

APR 29 4 08 PM '85

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

3	WALLOWA LAKE FOREST	)	
	INDUSTRIES, INC.	)	
4		)	
	Petitioner,	)	LUBA No. 84-097
5		)	
	vs.	)	FINAL OPINION
6		)	AND ORDER
	WALLOWA COUNTY,	)	
7		)	
	Respondent.	)	

9 Appeal from Wallowa County.

10 Leonard B. Netzorg, Portland, filed the Petition for Review  
and argued the cause on behalf of Petitioner Wallowa Lake  
11 Forest Industries, Inc.. With him on the brief were Preston,  
Ellis & Holman.

12 Dale K. Hormann, Salem, filed a brief and argued the cause  
13 on behalf of Intervenor-Petitioner, State of Oregon, Department  
of Transportation, Aeronautics Division.

14 William R. Kirby, Enterprise, filed a brief and argued the  
15 cause on behalf of Intervenors-Petitioners, City of Joseph,  
Herb Owens, Wilbur Cleveland, Doug Tippet and Roger and Judy  
16 Rabourne.

17 D. Rahn Hostetter, Enterprise, filed the response brief and  
argued the cause on behalf of Respondent Wallowa County.

18 Roland W. Johnson, Wallowa, filed the response brief and  
19 argued the cause on behalf of Intervenor-Respondent, City of  
Enterprise.

20 BAGG, Chief Referee; DuBAY, Referee; KRESSEL, Referee;  
21 participated in this decision.

22 AFFIRMED

04/29/85

23  
24 You are entitled to judicial review of this Order.  
Judicial review is governed by the provisions of ORS 197.850.  
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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner and intervenors appeal enactment of a Watershed  
4 Protection Ordinance (WPO) by the Wallowa County Court.<sup>1</sup> The  
5 ordinance controls uses within a watershed protection area  
6 established under the ordinance.

7 FACTS

8 The Watershed Protection Ordinance was enacted on November  
9 7, 1984, and became effective on February 5, 1985. The  
10 ordinance seeks to control residential, agricultural and  
11 industrial and commercial uses which pose a threat to the water  
12 source of the City of Enterprise. The ordinance includes  
13 controls on keeping of domestic livestock, storage of crops,  
14 use and storage of chemicals, and storage of fuels.<sup>2</sup> It  
15 regulates solid waste disposal and other commercial and  
16 industrial uses.

17 Prior to adoption of the ordinance, the county conducted a  
18 study of the water supply for the City of Enterprise.  
19 Information from the State Department of Health, the United  
20 States Environmental Protection Agency and a hydrologist was  
21 used to determine the threats to the city's watershed. From  
22 this information, the county drew the boundaries within which  
23 the ordinance would apply. This area is known as the Watershed  
24 Protection Area (WPA). Petitioner and intervenors have  
25 interests in property within the WPA.  
26

1 ASSIGNMENT OF ERROR No. 1

2 "The Federal Government has pre-empted the regulation  
3 of the activity that the ordinance seeks to regulate.  
4 (P.L. 98-616, 98 Stat. 3221, 3277-86)."

5 Petitioner advises a federal law, the Solid Waste Disposal  
6 Act, as amended by The Hazard and Solid Waste Amendments of  
7 1984 (P.L. 98-616; 98 Stat 3221; 3277-3287), includes new  
8 provisions regulating underground storage tanks of the kind  
9 owned by petitioner. The amended Act applies to storage tanks  
10 which contain petroleum and petroleum products at particular  
11 temperatures and pressures. Petitioner argues the provisions  
12 of the federal Act control use of underground fuel storage  
13 tanks such as those owned and operated by petitioners, and  
14 Wallowa County is therefore precluded from enacting similar  
15 regulations. Petitioner notes, however, that a provision of  
16 the Act advises states and their political subdivisions that  
17 they may adopt and enforce requirements more stringent than  
18 those found in federal law.

19 We find nothing in the federal Act to preclude Wallowa  
20 County from adopting regulations controlling petitioner's  
21 underground storage tanks. The federal law specifically  
22 provides it does not restrict adoption and enforcement of more  
23 stringent requirements by states and political subdivisions,  
24 and there is nothing in the Act that evidences a congressional  
25 intent to pre-empt local legislation. Without expression of a  
26 clear intent in the federal law to pre-empt local legislation,  
we decline to uphold petitioner's claim. Chicago and Northwest

1 Transportation Co. v. Kalo Brick & Tile Co., 450 US 311, 101  
2 Sup Ct 1124, 67 L Ed 2d 258 (1981); Derenco, Inc. v. Benjamin  
3 Franklin Savings and Loan Association, 281 Or 533, 577 P2d 477  
4 (1978), cert denied, 439 US 1051, 99 Sup Ct 733, 58 L Ed 2d 712  
5 (1979).

6 Assignment of Error No. 1 is denied.

7 ASSIGNMENT OF ERROR No. 2

8 "The findings of fact pertaining to and the decision  
9 to include Petitioner's land within the WPA are not  
10 supported by substantial evidence."

11 Petitioner and the Intervenor Oregon State Aeronautics  
12 Division claim the decision to include their property within  
13 the water protection area overlay zone is not supported by  
14 substantial evidence in the record. They explain that the  
15 hydrology report which the county used to draw the boundaries  
16 of the WPA does not establish with certainty underground water  
17 flows make petitioner's underground storage tanks, and certain  
18 facilities at the Joseph State Airport, a potential threat to  
19 the city's water supply. They add the hydrologist admitted he  
20 was unable to predict groundwater flows with certainty.

21 Petitioner points to no authority requiring that a  
22 legislative decision (as here) must be supported by substantial  
23 evidence. In Lima v. Jackson County, 56 Or App 619, 643 P2d  
24 355 (1982) the court noted that in the adoption of legislative  
25 acts,

26 "there has traditionally been no general requirement  
in their adoption process for specific evidence or

1 findings related to the zoning of particular parcels  
2 of land. Consequently, legislative planning and  
3 zoning decisions, as they affect particular parcels,  
4 have not been subject to review for substantial  
5 evidence. See, e.g., Culver v. Dagg, 20 Or App 647,  
6 532 P2d 1127, rev den (1975)."

7 We note that the statute governing our scope of review  
8 authorizes the Board to remand or reverse a decision "not  
9 supported by substantial evidence in the whole record," ORS  
10 197.835(8)(a)(C). However, as the Court of Appeals has said,  
11 the scope of review statute does not itself provide a basis for  
12 a requirement that a legislative decision be supported by  
13 substantial evidence. Lima, 56 Or App at 625.

14 Because petitioner does not cite a basis for a requirement  
15 that this legislative zoning measure be supported by  
16 substantial evidence, we deny the second assignment of error.<sup>3</sup>

#### 17 REMAINING ASSIGNMENTS OF ERROR

18 The petition of the City of Joseph, et al, Intervenors,  
19 raises additional issues. For convenience, these arguments  
20 will be discussed as Assignment of Error No. 3.

#### 21 ASSIGNMENT OF ERROR No. 3

22 "It [the ordinance] is in contravention of the  
23 directives of the Wallowa County Land Use Plan;"

24 "A. The ordinance violates the directives and  
25 findings of the Wallowa County Land Use Plan."

26 Intervenors list several policies in the county land use  
plan relating to groundwater resources and municipal water  
supplies.<sup>4</sup> Intervenors claim these policies, which require

1 consideration of water resources in planning activities, are  
2 controlled by particular findings in the plan. Intervenor  
3 claim these findings prohibit the county from proceeding with  
4 an ordinance such as the one on review. The findings state:

5 "4. That D.E.Q. is responsible for monitoring most  
6 resource quality through their control of air and  
7 water emissions, solid waste disposal site  
8 regulations, and subsurface sewage disposal  
9 systems.

8 "5. That the County has neither the expertise nor the  
9 funds to assume any additional regulation of  
10 resource quality."

10 This argument is unpersuasive. The plan does not indicate  
11 these legislative findings are intended to carry the force of  
12 binding policies or goals and we are reluctant to imply such a  
13 result. Further, even if plan findings could be considered  
14 legally binding, these findings do not prohibit any action,  
15 they simply recognize DEQ's responsibility and the county's  
16 present lack of funds and expertise. We conclude Wallowa  
17 County's legislative authority is not restricted by  
18 declarations in these findings.

19 "B. The Wallowa County Land Use Plan does not make  
20 any statement of a contemplated 'overlay' or  
21 'floating' zone as to the area covered by the WPA."

21 In this subassignment of error, intervenors argue there  
22 must be some kind of authorization for the enactment of an  
23 "overlay" zone.<sup>5</sup> Intervenor do not find authorization for  
24 an overlay zone in the county plan or ordinances, and therefore  
25 claim the overlay is impermissible.

26 This claim also is not persuasive. We are cited by

1 intervenors to nothing in law or the county's plan or ordinance  
2 that prohibits the county from adopting land use controls, such  
3 as the overlay zone, which could affect individual zones within  
4 the county.

5 "C. The ordinance is vague insofar as enforcement is  
6 concerned and unlawfully delegates power to prosecute."

7 Intervenor's next challenge is difficult to understand.  
8 They begin by advising that the challenged ordinance makes  
9 violation of its terms a public nuisance. They note the zoning  
10 ordinance to which the new ordinance is added, also includes a  
11 provision which declares a violation of the ordinance to be a  
12 nuisance and promotes penalties for violations. Wallowa  
13 County Zoning Ordinance, §1.130. The challenged ordinance also  
14 permits enforcement by private persons.

15 Given these several provisions, intervenors conclude the  
16 ordinance impermissibly mixes civil and criminal penalties.  
17 However, they do not support this conclusion with legal  
18 authority, and we decline to speculate on the underlying nature  
19 of their complaint.

20 Because individual citizens, and not just the county, may  
21 enforce the ordinances against violators, intervenors also  
22 complain the ordinance is impermissible. Again, however,  
23 intervenors do not explain what legal impediment exists to this  
24 enforcement scheme. The fact the ordinance provides for  
25 various remedies which may be invoked by the county and by  
26 individual citizens does not invalidate the ordinance. See

1 Columbia Fishermen's Union v. St. Helens, 160 Or 654, 87 P2d  
2 195 (1939).

3 Without some explanation of how the enforcement provisions  
4 invalidate the ordinance, we are unable to sustain intervenors'  
5 challenge.

6 "D. The ordinance enacts additional restrictions in  
7 violation of the county land use plan. It is spot  
8 zoning and invalid."

9 Intervenor make two arguments. First, intervenors recite  
10 that during the course of events leading to adoption of the  
11 Watershed Protection Ordinance, objections to adoption were  
12 made by a number of individuals and entities. Intervenor then  
13 make the following statement:

14 "Because the directives of the land use plan have been  
15 ignored by the county governing body, this ordinance  
16 constitutes 'spot zoning' purely and simply in favor  
of an individual municipality. Procedural portions of  
the county ordinance allow City of Enterprise  
participation as follows:

17 "1. Section 3.735(9) gives authority to the City of  
18 Enterprise to enter upon private land as a  
prerequisite of the granting of a permit;

19 "2. Section 3.780 states special provisions allowing  
20 notice to the City of Enterprise to the exclusion  
of all others;

21 "3. Section 3.780 presumes to give the City of  
22 Enterprise special standing to appeal to the  
exclusion of others;

23 "4. Section 7.735(7) allows the City prosecutorial  
24 power under the ordinance as discussed supra."

25 Intervenor conclude by claiming the ordinance constitutes  
26 a taking of property without due process of law because it

1 unduly and unfairly imposes additional restrictions upon them.

2 In their first argument, we understand intervenors to argue  
3 that the county has made a decision solely for the benefit of  
4 the City of Enterprise and contrary to all the substantive  
5 requirements of the county's ordinance. This constitutes  
6 invalid arbitrary or "spot zoning," according to intervenors.

7 The basis for invalidating spot zoning has been described  
8 as follows:

9 "Arbitrary, or spot zoning to accommodate the desires  
10 of a particular land owner is not only contrary to  
11 good zoning practice, but violates the rights of  
12 neighboring land owners and is contrary to the intent  
13 of the enabling legislation which contemplates planned  
14 zoning based upon the welfare of an entire  
15 neighborhood." Anderson, American Law of Zoning,  
16 §5.09 (2Ed, 1976) quoting Smith v. Washington County,  
17 241 Or 380, 406 P2d 545 (1965).

18 We find no such circumstance in this case. As described  
19 above, the ordinance is designed to protect a public water  
20 supply, not to benefit solely private economic interests.  
21 Also, there is no violation of the county's comprehensive  
22 plan. The record shows the county to have considered evidence  
23 both for and against the ordinance and its various provisions.  
24 There is nothing in the record to suggest the county acted  
25 arbitrarily or without regard for the welfare of the persons  
26 and entitites affected.

27 Intervenor's second complaint, that the ordinance  
28 constitutes an unconstitutional taking of property without just  
29 compensation, cannot be upheld. In Oregon, a finding that  
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1 property has been taken without just compensation requires a  
2 showing that the landowner

3 "(1)...is precluded from all economically feasible  
4 private uses pending eventual taking for public use;  
5 or (2) the designation results in such governmental  
6 intrusion as to inflict virtually irreversible  
7 damage." Fifth Avenue Corporation v. Washington, 282  
8 Or 591, 614, 581 P2d 50 (1978).

9 No such showing has been made here.

10 The decision of Wallowa County is affirmed.

FOOTNOTES

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The City of Joseph, Doug Tippet, Roger and Judy Rabourne, Wilbur Cleveland and Herb Owens, filed notices of intent to participate in this review proceeding. No objection was made to their participation, and we treat them as intervenors under ORS 197.830(5). See OAR 661-10-020 and OAR 661-10-050.

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Section 3.735 of the ordinance controls fuel storage. Fuel subject to the ordinance includes any petroleum distillate. Fuel storage, above or underground, is prohibited within 1,000 feet of the spring serving the City of Enterprise. Of particular importance to the parties in this case are controls on underground storage in amounts exceeding 500 gallons. Underground fuel storage in amounts exceeding 500 gallons is made a conditional use and requires the applicant to show that there is a need which may not reasonably be satisfied by storage outside the Watershed Protection Area; there is a need for storage in amounts exceeding 500 gallons which cannot be met by methods not restricted by the ordinance; and, there must be a finding that in the event of a spill or leak, such spill or leak will not create "a material risk" of adverse affect on the City of Enterprise water supply.

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But see statewide planning Goal 2 which calls for a "factual base" for land use decisions. See also Gruber v. Lincoln County, 2 Or LUBA 180 (1981).

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"POLICY 8, PAGE 45:

"That any proposed development adjacent to municipal watersheds be subject to the affected town's review.

22 "POLICY 2, PAGE 48:

"That partitioning, subdividing, or other development not be approved which exceeds the carrying capacity of an area's air, land, or water resources.

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"POLICY 6, PAGE 48:

"That municipalities be notified of any proposed development in the general proximity of their watersheds.

"ADDENDUM ITEM 11 (C):

"As the information and assistance from affected State and Federal agencies becomes available, include in the support through the Plan water resource information and policies to provide long-range guidelines."

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Typically, an "overlay" applies additional restrictions on conditional uses in certain geographical areas of a jurisdiction or when other triggering conditions are met. Overlays are also used to permit additional uses in particular zones within a jurisdiction. See, for example, Auckland v. Board of Commissioners of Multnomah County, 21 Or App 596, 536 P2d 444 (1975) and Franklin v. Lake Oswego, 267 Or 452, 517 P2d 1042 (1973).