

LAND USE
BOARD OF APPEALS

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

MAR 18 10 48 AM '82

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2
3 KEN CALE, DOROTHY CALE,
DOLO CUTTER, JAMES SAUL
4 and MARY WATERMAN,

5 Petitioners,

6 vs.

7 DESCHUTES COUNTY and
CITY OF BEND,

8 Respondent.

)
)
)
)
) LUBA NO. 81-018

)
) FINAL OPINION
) AND ORDER

9 Appeal from Deschutes County.

10 Daniel E. Van Vactor, Bend, filed a petition for review and
11 argued the cause for petitioners. With him on the brief were
Van Vactor, Francis & Martin.

12 Richard L. Isham, Bend, filed a brief and argued the cause
13 for Respondent Deschutes County.

14 Ronald L. Marceau, Bend, filed a brief and argued the cause
15 for Respondent City of Bend. With him on the brief were
Johnson, Marceau, Karnopp & Petersen.

16 Bagg, Referee; Reynolds, Chief Referee; Cox, Referee;
participated in the decision.

17 Affirmed.

3/18/82

18 You are entitled to judicial review of this Order.
19 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a).
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1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioners appeal Deschutes County Ordinance PL-80-222.

4 The ordinance is an amendment to the Deschutes County
5 Comprehensive Plan. The ordinance amends Transportation Policy
6 No. 24 and takes an exception to the application of Goal 3 to
7 certain property in Deschutes County.

8 FACTS

9 The Deschutes County Comprehensive plan was adopted on
10 November 1, 1979. The following year, the county attempted to
11 take a Goal 2 exception to the agricultural lands goal, Goal 3,
12 for certain property around the Bend airport. In Cale v.
13 Deschutes County, 1 Or LUBA 329 (1980), the attempted exception
14 was invalidated. Ordinance PL-80-222 was adopted on January
15 20, 1981 and, among other actions, excepted Bend airport
16 property from the requirements of Goal 3. The specific
17 property excepted is described as Tax Lots 200 and 300 of
18 Section 20, Township 17 South, Range 13 East of the Willamette
19 Meridian, and Tax Lot 200, Section 17, Township 17 South, Range
20 3 East of the Willamette Meridian all in Deschutes County,
21 Oregon. The exception was taken on the basis of the four
22 exception criteria in Goal 2 and on the ground that the
23 property is "committed" to non-resource uses.

24 In addition to the exception to Goal 3, the ordinance
25 recognized two day/night sound level contour lines. These
26 "Ldn" lines firstly delineate property subject to substantial

1 noise impacts (the Ldn 65 contour line) and secondly recognize
2 a moderate noise impact area, the Ldn 55 contour line.
3 Property within the Ldn 65 contour line is described in the
4 ordinance as "committed" for airport purposes, but the
5 ordinance provides that at such time as the property is to be
6 developed for airport purposes, an exception to Goal 3 will be
7 taken, and the property will be available to be rezoned for
8 airport development (the Airport Development zone or A-D
9 zone). The ordinance further states a showing of public need
10 must be made before the property may be developed. The
11 ordinance restricts uses within the Ldn 65 boundary to those
12 that do not conflict with airport uses.

13 The ordinance mentions the Bend Municipal Airport Plan as a
14 guide for development, but the ordinance states that the Bend
15 Municipal Airport Plan is not adopted as a part of the
16 Deschutes County Comprehensive Plan. Ordinance PL-80-222 is
17 attached herein as Exhibit A. The findings in support of the
18 exception are not attached but appear in the record.

19 The Land Conservation and Development Commission
20 acknowledged the Deschutes County Comprehensive Plan, Ordinance
21 PL-80-222 and all implementing ordinances as being in
22 compliance with Statewide Land Use Planning Goals on May 11,
23 1981.¹ The acknowledgment order includes portions of the
24 staff report of April 30, 1981. The staff report chronicles
25 part of the controversy over the Bend airport and notes county
26 responses to criticisms of the earlier attempted exception to

1 the Bend airport property.

2 "Additional Requirement:

3 "In September 1980, LUBA and the Commission issued a
4 decision in Cale v. Deschutes (LUBA No. 80-016 and
5 80-030). The decision found that the County's
6 exception for the Bend Airport was not adequate
7 because it did not examine the compatibility of the
8 airport and its proposed expansion with adjacent
9 lands. LUBA found that Goals 11 and 12 also needed to
10 be more fully addressed.

11 "County Response:

12 "Deschutes County has adopted a new Transportation
13 Policy to its plan and an exception to Goal 3
14 (Ordinance No. 80-222). The policy incorporates the
15 Bend Municipal Airport Master Plan into the
16 comprehensive plan and references the adopted
17 exception.

18 "The exception statement includes findings and reasons
19 on why Deschutes County believes the airport property
20 (340 acres) is built and committed to nonfarm uses and
21 thus it is not possible to apply Goal 3. Besides the
22 land actually built on with runways, hangers and other
23 buildings, the majority of the remaining airport
24 property is within the Ldn 65+ noise contour. Land
25 within the Ldn 65+ noise contour is considered a
26 substantial noise impact area where only airport
related uses should be allowed and is committed as a
buffer to airport usage. Areas adjacent to the
airport are zoned for farm use and the exceptions
statement finds that growth at the airport and
increased noise levels are compatible with nearby
agricultural uses (Attachment 1). Livestock
operations would be the most sensitive to noise
impacts but the statement finds that there are 'no
commercial poultry, rabbit or mink producers' in the
area (Statement p. 13).

"The statement also finds that adequate facilities are
available and the airport is part of the County's
overall transportation plan as required by Goals 11
and 12.

24 "Conclusion: Deschutes County complies with Goal 3
25 for the following reasons:

26 "The County's four EFU zones are now consistent with

1 ORS Ch. 215. Amendments were adopted which apply the
2 required review standards in ORS 215.213 to nonfarm
3 dwellings. The minimum lot sizes used are consistent
4 with the predominate size of lots and farm units for
various areas of the County and are considered
'appropriate for the continuation of the existing
commercial agricultural enterprise' in these areas.

5 "The new plan policy ensures that a change of EFU
6 zoning to a nonresource zone requires a plan amendment
7 and thus an exception to Goal 3 will be required when
changing the plan designation from 'agriculture' to a
nonresource designation.

8 "Deschutes County's exception statement presents
9 compelling reasons and facts to demonstrate that all
10 340 acres of the Bend Municipal Airport is built upon
and committed to such uses and that it is not possible
to apply Goal 3 to it." LCDRC Staff Summary and
Recommendations of April 30, 1981, pp. 3-4.

11
12 ASSIGNMENTS OF ERROR AND MOTION TO DISMISS

13 Our review of this case is complicated somewhat by
14 petitioners' characterization of the land use decision under
15 review. The notice of intent to appeal filed herein correctly
16 describes Ordinance PL-80-222 as an ordinance that amends the
17 Deschutes County Comprehensive Plan as follows:

- 18 "1. Transportation Policy No. 24;
19 "2. The Exception to agricultural lands to include
the Bend Municipal Airport Exceptions Statement;
20 "3. The Bend Exception Map as amended; and
"4. The map adopted to identify those lands committed
21 to Airport uses." LUBA No. 81-018, Notice of
Intent to Appeal.

22 In the petition for review, petitioners described the order
23 from which they "seek relief" as "the land use element of the
24 Bend Airport Master Plan * * * *" Petition for Review at 1.
25 Petitioners apparent reason for characterizing Ordinance
26 PL-80-222 as something other than an amendment to the

1 transportation element of the Deschutes County Comprehensive
2 Plan and a Goal 2 exception for certain property is
3 petitioners' belief that the ordinance adopts the Bend Airport
4 Master Plan and gives it the full force of the Deschutes County
5 Comprehensive Plan. Petitioners are in error. As noted above
6 and as can be seen from the ordinance itself (see Exhibit A),
7 the Bend Airport Master Plan is specifically not adopted but is
8 recognized as a guide for development.

9 We do not believe we can review the Bend Airport Master
10 Plan as though it is an adopted element of the Deschutes County
11 Comprehensive Plan in direct contravention of the terms of
12 Ordinance P1-80-222. Additionally, as the Deschutes County
13 Comprehensive Plan has been acknowledged by the Land
14 Conservation and Development Commission as being in compliance
15 with all Statewide Land Use Planning Goals, we do not believe
16 we may compare and contrast conflicting or potentially
17 conflicting portions of the Bend Airport Master Plan with the
18 Deschutes County Comprehensive Plan. Statewide Planning Goal 2
19 requires that the plans of any county "shall be consistent with
20 the comprehensive plans of cities * * * *" to the extent that
21 petitioners may perceive inconsistencies between the two plans,
22 LCDC has apparently either not seen such inconsistencies or
23 does not believe they are relevant. In other words, LCDC's
24 acknowledgment of the Deschutes County Comprehensive Plan as
25 being in compliance with Goal 2 precludes our review of any
26 "consistency" issues between the two plans. Even if we

1 were to treat the Bend Airport Master Plan as an adopted
2 portion of the Deschutes County Comprehensive Plan, the use of
3 the Master Plan is to guide (control?) future development.
4 When future development is authorized by the county, any
5 inconsistencies between the Master Plan and the Comprehensive
6 Plan may be resolved or made the subject of an appeal. ²

7 Petitioners divide their petition for review into two
8 portions. Petitioners have a number of what they describe as
9 "NON-GOAL VIOLATIONS," and petitioners also request review of a
10 number of what they call "GOAL VIOLATIONS." We will discuss
11 goal violations first. Our discussion shall constitute an
12 order granting, in part, the motion of the City of Bend to
13 dismiss the case for the reasons that "LCDC's order dated May
14 11, 1981 acknowledging the Deschutes County Comprehensive Plan
15 and implementing measures relieves this Board of its
16 jurisdiction to review petitioners' issues on appeal." Motion
17 to Dismiss of Participant City of Bend. ³

18 Petitioners' allgations of goal violations are as follows:

19 "A. Issue: Petitioners, Cale, et al., were denied
20 their right to citizen involvement in the
21 preparation and adoption of the 'Land Use
22 Element' of the 'Bend Airport Master
23 Plan'."

22 "B. Issue: Respondent's finding that the proposed
23 uses will be compatible with other
24 adjacent uses is not supported by
25 substantial evidence."⁴

24 "Issue: Economic considerations are not
25 sufficient justification for satisfying
26 the Goal 2 requirement of alternative
27 locations."

1 "Issue: Failure to prove the elimination of
2 alternative sites within the Bend Urban
3 Growth Boundary was error, and violated
4 Goal No. 2."⁵

5 "Issue: Goal 2 Exception - consequences, effects
6 on other goals.

7 "C. Issue: Does the expansion authorized by the land
8 use element of the Bend Airport Master
9 Plan violate Goal 3's objective to
10 preserve and maintain agricultural lands?"

11 "D. Issue: Did the Respondent fail to comply with
12 Goal 5 by not balancing the expanded
13 airport use with the existing natural and
14 scenic resources."

15 "E. Issue: Does the Land Use Element of the Bend
16 Airport Master Plan violate Goal No. 11?"

17 "F. Issue: Does the Land Use Element of the Bend
18 Airport Master Plan violate the
19 transportation goal?"

20 "G. Issue: Rural lands are not available for
21 non-resource employment uses."⁶

22 "H. Issue: Failure to make findings."⁷

23 In response to the city's motion for dismissal, the
24 petitioners assert the following as reasons why the motion
25 should not be granted:

26 "1. Participating party was aware of LCDC's
27 order of May 11, 1981 prior to December 14, 1981.

28 "2. Participating party failed to raise their
29 motion in a timely fashion as required by LUBA Rule
30 14(B).

31 "3. Deschutes County Ordinance No.'s 81-017 and
32 81-018, to have been considered in the acknowledgment
33 process, had to be received by LCDC when the record
34 was deemed complete on October 10, 1981. ORS 197, and
35 OAR 660-010 and 660-020.

1 "4. The review by LCDC of the Ordinances did not
2 include a review of the record of the hearing record
3 on 81-017 and 81-018 as required. ORS 197, and OAR
4 660-010 and 660-020.

5 "5. The public was not allowed an opportunity to
6 review 81-017 and 81-018 because they were not timely
7 filed as part of the acknowledgment record when it was
8 deemed complete. Said action prejudiced Petitioners'
9 legal rights. ORS 197 and OAR 660-010 and 660-020.

10 "Petitioners move the Court for a special
11 evidentiary hearing to determine whether LCDC propely
12 [sic] complied with ORS 197 an OAR 660-010 and 660-020
13 in acknowledging 81-017 and 81-018." Petitioner's
14 Motion to Quash Participating Party's Motion to
15 Dismiss and Request for Special Evidentiary Hearing.

16 We believe petitioners' arguments as to why this Board has
17 the power to review Ordinance PL-80-222 for compliance with
18 Statewide Goals to be unconvincing.⁸ Petitioners' points in
19 response to the motion are better raised in proceeding before
20 the Court of Appeals to challenge the LCDC acknowledgment
21 order. See ORS 197.650. This Board has no power to second
22 guess an LCDC acknowledgment or to consider whether the Land
23 Conservation and Development Commission properly followed its
24 own goals, as petitioners would have us do in a request for an
25 evidentiary hearing, supra. If the acknowledgment of the
26 Deschutes County Comprehensive Plan (and in particular, this
27 ordinance) is defective, that ruling must come from an
28 appropriate reviewing court and not this Board.

29 The Board's authority to take actions affecting a prior
30 acknowledgment was discussed in Fujimoto v. Land Use Board of
31 Appeals, 52 Or App 875, 630 P2d 364 (1981), and in that case
32 the court stated that "it was not part of the statutory scheme

1 for LUBA to have power to second guess acknowledgment." 52 Or
2 App at 878. Indeed,

3 "LUBA has no appellate function from LCDC and it has
4 no advisory function to LCDC except in the narrow
5 context of Section 6 of the 1979 Act. [1979 Oregon
6 Laws, ch 772, sec 6] Whether this proceeding was
7 rendered 'moot' by the acknowledgment or whether LUBA
8 was simply ousted of jurisdiction is, in this
9 instance, an irrelevant matter of semantics. It
10 simply had no function to perform." Fujimoto, 52 Or
11 App at 879.

12 Additionally, and with respect to each of the alleged goal
13 violations, the petitioners are attacking an alleged adoption
14 of the Bend Airport Master Plan or provisions within the plan
15 controlling airport development. Throughout, the petitioners
16 assume that development is "authorized" by the land use action
17 under appeal. As explained above, no such development is
18 authorized by PL-80-222. By its terms, the ordinance only
19 takes an exception for certain property and amends the
20 transportation element of the Deschutes County Comprehensive
21 Plan. The ordinance quite clearly states that development will
22 occur in the "AD" zone only after a need is shown, an exception
23 is taken and the AD zone is actually applied to property. See
24 Ordinance PL-80-222 in Exhibit A attached. Respondent
25 Deschutes County also explains in its brief that the placement
26 of the AD zone on lands contiguous to the airport will occur
"when there is a showing that there is a need for such
properties to be re-zoned and the appropriate exception
taken." Brief of Respondent Deschutes County at 6. The
commission has acknowledged Ordinance PL-80-222 as being in

1 compliance with Goal 3, as well as other goals, and it is
2 beyond this Board's authority to hear complaints regarding
3 compliance with Statewide Goals directed against the
4 ordinance. The motion to dismiss is granted as to allegations
5 of violations of Statewide Land Use Planning Goals.

6 NON-GOAL ISSUES

7 The first of petitioners' "NON-GOAL VIOLATIONS" is:

8 "A. Issue: Violation of LUBA Opinion 80-016 and
9 80-030."⁹

10 The petitioners argument is as follows:

11 "LUBA Order 80-016 and 80-030 reversed Deschutes
12 County's action and held there was no commitment for
13 presently undeveloped lands in the vicinity of the
14 Bend Airport. (Transcript p. 159 line 107) The
15 Respondent's plan amendment does not include adjacent
16 contiguous lands in the airport overlay zone as
17 required by the LUBA Order."

18 We understand petitioners to be complaining that the case
19 under review does not take an exception large enough to comply
20 with what petitioners understand to be the terms of our order
21 in the earlier Cale cases.

22 The respondent states that the Land Conservation and
23 Development Commission acknowledged the Deschutes County
24 Comprehensive Plan. Any complaint as to the attempted
25 exceptions in LUBA Cases No. 80-016 and 80-030 no longer
26 apply.

27 We understand the ordinance under review here to be a new
28 land use action entirely. The attempted acknowledgment that
29 was the subject of LUBA Cases 80-016 and 80-030 (1 Or LUBA 329

1 (1980)) was not precisely reenacted in Ordinance PL-80-222; and
2 even if they were, the acknowledgment by the Land Conservation
3 and Development Commission of the Deschutes County
4 Comprehensive Plan including this ordinance renders our order
5 in the earlier Cale case and petitioners' reliance on it of
6 little relevance to this case. Also, references to an airport
7 overlay zone utilized by Deschutes County in the older Cale
8 case is no longer a factor in this case. Deschutes County has
9 approached the Bend airport in a different manner in the
10 instant proceeding, and it certainly is entitled to do so.
11 LUBA orders should not be taken to be a direction to local
12 governments as to how to zone the property or what property to
13 include within the zone. Such a decision is a local decision
14 subject to state land use laws and standards as well as the
15 standards in the county's own plan. Here, application of an
16 overlay zone or an "Airport Development" (AD) zone has not
17 occurred, and there is no error in Deschutes County choosing
18 not to apply it at this time. Application of the AD zone and
19 development of property around the airport will occur when a
20 need is shown. See Ordinance PL-80-222.

21 The next assignment of error states:

22 "B. Issue: Respondent Deschutes County, in its
23 approval of the land use action, violated
24 the following elements of the Deschutes
25 County Comprehensive Plan, Deschutes
26 County Ordinance PL-20:

- "1. Agricultural Lands
- "2. Rural Development
- "3. Public Facilities

1 "4. Transportation
2 "5. Urbanization"

3 Petitioners attack Ordinance PL-80-222 as being in
4 violation of the above quoted five elements of the Deschutes
5 County Comprehensive Plan. The Plan requires that all goals
6 meeting the definition of agricultural land containing Goal 3
7 are to be zoned for exclusive farm use unless an exception is
8 taken. The petitioners claim the exception for the Bend
9 airport does not demonstrate compatibility with adjacent lands,
10 and it contemplates non-agricultural use on agricultural land.
11 Such non-agricultural uses violate the Deschutes County Plan,
12 say petitioners.

13 The rural development portion of the plan requires
14 preservation of open spaces, rural character and scenic values
15 and the natural resources of the county. Petitioners claim
16 that the rural development portion of the plan is designed to
17 maintain the status quo. Petitioners characterize the airport
18 as a non-conforming use in a rural setting, and they state any
19 expansion of the facility violates the comprehensive plan.
20 Petitioners again reference the earlier Cale case and claim
21 that the "commitment at the Bend Municipal Airport has been
22 found insufficient to justify any further expansion of the
23 facility by the Order of the Land Use Board of Appeals."

24 The petitioners claim the public facilities element of the
25 plan is violated because the plan requires that adequate
26 services be present before urban development occurs, and

1 services are inadequate at the Bend Municipal Airport.
2 Additionally, petitioners quote a number of requirements in the
3 public facilities element of the plan controlling new
4 development.¹⁰ These provisions cannot be met at the
5 airport, according to petitioners. The petitioners' point
6 appears to be that any future expansion of the airport pursuant
7 to the Bend Municipal Airport Plan will violate these
8 provisions in the Deschutes County Comprehensive Plan.

9 Petitioners assert the transportation element of the
10 Deschutes County Comprehensive Plan is broken because policy 8
11 of the transportation element of the plan requires that

12 "[a]ll new transportation facilities, construction, and
13 particularly new roadways shall consider:

14 "A. Environmental impact,

15 "B. reduction of traffic generated noise,

16 "C. minimal disruption of land uses and social
17 patterns,

18 "D. retention and recovery of scenic qualities,

19 "E. reduction of accesses to adjacent property along
20 roadways,

21 "F. increased safety,

22 "G. public review,

23 "H. non-motorized facilities, and

24 "I. cost effectiveness."

25 The petitioners claim the Bend Municipal Airport Master Plan
26 does not consider these issues.

27 At this point in their petition, petitioners depart from
28 their early claim that Ordinance PL-80-222 adopts the Bend
29 Airport Master Plan. Petitioners here appear to acknowledge
30 that the Bend Airport Master Plan was not adopted by the
31 Deschutes County governing body. The petitioners then cite
32 Policy 26 of the transportation element of the plan requiring

1 that any land use decisions regarding airports in the county
2 that do not have master plans must be based on compatibility
3 planning as recommended by the Oregon Department of
4 Transportation Aeronautics Division. Petitioners claim that
5 the Airport Master Plan does not follow Aeronautics Division
6 guidelines. Finally, under the transportation section,
7 petitioners complain that a requirement in the transportation
8 element that nets be placed over water and sewage ponds within
9 12,000 feet of a runway are incompatible with agricultural
10 uses.

11 Lastly, in this assignment, the petitioners attack the
12 ordinance as being in violation of the urbanization element of
13 the comprehensive plan. Petitioners major complaint is a
14 belief that improper transition is provided between the airport
15 as an urban use, and surrounding rural uses.

16 The respondents characterize this assignment of error as
17 "confusing." We understand the respondents to view the
18 petitioners' attacks as attacks rooted in Statewide Land Use
19 Planning Goals. We agree with respondents that the petitioners
20 are using portions of the Deschutes County Comprehensive Plan
21 having foundation in Statewide Land Use Goals as a basis to
22 attack Ordinance PL-80-222. As such, we can agree with
23 respondents when respondents claim that "goal issues raised as
24 to the comprehensive plan are moot" under the holding in
25 Fujimoto, supra.

26 All of the cited elements of the Deschutes County

1 Comprehensive Plan have as their purpose compliance with the
2 respective statewide land use planning goals. "Agricultural
3 Lands" is controlled by Statewide Goal 3; "Rural Development"
4 is controlled by Goals 3, 5, and 14 primarily with other goals
5 having additional relevance; "Public Facilities" is controlled
6 by Statewide Planning Goal 11; "Transportation" is controlled
7 by Statewide Planning Goal 12; and "Urbanization" is controlled
8 by Statewide Planning Goal 14. Where the Land Conservation and
9 Development Commission has found the Deschutes County
10 Comprehensive Plan to be in compliance with those goals, we do
11 not believe it is possible for us to hold that ordinance
12 PL-80-222, as an acknowledged portion of an acknowledged plan,
13 is in violation with other portions of the plan. That is, as
14 the whole of the Deschutes County Comprehensive Plan was
15 acknowledged for compliance with each of the goals, the plan is
16 not viewed by the Commission to be in conflict with itself.
17 Further, LCDC Statewide Goal 2 requires that land use plans
18 take into consideration "social, economic, energy and
19 environmental needs." The plans are to be "coordinated" as
20 that term is defined in ORS 197.015(5).¹¹ Without such
21 coordination and without meeting the definition of the
22 comprehensive plan contained in that same statute, a plan can
23 not be acknowledged as meeting Goal 2. Goal 2 requires that
24 plans be the bases for specific implementation measures and the
25 measures must be consistent with the plan. We simply do not
26 believe it possible for a comprehensive plan to be acknowledged

1 by the Commission as to Goal 2 and be at war with itself at the
2 same time.¹²

3 We are mindful that petitioners are arguing that there are
4 inconsistent provisions between the Bend Airport Master Plan
5 and the Deschutes County Comprehensive Plan. However, to the
6 degree that this stated "guide" is inconsistent with the master
7 document, the guide must fall. The Comprehensive Plan as the
8 major document must control the "guide." Also, the terms of
9 the acknowledgment requiring, as does the plan, goal exception
10 for further impact development, protects agricultural land and
11 uses near the airport. The county itself recognizes that
12 development of the property (and the application of the AD
13 zone) will require a showing of need and further exceptions.
14 See Ordinance PL-80-222 and Respondent's Brief at 6. Though we
15 can recognize the existence of petitioners' fears, we do not
16 believe they are sufficient reasons for us to remand this
17 decision.¹³

18 "C. Issue: There is not substantial evidence to
19 support the Findings identified herein."

20 Petitioners attack several findings as being unsupported by
21 substantial evidence in the record. At first, it seems that
22 this assignment of error is based on a requirement that land
23 use decisions be supported by substantial evidence and is not
24 rooted in Goal 2. Under Oregon Laws 1979, ch 772, sec
25 5(4)(a)(C), we may overturn the decision if it is not based on
26 substantial evidence. However, the findings are those

1 contained in the exception and required by Goal 2.¹⁴ We view
2 petitioners' attack to be one directed at a goal rather than a
3 non-goal issue. A non-goal issue is an issue which exists
4 independently of the goals. Petitioners here attack findings
5 because they lack substantial evidentiary support, yet the
6 findings attacked are required only by Goal 2, not by some
7 independent requirement. Whether the findings are adequately
8 supported by evidence in the record is only an issue because
9 Goal 2 requires that the findings be made. The attack on the
10 findings is, therefore, a goal issue which we are unable to
11 review given acknowledgment of the exception.

12 Although petitioners claim that their attack on these
13 findings is a "non-goal violation," in reality the attack is
14 against the exception, a decision finding its basis exclusively
15 in Statewide Planning Goals and a decision that has already
16 been reviewed and found adequate.¹⁵

17 "D. Issue: Failure to follow procedure."

18 Petitioners here argue that respondents prejudiced
19 petitioners' rights by not allowing cross examination of
20 respondents' witnesses. Petitioners cite a portion of the
21 Deschutes County Ordinance PL-9 which allows cross-examination
22 of witnesses. Additionally, petitioners complain that after
23 the hearing was closed and evidence received, a memorandum from
24 John Andersen, Deschutes County Planning Director, was received
25 by the Board of Commissioners and considered by them. No copy
26 was provided to petitioners' counsel.

1 Respondent explains that the hearing about this ordinance
2 lasted for many hours. Respondent states that one of the
3 witnesses who testified in the morning did not return in the
4 afternoon, and none of the witnesses were under subpoena.
5 Respondent County states that "it seems only reasonable that
6 they [the petitioners] should be required to set forth the
7 manner in which they were prejudiced, the information which
8 they would have elicited and how that would have changed the
9 result of the hearing." Respondent County claims the
10 petitioners were not prejudiced by the actions of the county.

11 With respect to the memorandum, the county states that
12 there is no evidence that the commissioners relied on the
13 memorandum. Further, respondent states petitioners should be
14 required to explain how they were substantially prejudiced by
15 the memorandum.

16 The petitioners have not explained how it is that their
17 rights were prejudiced by the apparent failure to cross-examine
18 a witness that was not even under subpoena.¹⁶ Petitioners
19 were represented by counsel, and it seems only appropriate that
20 counsel either insure that witnesses are under subpoena, or
21 that they will be present for cross-examination. Without an
22 obligation on the part of the county to insure the presence of
23 witnesses and a breach of that obligation, we do not find the
24 county to have prejudiced petitioners' rights in the manner
25 alleged. Apparently, a witness not under subpoena left. We do
26 not believe the witnesses' conduct, under these circumstances,

1 to be chargeable to the county.

2 With respect to the memorandum, it is correct that
3 Deschutes County Ordinance PL-9 limits evidence to the hearing
4 and does not allow evidence to be received after the hearing is
5 closed.¹⁷ We note in addition that Section 11.000 Hearing
6 Procedure, Subsection (4) allows for the presentation of a
7 staff report if there is one. The report is required to
8 contain findings that will support the recommendation if the
9 findings were "the entire record." In this case, the letter of
10 Mr. Andersen appears to meet the definition of the staff
11 report. It includes what amounts to personal comments and some
12 facts to support the comments. Our review of the record,
13 however, indicates that the letter does not contain any
14 information that is not present elsewhere in the record.
15 Indeed, the petitioners do not allege there is any new
16 information in the memorandum.

17 Under these circumstances, it would have been preferable
18 had Deschutes County followed its procedure more closely and
19 considered the letter as part of its staff report and had the
20 report presented at the appropriate time during the course of
21 the hearing. However, we do not see the petitioners are
22 sufficiently prejudiced by this action to warrant reversal of
23 the decision. A county commission may certainly rely on its
24 staff and receive advice from its staff in the course of its
25 proceedings. Though petitioners have reason for some anger
26 over the breach of the county's procedures, we do not believe

1 they have suffered prejudice.

2 The "NON-GOAL VIOLATIONS" are denied. The decision of
3 Deschutes County is affirmed.

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Previous commission action had acknowledged portions of the plan for some of the Statewide Planning Goals.

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Of great concern to petitioners is the limitation of uses within the Ldn 65 contour line. Petitioners' argument in sum is that the limitations on agricultural use occasioned by that line are inconsistent with Goal 3. We understand petitioners' concerns, and we can see how petitioners could find a potential Goal 3 conflict. However, the petitioners and the LCDC had the opportunity to explore and resolve that issue before the acknowledgment was granted. Indeed, LCDC appears to have been aware of the conflict. See Staff Report, pg. 4-5 quoted supra at 4.

3

The motion requests dismissal of the whole appeal, both alleged goal and non-goal issues. We grant the motion as to goal issues and deny the motion as to non-goal issues. We deny the motion as to non-goal issues because we believe an acknowledged plan is still subject to our review for other than goal issues. See Realty Investment v. Gresham, 2 Or LUBA 153 (1981). We note, however, that as we find all but one of petitioners' alleged non-goal violations to be rooted in the goals, the effect of this opinion is very nearly the same as if we were to grant the city's motion.

4

We take this assignment of error to be an attack on the Plan's compliance with Statewide Planning Goal 2. In part, the goal requires that various plans be "consistent" with one another and that all plans include "inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action, and ultimate policy choices, taking into consideration social, economic, energy and environmental needs." Under Goal 2, we understand the goal to require that plans be "coordinated" as that term is defined in ORS 197.015(5).

5

We understand petitioner here to be arguing that the county did not consider Goals 5, 6 and 14 when they approved the exception.

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Petitioners here attack compliance with Goal 14.

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We understand petitioners' argument to be that Statewide Planning Goal No. 14 requires findings showing justification for urban uses in a rural setting. Petitioners claim that the county has failed to make such findings.

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We note at the outset that the city's (participating party) failure to raise the motion for dismissal in a timely fashion, [within 10 days as required by Rule 14(B)] does not control in this instance. Where a moving party challenges the Board's jurisdiction or authority to review a decision, as here, the time limit specified in LUBA Rule 14(B) does not apply.

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These cases are found at 1 OR LUBA 329 (1980).

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We understand these provisions to control future development. If petitioners are arguing that these provisions control existing public facilities, petitioners are mistaken. Were the provisions to control existing public facilities, massive public works construction projects would undoubtedly be necessary in Deschutes County to bring existing public services up to the level required in the provisions. We believe rather that when development is contemplated at the Bend airport and elsewhere in the county, the provisions quoted by petitioners will have to be considered and applied. The provisions are as follows:

"1. Public facilities and services shall be provided at levels and areas appropriate for uses based upon the carrying capacity of the land and water, as well as the important distinction that must be made between urban and rural services. In this way public services may guide development while remaining in concert with the public's needs.

"2. While clear distinctions are not always possible between urban and rural services, those services such as sewage treatment plants, water systems, schools, and fire stations, which are necessary to serve concentrations of people shall be known as key facilities and shall be located in urban

1 areas or in rural service centers if necessary to
2 meet the needs of existing rural residents. Key
3 facilities shall be built to encourage urban
4 rather than increased rural residential
5 development. Rural services such as Sheriff's
6 patrol, snow plowing, schools and school busing
7 shall be kept at levels adequate to meet public
8 needs but not in excess to encourage additional
9 development. Rural service centers are logical
10 locations for future rural key facilities so that
11 services may be used and constructed in as
12 efficient a manner as possible. Key facilities
13 outside urban areas or rural service centers
14 shall be discouraged unless the facility is
15 needed to service existing development, it is at
16 the most efficient and economic location, and is
17 consistent with the capabilities of the land and
18 the planned growth of the County.

19 "3. The County shall prepare a capital improvement
20 plan which considers the cost and benefits of
21 construction at various sites. Sites which are
22 less expensive in the long run shall be give
23 priority to less sufficient sites.

24 "4. Because of the increase costs of development
25 which must be borne by local residents, the
26 County shall investigate various methods to
27 control or obtain funds for providing new public
28 service levels. This investigation is to include
29 review of a systems development charge.

30 "5. Because of the difficulty in providing
31 County-wide Sheriff patrol, all future
32 development shall be reviewed for the adequacy of
33 police protection.

34 "6. The Plan requires that the minimum diameter for
35 water distribution means on which fire hydrants
36 are located shall be 6 inches.

37 "7. Water source or storage shall have a capacity to
38 support the required fire flow for a period of
39 two hours in addition to maximum daily flow
40 requirements for other consumer uses in a rural
41 area. The application has not addressed this
42 issue."

43

11

44 ORS 197.015(5) states:

1 "'Comprehensive plan' means a generalized,
2 coordinated land use map and policy statement of the
3 governing body of a state agency, city, county or
4 special district that interrelates all functional and
5 natural systems and activities relating to the use of
6 lands, including but not limited to sewer and water
7 systems, transportation systems, educational systems,
8 recreational systems, and natural resources and air
9 and water quality management programs.

10 'Comprehensive' means all-inclusive, both in terms of
11 the geographic area covered and functional and natural
12 activities and systems occurring in the area covered
13 by the plan. 'General nature' means a summary of
14 policies and proposals in broad categories and does
15 not necessarily indicate specific locations of any
16 area, activity or use. A plan is 'coordinated' when
17 the needs of all levels of governments, semipublic and
18 private agencies and the citizens of Oregon have been
19 considered and accommodated as much as possible.

20 'Land' includes water, both surface and subsurface,
21 and the air."

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25 We also believe that the provisions of the plan requiring
26 development to meet certain standards are to be met for new
development at the time new development permits or zoning
actions take place, not when new development is authorized;
and, indeed, the development zoning (AD) has not been applied.

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30 As to the matter of failure to follow Aeronautics Division
31 guidelines on airport planning, we note that Ordinance
32 PL-80-222 takes a goal exception for certain property and
33 amends a portion of the County Comprehensive Plan. The
34 ordinance does not address these guidelines, and it need not,
35 as it authorizes no new development. Also, the record shows
36 the guidelines and the Aeronautics Division itself to be
present throughout these proceedings. We hasten to add that
the guidelines are only guidelines.

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40 Goal 2 Exceptions, in pertinent part, states:

41 "If the exception to the goal is adopted, then the
42 compelling reasons and facts for that conclusion shall
43 be completely set forth in the plan and shall include:

44 "(a) Why these other uses should be provided for;

- 1 "(b) What alternative locations within the area could
2 be used for the proposed uses;
3 "(c) What are the long term environmental, economic,
4 social and energy consequences to the locality,
5 the region or the state from not applying the
6 goal or permitting the alternative use;
7 "(d) A finding that the proposed uses will be
8 compatible with other adjacent uses."

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We note that petitioners have attacked the exception on the grounds of failure to support findings with substantial evidence in his Assignment of Error B, "Goal Violations." Petitioner apparently recognizes that his attack on the exception is lacking substantial evidence is a goal issue.

16

Section 7.000(4) of Ordinance Pl-9 states

"Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. Other participants permitted to testify or present evidence shall have such rights as are determined by the Hearings Officer."

This provision is echoed in Section 11.000(7) "Hearing Procedure."

17

The applicable provision is Ordinance PL-90, Section 11.000(11)

"Close of Hearing and Deliberation. The Hearings Officer shall either make its decision and state the findings of fact or continue deliberation to a subsequent date, time and date of which shall be announced. No additional testimony or evidence shall be taken after closing of the hearing."

EXHIBIT A

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Relating to Ordinance No.)
 PL-20, Deschutes County Year 2000)
 Comprehensive Plan; Amending Transportation)
 Policy No. 24 Relating to Roberts Field)
 Airport and Bend Municipal Airport; Add-)
 ing an Exception Statement Relating to)
 the Bend Municipal Airport Property;)
 Designating Certain Portions of Property)
 Known as Municipal Property as Committed)
 to Airport Uses)

ORDINANCE NO. 80-222

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. That Transportation Policy No. 24, Ordinance No. PL-20, Deschutes County Year 2000 Comprehensive Plan, is amended to read as follows:

"24. A) The land use element of the Roberts Field Master Plan is part of the Deschutes County Comprehensive Plan and shall guide land use decision making in the vicinity of this facility.

B) The Bend Municipal Airport is a General Aviation facility and shall develop to meet the growing needs of the community for such a transportation facility. The Bend Municipal Airport Master Plan is recognized as a guide for development although it is not a part of this plan. Appropriate implementing techniques shall be adopted to provide for the growth and development of this airport, to protect it from encroachment by incompatible land uses, to protect the aviation users and public and nearby properties from possible conflicts, and to allow development in the vicinity of the airport that is compatible with the airport's future development.

1. Since the airport will grow along with the rest of Deschutes County, the following additional policies shall apply to the properties shown on the components of Airport Overlay Zones within the area of average Ldn 65 contour, substantial impact area:

a. Property within the average Year 2000 Ldn 65 contour, substantial noise impact area, shall be considered committed for airport, airport related or accessory commercial and industrial uses. At such time

as an exception to LCDC Goal 3, Agricultural Lands, is taken, such properties shall be available to be rezoned to Airport Development (A-D), provided public need is demonstrated for the exception, in accordance with LCDC Goal 2, Land Use Planning, and public need is demonstrated for the zone to be placed upon the property. The Ldn 65 noise contour map, marked Exhibit A, attached hereto and by this reference incorporated herein, is adopted to designate those properties within the Ldn 65 noise contour.

b. Property within the Ldn 65 boundary shall not be used for any use that conflicts with airport uses.

2. Properties in the average Ldn 55 contour, moderate noise impact area, can expect increased noise levels and therefore further increases in residential densities shall be discouraged. The Ldn 55 contour map, marked Exhibit B, attached hereto and by this reference incorporated herein, is adopted to designate those properties within the Ldn 55 noise contour.

Section 2. That the exception to Land Conservation and Development Commission Goal 3, Agricultural Lands, entitled, "Bend Municipal Airport Exceptions Statement," marked Exhibit 1, attached hereto and by this reference incorporated herein, is hereby adopted.

Section 3. That the property described as:

Tax Lots 200 and 300 of Section 20, Township 17 South, Range 13 East, Willamette Meridian, Deschutes County, Oregon, and Tax Lot 200, Section 17, Township 17 South, Range 13 East, Willamette Meridian, Deschutes County, Oregon,

and depicted on the map, marked Exhibit 2, attached hereto and by this reference incorporated herein, be added to the Bend Exceptions Map based on the reasons and facts contained in Section 2 of this Ordinance.

Section 4. That the property described as:

Tax Lots 200 and 300 of Section 20, Township 17 South, Range 13 East, Willamette Meridian, Deschutes County, Oregon, and Tax Lot 200, Section 17, Township 17 South, Range 13 East, Willamette Meridian, Deschutes County, Oregon,

and depicted on the map, marked Exhibit 3, attached hereto and by this reference incorporated herein, be designated as lands committed to airport uses based upon the findings of fact, marked Exhibit 4, attached hereto and by this reference incorporated herein.

DATED this 20 day of January, 1981.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Robert C Paulson
Chairman

Clay Chapman
Commissioner

NO
Commissioner

ATTEST:

Tammy J. Richardson
TAMMY J. RICHARDSON
Recording Secretary

BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

| | | |
|-----------------------------|---|--------------------|
| KEN CALE, DOROTHY CALE, |) | |
| DOLO CUTTER, JAMES SAUL and |) | |
| MARY WATERMAN, |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | LUBA No. 81-018 |
| |) | 81-017 |
| DESHCUTES COUNTY and |) | |
| CITY OF BEND, |) | LCDC DETERMINATION |
| |) | |
| Respondents. |) | |

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA case No.'s 81-018, 81-017.

Dated this 17th day of March, 1982.

For the Commission:


James F. Ross, Director
Department of Land Conservation
and Development



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 2/23/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: CALE v DESCHUTES COUNTY
LUBA No. 81-017 & 81-018

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

In Cale v Deschutes County, the petitioners attack Ordinance PL 80-222 on several grounds. Our review of the petitioners' attack as to goal issues and as to most non-goal issues leads us to conclude that most of petitioners' challenge before LUBA is precluded by acknowledgment of the Deschutes County Comprehensive Plan and its implementing ordinances. Indeed, the staff report prepared in preparation for your acknowledgment specifically mentions Ordinance PL 80-222 and some of the issues raised by petitioners.

Petitioners divide their petition for review into two major sections entitled "Goal Violations and Non-Goal Violations." Under "Goal Violations," it is quite clear that your acknowledgment takes care of all of petitioners' concerns. Under the non-goal violation heading, we found that petitioners' challenges, for the most part, are about issues that are founded in the goals. That is, when petitioners attack Ordinance PL 80-222 as being in violation of parts of the Deschutes County Comprehensive Plan, the parts of the plan cited are parts that echo or have the same purpose as one or more of the statewide goals. Also, much of petitioners' attack is based on the proposition that the ordinance and the county plan are inconsistent, and we believe any allegation of inconsistency is precluded by Goal 2 acknowledgment.

The only non-goal issue we review independently of the goals is about the county's adoption procedure. Our discussion of that issue begins on page 18 of the opinion.

The Board is of the opinion that oral argument will not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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