

MAY 11 3 39 PM '81

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

1
2
3 FREY DEVELOPMENT CO., INC.,)
4 an Oregon corporation,)
5 Petitioner,)
6 vs.)
7 MARION COUNTY and DOUGLAS)
8 K. and DOROTHY L. SEIBERT,)
9 Respondents.)

LUBA No. 80-173
LUBA No. 80-174

FINAL OPINION
AND ORDER

9 Appeal from Marion County.

10 Donald H. Upjohn, Salem, filed the Petition for Review and
11 argued the cause on behalf of Petitioner. With him on the
12 brief were Heltzel, Byers, Upjohn and Shaw.

13 Kris Jon Gorsuch and Daniel A. Ritter filed the brief and
14 argued the cause on behalf of Respondent Sieberts. With them
on the brief were Harland, Ritter, Saalfeld and Griggs.

15 COX, Referee; REYNOLDS, Chief Referee; BAGG, Referee;
16 participated in this decision.

17 AFFIRMED

5/11/81

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).

1 COX, Referee.

2 NATURE OF THE PROCEEDING

3 Petitioner appeals two land use decisions of Marion
4 County. Those decisions are recorded as Marion County
5 Ordinance No. 594, dated December 12, 1980. The first is an
6 amendment to the Salem Area Comprehensive Plan for an area
7 located outside the City of Salem but within the Salem Urban
8 Growth Boundary. On the same date Marion County adopted as
9 part of Ordinance 594 a resolution of intent to rezone the
10 subject property. Petitioner seeks to have these final
11 decisions reversed.

12 STANDING

13 Respondent does not contest petitioner's standing.

14 ASSIGNMENTS OF ERROR

15 Petitioner sets forth three assignments of error as follows:

16 1. "The county erred in amending the Salem Area
17 Comprehensive Plan from MR to C without first adopting
18 rules of procedure for such an amendment as required
by the Salem Area Comprehensive Plan."

19 2. "The county's amendment of the SACP from AR
20 to C violated LCDC's Goal No. 2 and that it was done
without adequate notice, was not periodic and was not
based on changing public policies and circumstances."

21 3. "The county's resolution of intent to rezone
22 from RM to CR was erroneous in light of the defects
the purported amendment to the SACP."

23 FACTS

24 The land which is the subject of this case is located at
25 the intersection of Hayesville Drive and Portland Road in
26 Marion County, Oregon. Pursuant to ORS ch 197 and the

1 statewide planning goals and guidelines, Marion County and the
2 City of Salem mutually agreed upon and adopted an urban growth
3 boundary for the City of Salem. They also provided for a
4 coordinated comprehensive plan to regulate the uses of land
5 located within the UGB but outside the Salem city limits. In
6 furtherance of this coordinated effort, Marion County adopted
7 portions of the Salem Area Comprehensive Plan covering non-city
8 urban growth boundary property as an element of its plan by
9 Ordinance 544, dated September 27, 1979. On June 18, 1980
10 Marion County adopted its revised comprehensive plan by
11 Ordinance 580. In August 1980, Salem made major amendments to
12 its comprehensive plan and by Ordinance 588 Marion County, on
13 August 20, 1980, adopted the amendments to the Salem Area
14 Comprehensive Plan.

15 On July 7, 1980 applicants filed their application with the
16 Marion County Planning Commission to change the comprehensive
17 plan designation for the subject property from MR (Multi-Family
18 Residential) to C (Commercial) and thereafter to change the
19 zoning on the subject property from RM (Multi-Family
20 Residential) to CR (Commercial Retail). The initial public
21 notice for an August 19, 1980 hearing, indicated only that the
22 application to be considered was for a zone change. At the
23 August 19, 1980 hearing petitioner appeared through its
24 attorney and argued, among other things, that the proposed zone
25 change conflicted with the applicable Salem Area Comprehensive
26 Plan. At that point the hearing was continued to allow for a

1 corrected notice to issue and to also give the City of Salem
2 further time to respond to the notice of intent to take action
3 on the property.

4 Corrected notice was issued stating that another hearing
5 would be had on September 2, 1980. On that date, the Marion
6 County Planning Commission hearing was again set over until
7 September 16, 1980, when petitioner again appeared and
8 testified. Petitioner objected to the proposed plan change on
9 a variety of grounds including that the plan change (1)
10 violated a Salem Area Comprehensive Plan's (SACP) directive
11 requiring the county to adopt procedural rules for plan
12 amendments and (2) violated LCDC Goal No. 2.

13 The planning commission on September 25, 1980 ruled in
14 favor of applicants. On October 10, 1980 petitioner appealed
15 the planning commission's recommendation to the Marion County
16 Board of Commissioners. On October 22, 1980 the planning
17 commission made a correction in its recommendation to include
18 both the plan change and the zone change. On November 6, 1980
19 the county sent out notice of the hearing to adjacent property
20 owners. In addition, on November 8, 1980 the notice was
21 published in the "Oregon Statesman."

22 On November 18, 1980 the hearing before the Board of
23 Commissioners took place. Petitioner appeared and reiterated
24 its arguments that the proposed change violated the Salem Area
25 Comprehensive Plan and LCDC Goal No. 2. On December 12, 1980
26 the Board of Commissioners adopted Ordinance 594, and issued

1 its final order.

2 DECISION

3 FIRST ASSIGNMENT OF ERROR

4 Petitioner first asserts that Marion County erred in
5 amending the portion of the Salem Area Comprehensive Plan
6 governing the subject property. Petitioner argues the action
7 was taken without first adopting rules of procedure for such an
8 amendment as required by Section V, paragraph F of the SACP and
9 therefore the county was without authority to act. Section V,
10 Paragraph F provides:

11 "Each governing body shall adopt rules of
12 procedure to govern the initiation and processing of
13 amendments to this plan in the geographic area of the
14 jurisdictions." (Emphasis added)

15 Respondent first points out the SACP expressly recognizes
16 that the county is the governing body which has jurisdiction
17 over land use actions taking place outside the city but within
18 the urban growth boundary. Respondent cites Section V,
19 Paragraph B of the SACP as amended, which states:

20 "Amendments to the jointly adopted comprehensive
21 plan which apply throughout the Salem urban area must
22 be concurred in by the City of Salem, Marion County
23 and Polk County. Legislative (as opposed to
24 quasi-judicial) amendments which apply only outside
25 the Salem city limits and within one county must be
26 concurred in by the City of Salem and the county in
27 which the amendments apply. Quasi-judicial plan
28 amendments which apply outside the Salem city limits
29 and within one county are the final responsibility of
30 that county, provided that the City of Salem and the
31 other county shall be given notice and an opportunity
32 to be heard as provided in 'C' below. Amendments to
33 the Comprehensive Plan which apply only within the
34 Salem city limits are the final responsibility of the

1 City of Salem, provided that both counties shall be
2 given notice and an opportunity to be heard as
provided in 'C' below." (Emphasis added)

3 Paragraph C "Notice of Opportunity for Third Party to Be
4 Involved," states:

5 "Notice of all proposed amendments must be given
6 to the City of Salem, Marion County and Polk County.
7 When a jurisdiction's concurrence is not required by
paragraph B. above, that jurisdiction must be afforded
8 an opportunity to present its position to the other
two."

9 Respondent then argues that Marion County has adopted the
10 necessary rules of procedure governing quasi-judicial plan
11 amendments and they are set forth in the Marion County
12 Comprehensive Plan, dated June 1980. The applicable portion of
13 the Marion County Comprehensive Plan cited to by the respondent
14 is found on page 6 of that plan. It states:

15 "The following is the procedure which Marion County
16 will use to consider Comprehensive Plan amendments
affecting rural lands.

17 "Individual Property or Quasi-Judicial Amendments:

18 "Plan changes directly involving 3 or less
19 properties will be considered a quasi-judicial
20 amendment. Quasi-judicial amendments may be
initiated by the subject property owners with an
21 application form supplied by the Marion County
22 Planning Department. The amendment will be
23 reviewed by the zone change procedure established
in the Marion County Zoning Ordinance. A Plan
24 amendment application of this type may be
25 processed simultaneously with a zone change
26 request. (Emphasis added).

"Area-wide or Legislative Amendments:

27 "Where more than three properties are involved,
28 or where a change in the text of the Plan is
29 proposed, the amendment will be considered a
30 legislative amendment. Legislative plan

1 amendments may be initiated only by the County
2 Planning Commission or the Board of
3 Commissioners. Any interested person may request
4 changes in the Land Use Map or the text of the
5 Plan by letter or petition. If the Commission or
6 Board accept the request and initiate a change,
7 the review will follow the planning process
8 described earlier.

9 "Urban Area Plan and Boundary Amendments:

10 "Urban Area Plan and Urban Growth Boundary
11 changes shall be accomplished by the Amendment
12 Procedure included in each city/county urban
13 growth boundary and policy agreement." (Emphasis
14 added).

15 Respondent argues that this is a quasi-judicial action and that
16 the applicable portion of the above cited amendment procedure
17 (that relating to Individual Property or Quasi-Judicial
18 Amendments) was, in fact, followed.

19 Petitioner, at this point, argues, however, that the term
20 rural lands in the Marion County Comprehensive Plan Amendment
21 provision does not relate to urban growth boundary property.
22 It argues that the provision applies only to plan changes
23 affecting "rural" land.

24 Respondent counters that petitioner places undue
25 significance on the term "rural" and says that the term is used
26 as a short cut phrase for designating those land use actions
27 which concern land within the jurisdiction of the county.

28 Respondent contends the use of the term "rural lands" was an
29 "inadvertent mistake which can be corrected during the
30 acknowledgment process." They state that Marion County has
31 consistently interpreted its plan to mean that the applicable

1 amendment procedures will be those of the Marion County Zoning
2 Ordinance. Respondents' argument, however, does not address
3 the section on amendment procedures entitled "Urban Area Plan
4 and Boundary Amendments."

5 The comprehensive plan indicates that a separate policy
6 agreement was to govern urban area plan and boundary
7 amendments. However, there is no such agreement in
8 existence.¹ As above quoted, the lead-in sentence to the
9 portion of Marion County's Comprehensive Plan governing
10 comprehensive plan amendments refers to "rural lands." Within
11 the scope of that lead-in sentence is the subcategory entitled
12 "Urban Area Plan and Boundary Amendments." While it appears
13 the Urban Area Plan and Boundary Amendments section refers to
14 property other than what has traditionally been known as
15 "rural" (i.e., land outside urban growth boundaries) the
16 positioning of the subject matter under the lead-in sentence of
17 rural lands at least causes some confusion. Based on the
18 record and Marion County's decision not to participate in this
19 appeal, we are unable to clarify the confusion. Whether we
20 view this problem as petitioner describes it, one of a local
21 government failing to adopt rules of procedure and thus acting
22 without authority, or as respondent basically argues, one of
23 procedure, we deny petitioner's allegation of error. Under
24 either manner of identifying the key issue involved, petitioner
25 is required to show how it was prejudiced as a result of Marion
26 County's action. Petitioner has not done so in this case.

1 Failure to Adopt Rules

2 According to McQuillan, Municipal Corporations, sec 25.256,
3 1976, where a local government has adopted an ordinance
4 containing a provision that it adopt rules of procedure for the
5 conduct of its activities, its failure to adopt the rules does
6 not of necessity render nugatory the local governments' action
7 without a showing of prejudice. McQuillan, supra, cites Yahnel
8 v. Board of Adjustment of Jamesburg, N.J., 76 NJ Super 546, 185
9 A2d 50 and states:

10 "Failure of Board of Adjustment to adopt rules
11 governing conduct of its business, as required by
12 stature and ordinance, did not render actions of board
nugatory in absence of showing of prejudice."

13 Adoption of Unclear Provision

14 As is set forth in Oregon Laws 1979, ch 772, sec 5(4):

15 "The Board shall reverse or remand the land use
16 decision under review only if: (a) the Board finds
17 that the city, county or special district governing
body: (B) failed to follow the procedure applicable
to the matter before it in a manner that prejudice the
substantial rights of the petitioner;"

18 Petitioner herein does not indicate how even if it were
19 determined Marion County followed the wrong procedure this
20 alleged error prejudiced it. It is clear that petitioner was
21 represented at all stages of the hearing and took active part
22 in raising and arguing its allegations of error. In addition,
23 the City of Salem was given ample opportunity, had it been
24 concerned that the action of Marion County was somehow
25 violative of its comprehensive plan, to participate in the
26 proceeding and correct any error that might have been inherent

1 in the procedures used by Marion County. This factor is
2 evidenced in a portion of Marion County's order entitled
3 conclusion no. 1 which states:

4 "The Salem Comprehensive Plan is an element of
5 the Marion County Comprehensive Plan. In the latter
6 Plan the appropriate procedure for consideration of
7 Comprehensive Plan amendments is identified as being
8 the process used for zone changes. All requirements
9 of this process have been followed. The City of Salem
has been given more than three months to respond which
is more than adequate. Their lack of response is
interpreted to mean that they have no objection to the
County proceeding to consider this Comprehensive Plan
change and rezoning." (Emphasis added).

10 Petitioner next argues that the SACP specifically does not
11 incorporate a reference to the Marion County comprehensive plan
12 as part of Section V, supra. Instead, petitioner argues, the
13 SACP "specifically requires each jurisdiction to adopt rules in
14 accordance with 'this plan.'" The above quoted paragraph (F),
15 Section V, however, refers to amendments "to this plan" and,
16 therefore, does not require specific incorporation of rules in
17 conjunction with the SACP. All it requires is that Marion
18 County develop some procedures and rules to amend the plan.
19 This merely brings us back to the key argument in this case,
20 i.e., whether or not the county has in fact adopted the rules
21 of procedure. Therefore, based on the foregoing, this Board
22 denies petitioner's first assignment of error.

23 SECOND ASSIGNMENT OF ERROR

24 Petitioner next argues that Marion County's amendment to
25 the SACP violated LCDC's Goal No. 2 in that it was (1) done
26 without adequate notice, (2) not periodic, and (3) not based on

1 changing public policies and circumstances.

2 Inadequate Notice

3 Petitioner argues that notice of each hearing before both
4 the planning commission and the Board of County Commissioners
5 was only issued approximately two weeks before each hearing
6 date. While petitioner recognizes that this was done
7 apparently to conform to a ten day notice requirement contained
8 in Marion County Zoning Ordinances, it argues that under
9 Guideline 5 of Statewide Goal No. 2 there should have been at
10 least 30 days prior notice of each public hearing. Petitioner
11 argues the county failed to meet this recommendation.

12 Guideline 5 to Statewide Goal No. 2 states in pertinent part:

13 "The citizens in the area and any affected
14 governmental unit should be given an opportunity to
15 review and comment prior to any changes in the plan
16 and implementation ordinances. There should be at
least 30 days notice of the public hearing on the
proposed change * * * * (Emphasis added).

17 Petitioner then cites the Board to the introductory paragraph
18 to Part III of Statewide Goal No. 2 which states as follows:

19 "Part III - Use of Guidelines: Governmental
20 units shall review the guidelines set forth for the
21 goals and either utilize the guidelines or develop
22 alternative means that will achieve the goals. All
land use plans shall state how the guidelines or
alternative means utilized achieve the goals."

23 While petitioner acknowledges that LCDC's guidelines are
24 not mandatory (ORS 197.015(9)) and that a local government is
25 entitled to use another course of action to meet the mandatory
26 goal requirements of reasonable notice, petitioner reasons the

1 introductory paragraph of Part III, Goal 2 requires that
2 respondent state in its plan how the alternative means utilized
3 achieves the goal. Petitioner argues the appropriate place for
4 the county to have met this requirement was in the mandated
5 rules of procedure for amendments to the SACP and since no such
6 rules were adopted (referring to its first assignment of error)
7 Marion County has violated Statewide Goal 2.

8 Petitioner has not shown how it was prejudiced by the
9 alleged goal 2 violation. The facts reveal that approximately
10 four months passed between the date of the first public notice
11 concerning this matter (August 19, 1980) and the date of Marion
12 County's final order (December 12, 1980). Petitioner actively
13 participated in all the hearings which took place during that
14 time span. Without petitioner indicating how its substantial
15 rights were prejudiced by this alleged procedural error, this
16 Board denies petitioner's assertion of error. Oregon Laws
17 1979, ch 772, sec 5(4).

18 Periodicity

19 Petitioner here argues that plans were underway to amend
20 the SACP to allow for the proposed shopping center before the
21 ink was dry on Marion County's adoption of that comprehensive
22 plan. Petitioner points us to guideline 5, paragraph (B),
23 Statewide Goal 2, which refers to minor plan changes and points
24 out that changes of the type proposed should not occur more
25 frequently than once a year. Petitioner's argument is mainly
26 that on August 19th, the Marion County Planning Commission

1 convened a hearing on the subject amendment to the SACP. The
2 next day, August 20, 1980, the Marion County Board of
3 Commissioners adopted the SACP without the subject amendment.
4 The amendment of the comprehensive plan to recognize
5 applicant's request was finalized by Marion County on December
6 12, 1980. Petitioner argues it is apparent that the county
7 began to consider this amendment before it finished adopting
8 the SACP. Petitioner reasons that this sort of "perpetual
9 amendment process" is inconsistent with the notion of orderly
10 land use planning embodied in LCDC's goals and guidelines
11 generally and in Goal No. 2 in particular. Petitioner contends
12 that by using the term periodic in the goal, LCDC obviously
13 intended that a plan would be revised only after a lapse of a
14 significant period of time from its adoption. Petitioner then
15 points to the policy of periodicity as being emphasized by the
16 one year provision in guideline No. 5.

17 Respondent argues there is no indication that the county
18 "willy nilly" amended its plan. Respondent points to Statewide
19 Goal 2, guideline 5B which states:

20 "Minor changes, i.e. those which do not have
21 significant effect beyond the immediate area of the
22 change, should be based on special studies or other
23 information which will serve as the factual basis to
24 support the change. The public need and justification
25 for the particular change should be established.
26 Minor changes should not be made more frequently than
once a year, if at all possible."

25 Respondent reasons this guideline leaves the ultimate decision
26 to the county as to how often it should quasi-judicially amend

1 its plan. Respondent further contends the overall policy of
2 the SACP is that the plan should be stable yet flexible. In
3 support of this flexible policy, respondent cites us to a
4 section of the SACP, which under the subject "Commercial"
5 states:

6 "Failure to designate areas for neighborhood and
7 convenience commercial facilities is not meant to
8 preclude establishment of such uses where they are
9 compatible with surrounding uses and are consistent
with the policies of this Plan." SACP, September 1979
(page 8).

10 In addition, respondent cites us to the SACP which
11 distinguishes two methods for ensuring that anticipated land
12 use needs are met: "(a) the rezoning of land in quantities
13 sufficient to accommodate land use demands in the future; and
14 (b) rezoning in response to demand for specific land uses."
15 SACP as revised and adopted by Marion County, Ordinance 588,
16 August 20, 1980, page 1. In line with method (b), the
17 comprehensive plan states:

18 "This plan recognizes that the land use and
19 zoning are expected to change during the time span of
the plan as conditions change."

20 We do not find that Marion County has violated the
21 periodicity portion of Goal 2. The mere fact that someone
22 initiated a request one day before adoption of the plan by
23 Marion County does not violate Goal 2.²

24 [If we accepted petitioner's argument, we would be placing
25 a shroud of stagnation on a local government's ability to
26 respond to the needs of its citizens prior to LCDC

1 acknowledgment of its comprehensive plan. Marion County would
2 have had to delay its adoption of the SACP for several months
3 until the proposed amendment could have been ruled upon. In
4 the meantime, additional amendments may well have been proposed
5 which would further have delayed the ultimate adoption of the
6 SACP and the coordination of comprehensive plans as required by
7 the goals. This would be taking place during a period of time
8 when Marion County was under great pressure from the State of
9 Oregon through the Land Conservation and Development Commission
10 to submit a plan for acknowledgment. We do not address the
11 meaning of periodicity terminology as applied to acknowledged
12 plans.]³

13 Changing Policies and Circumstances

14 Petitioner argues here that the respondent fails to make
15 any findings as to changing policies and circumstances as
16 required by Statewide Goal No. 2, Part I. It points us to that
17 portion of Statewide Goal 2 which states:

18 "All land use plans and implementation ordinances
19 shall be adopted by the governing body after public
20 hearing and shall be reviewed and, as needed, revised
21 on a periodic cycle to take into account changing
public policies and circumstances, in accord with a
schedule set forth in the plan." (Emphasis added).

22 Petitioner reasons there must be both an evidentiary basis
23 establishing that changing policies and circumstances exist and
24 also findings and conclusions setting forth what precisely the
25 changing policies and circumstances are in any particular case.

26 While the above quoted Goal 2 language may be used to force

1 a jurisdiction to amend its plan it does not make a finding of
2 changed policies and circumstances a prerequisite to plan
3 amendments. Indeed, a supported finding of need for the
4 proposed change could indicate a change in policy and
5 circumstances. The SACP itself recognizes that periodic
6 modifications of any specific location designation may occur.
7 The basis for finding that such modifications are necessary is
8 a finding of need and, as conceded by petitioner, that evidence
9 supported finding has been made in this case. Therefore, for
10 the above stated reasons, petitioner's second assignment of
11 error in its three parts, is denied.

12 THIRD ASSIGNMENT OF ERROR

13 Here petitioner argues the county's resolution of intent to
14 rezone from multi-family residential to commercial retail was
15 erroneous in light of the defects in the porported amendment to
16 the SACP. Petitioner contends that since the county's
17 comprehensive plan change is defective for a variety of
18 reasons, its resolution of intent to rezone has to be tested
19 against the unamended SACP which designated the subject
20 property as multi-family residential. Since the proposed
21 commercial retail zone is too intensive for the MR zone
22 designation it follows, according to petitioner, the resolution
23 of intent to rezone is invalid, citing Baker v. City of
24 Milwaukie, 271 Or 500, 533 P2d 771 (1975).

25 Petitioner's argument under this assignment of error is
26 dependent upon its prevailing under either Assignment of Error

1 1 or 2. In light of the fact this Board has found that
2 petitioner does not prevail on either of its first or second
3 assignments of error, we deny petitioner's third assignment of
4 error.

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FOOTNOTES

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Based on the statements of the parties during the oral argument and a telephone call to Marion County counsel (of which the parties were advised), we conclude that no such policy agreement has been adopted.

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On May 5, 1981, the LCDC issued the following determination

"The Land Conservation and Development Commission hereby adopts the proposed opinion and order of the Land Use Board of Appeals in Frey Development Company v. Marion County, LUBA 80-173 and 80-174, concerning allegations of Goal violations with the following modifications:

- "1. Delete the portion of the sentence starting at line 21 on page 14 through the word 'need' on line 23 on page 14. . . ."

This sentence, before correction to reflect LCDC's determination, stated:

"In light of the fact that the plan itself contains a policy which allows changes of the type proposed upon a showing of need, the mere fact that someone initiated a request one day before adoption of the plan by Marion County does not violate Goal 2."

3

In addition, to the material set forth in footnote 2 supra, LCDC stated in its May 5, 1981 determination:

- "2. Delete the language from line 26 of page 14 through line 14 of page 15."

The material the LCDC was referring to is bracketed in this order.