicial land use decisions. South
11 of Sunnyside Neighborhood League v. Board of County
12 Commissioners, supra. They do not explain, as they must, what
13 the county considered to be the relevant evidence and the
14 applicable objectives or policies. Id., 280 Or at 21-23. Nor
15 do they "...describe how or why the proposed action will in
16 fact serve the objectives and policies." Id.⁵

17 We find none of respondents' arguments concerning this
18 assignment of error persuasive. First, the prior adjudication
19 in Marsh v. Pullen, supra, could not excuse the county from the
20 obligation of making specific findings because, as previously
21 noted, the litigation concerned wholly different issues.
22 Indeed, the county was not even a party in the prior case.

23 Second, we cannot accept respondents' contention that the
24 county's order was a mere "acknowledgement" of the ruling in
25 Marsh v. Pullen, supra, and not a decision. Acceptance of that
26 contention would be inconsistent with the terms of the county's
order and would call upon this board to characterize the order

1 as mere surplusage, i.e., a legal nullity. This we decline to
2 do.

3 Finally, we reject the idea that because petitioner was a
4 party in Marsh v. Pullen, supra, and because the county court
5 and petitioner were familiar with the facts and ruling in that
6 case, the county had no duty to explicitly set forth its
7 reasoning in connection with the challenged order. We have
8 already indicated that the legal issues and underlying factual
9 considerations in Marsh v. Pullen, supra, were distinct from
10 the issues involved in this quasi-judicial land use
11 proceeding. As the courts have repeatedly made clear, agency
12 findings are necessary in quasi-judicial cases in order to
13 permit meaningful judicial review. South of Sunnyside
14 Neighborhood League v. Clackamas County, supra, 280 Or at
15 20-23; Green v. Hayward, 275 Or 693, 707, 552 P2d 815 (1970);
16 Home Plate, Inc. v. OLCC, 20 Or App 188, 190, 530 P2d 862
17 (1975). Whether or not members of the county court were
18 influenced by the prior litigation and whether they somehow
19 communicated this in some informal way to petitioner during the
20 county's hearings, is irrelevant to the county's duty to
21 express its findings in a formally adopted written statement.
22 This Board cannot review the order until that duty is carried
23 out.

24 For the reasons outlined above, we agree with petitioner's
25 second assignment of error. This matter must be remanded for
26 further findings by the county. The findings need not be

1 extensive. They must specifically refer to the criteria and
2 standards considered relevant, state the facts relied on in
3 rendering the decision, and explain the justification for the
4 decision based on the criteria, standards and the facts. ORS
5 215.416(7).

6 THIRD ASSIGNMENT OF ERROR

7 Petitioner's final assignment of error is that the
8 challenged order is not supported by substantial evidence. His
9 argument is in two parts. First, he claims there is not
10 substantial evidence to demonstrate the county had regulatory
11 authority over all of Foley Lakes Lane, an argument which
12 echoes the first assignment of error. Second, he contends the
13 record does not contain substantial evidence demonstrating that
14 the particular speed control measures adopted by the county
15 were reasonable and necessary.

16 Our discussion of the first assignment of error is
17 sufficient to resolve the jurisdictional issue raised again
18 here. Suffice it to say, we find enough evidence in the record
19 to justify a conclusion that the undedicated parts of Foley
20 Lakes Lane constitute a private road. Record at 20, 22, and
21 35. As such, the road was subject to the county's regulatory
22 authority to the same extent as the other property included in
23 respondents' permit application.

24 Our disposition of the second assignment of error
25 (inadequate findings) makes it unnecessary to delve deeply into
26 petitioner's last claim. At this point, the argument that

1 there is not substantial evidence the particular speed control
2 measures are reasonable and necessary puts the cart before the
3 horse. Until the county makes findings explaining why the
4 challenged measures were adopted, there is no point in
5 reviewing the record for substantial evidence.

6 Based on the foregoing, we deny the third assignment of
7 error.

8 CONCLUSION

9 In conclusion, the county has a duty to support the
10 challenged order with adequate findings. The findings should
11 cite the criteria governing the decision to impose speed
12 control conditions and the facts about this case deemed
13 pertinent to the cited criteria. The findings should also
14 explain the rationale for the county's conclusion that the
15 permit conditions are necessary in order to satisfy the
16 criteria.

17 The findings referred to above must be supported by
18 evidence a reasonable person would find worthy of belief. If
19 conditions are again attached to the permit, they must be
20 reasonably designed to achieve the public purposes identified
21 in the county's order.

22 Reversed and remanded.

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FOOTNOTES

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Actually, the Respondent County was not a party in the prior litigation. However, this circumstance would not prevent application of res judicata if the other elements were present. See e.g., Erwin v. City of Portland, 23 Or App 734, 738, 543 P2d 695 (1975).

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We note also that this is not a situation in which res judicata should be applied because the issues sought to be adjudicated could have been, but were not raised in the prior suit. See e.g., Gittelsohn v. City of Cannon Beach, 44 Or App 247, 605 P2d 743 (1980). Marsh v. Pullen, supra, was decided two years before the permit application at issue in this proceeding was even filed.

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Even if the Speed Control Board did have regulatory power over the undedicated part of the road, that power would extend only to setting a speed limit. ORS 487.490. The separate question of whether speed bumps should be allowed appears to be reserved to the county. ORS 487.905(1). Thus, petitioner's jurisdictional argument could apply only to the speed limit issue. As noted in our opinion, we reject that argument because the road in question, as far as we can tell from the present record, is a private road.

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We express no opinion as to whether petitioner is correct about this issue. For purposes of this appeal only, we assume the county could authorize installation of speed bumps on a dedicated road.

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We note that the cases which discuss the findings requirement do not involve, as this case does, a decision solely to impose conditions on a land use permit. Respondents do not argue that this factual difference has legal significance. Under the circumstances, we find no

1 basis for departing from the general rule that land use
2 permit decisions must be supported by findings. ORS
3 215.416(7). Where, as here, the sole issue addressed by
4 the governing body and brought to this Board on appeal
5 concerns the validity of conditions of permit approval,
6 findings justifying those conditions must be adopted.
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