

BEFORE THE LAND USE BOARD OF APPEALS

OCT 16 8 37 AM '81

OF THE STATE OF OREGON

1  
2  
3 JEFFERSON COUNTY CO-OP, )  
4                   Petitioner,    )  
5                   vs.                )  
6 JEFFERSON COUNTY,                )  
7                   Respondent.     )

LUBA No. 81-035  
FINAL OPINION  
AND ORDER

8                   Appeal from Jefferson County.

9                   David C. Glenn, Madras, filed the Petition for Review and  
10 argued the cause on behalf of Petitioner.

11                  Michael C. Sullivan, Madras, filed the brief and argued the  
12 cause on behalf of Respondent.

13                  COX, Referee; BAGG, Referee; REYNOLDS, Chief Referee;  
14 participated in this decision.

15                   AFFIRMED

10/16/81

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

1 COX, Referee.

2 NATURE OF THE PROCEEDING

3 Petitioner contests respondent's comprehensive plan  
4 designation of Development Reserve (DR) on 120 acres of its 160  
5 acre parcel located adjacent to the Madras Urban Growth  
6 Boundary. Petitioner seeks to have the Development Reserve  
7 zoning reversed.

8 ALLEGATIONS OF ERROR

9 Petitioner attacks the placement of the Development Reserve  
10 zone on its property on the grounds that it (1) was done  
11 without providing petitioner with sufficient notice, (2) does  
12 not meet statewide planning goals (unspecified), and (3) is not  
13 supported by substantial evidence in the whole record. We  
14 affirm the county's decision.

15 FACTS

16 Petitioner's property was zoned A-3, General Agriculture,  
17 under the 1973 Jefferson County Zoning Ordinance. The A-3 zone  
18 allowed a non-farm residence on one acre of land as an outright  
19 permitted use and on 10,000 square feet of land as a  
20 conditional use. The county began revision of that 1973 zoning  
21 ordinance in 1973 and its planning efforts culminated in the  
22 adoption of the Jefferson County Comprehensive Plan in  
23 February, 1981. The property in question is 120 acres of a 160  
24 acre parcel owned by the petitioner. The total 160 acre parcel  
25 is located on the southern boundary of the Madras Urban Growth  
26 Boundary. Forty acres of the 160 acre parcel were included by

1 the City of Madras in its Urban Growth Boundary. LCDC  
2 acknowledged the Madras Urban Growth Bondary as being in  
3 compliance with the statewide goals in January, 1980. The  
4 subject 120 acres appear to be undeveloped at the present time  
5 and apparently have not been farmed or used for any income  
6 producing agricultural purpose since at least 1930. The area  
7 adjacent to the subject property, other than that included  
8 within the Madras UGB, is all zoned Rural Residential (RR)  
9 which under the Jefferson County Comprehensive Plan allows for  
10 the construction of a single family residence on two acres.

11 During the planning process the county took an exception to  
12 Statewide Goal 3 and the subject property was included within  
13 the scope of that exception. Except for the property  
14 designated DR, the property covered by the exception was all  
15 zoned Rural Residential (RR).

16 Section 305 of the Jefferson County Zoning Ordinance dated  
17 March, 1981, sets forth the Development Reserve zone  
18 provisions. Section 305 states:

19 "The purpose of the Development Reserve Zone is  
20 to designate land which is necessary for future  
21 residential use over time. Development Reserve land  
22 shall be convertible to Rural Residential land through  
23 a zone change once the conditions listed below are  
24 met. This zone is intended to protect the  
25 agricultural productivity of property until the need  
26 for conversion to residential use is demonstrated."1

24 The first official public hearing on the proposed  
25 comprehensive plan and implementing zoning ordinances was held  
26 on September 27, 1979. Notice of that first hearing was mailed

1 to petitioner. The notice sent to petitioner was also sent to  
2 all persons county records indicated were owners of property  
3 zoned A-3 which was proposed to be rezoned to SR by terms of  
4 the proposed comprehensive plan. Citing ORS Chapter 215  
5 requiring that it send a notice, the county informed all people  
6 similarly situated to petitioner that:

7 "Jefferson County, Oregon is currently in the  
8 process of revising and updating its zoning and  
9 comprehensive plan. Your property as described on  
10 this envelope is currently zoned A-3. Under the  
11 current proposal your property would be rezoned to  
12 SR. Under the current comprehensive plan proposal  
13 your property would be outside the urban growth  
14 boundary of any incorporated city in Jefferson County."

15 The notice then informed the petitioner what outright uses  
16 were allowed by the A-3 zoning. In addition, the notice  
17 indicated what would be the outright permitted uses under the  
18 proposed SR zone. In general, the A-3 zone allowed a single  
19 family dwelling on one acre of land or, if community water or  
20 sewer was available, 10,000 square feet of land. Under the  
21 "proposed" SR zone the minimum lot size would increase to 2.5  
22 acres for a single family dwelling. The notice went on to  
23 state:

24 "Under the proposed comprehensive plan, the land  
25 outside urban growth boundaries, such as yours, is  
26 land that is not presently designated as land suitable  
and available for future urban development. Also land  
outside the urban growth boundary is deemed to be  
rural land which is not presently seen as an area to  
which city services will be extended in the near  
future nor an area that would have high density  
development. Proposed comprehensive plan policies for  
your property are similar to the zoning outlined  
above. The proposed zoning was designed to meet the  
goals of the proposed comprehensive plan. After a

1 zoning ordinance and comprehensive plan are adopted,  
2 no changes that are inconsistent with the  
3 comprehensive plan may be adopted without first  
4 amended the comprehensive plan. The first county  
5 public hearing on the proposed comprehensive plan  
6 policies and the proposed zoning for the area outside  
7 the urban growth boundaries will be in the Jefferson  
8 County Courthouse conference room, Madras, Oregon on  
9 September 27, 1979, at 7:30 p.m." (Emphasis added).

6 Sometime after the September 29, 1979 hearing and the  
7 February, 1981 comprehensive plan adoption, the zoning  
8 designation on petitioner's property changed from the proposed  
9 SR to the contested DR. The petitioner was not mailed  
10 individual notice that the proposal to designate the subject  
11 property SR had been dropped in favor of the DR designation.  
12 The record indicates, however, that after the initial  
13 individual notice, general notices announcing all public  
14 hearings concerning the comprehensive plan were issued by the  
15 county. The county notified the public of these public  
16 hearings by placing announcements in the Madras Pioneer, a  
17 local newspaper of general circulation serving Jefferson  
18 County. The general notices either indicated that a  
19 comprehensive plan work session would be held or that the  
20 entire comprehensive plan or portions thereof would be  
21 discussed. The record includes numerous such notices.

#### 22 FIRST ASSIGNMENT OF ERROR

23 Petitioner first argues that it was not granted due process  
24 of law required by Article I, Section 10 of the Oregon  
25 Constitution and by the Fourteenth Amendment to the  
26 Constitution of the United States of America. Petitioner

1 argues that the only notice it received regarding the zoning of  
2 its property was provided it in September, 1979. At that time  
3 the plan was to designate the property SR, a designation it did  
4 not contest. It argues that without any further notice and  
5 "apparently at the whim of the county planner" its land was  
6 designated DR. Petitioner argues that due process at a minimum  
7 would require individual notice of the change from SR to DR in  
8 order to allow petitioner to appear and be heard, citing South  
9 of Sunnyside League v. Board of County Commissioners of  
10 Clackamas County, 27 Or App 647, 557 P2d 1375 (1976). Brown v.  
11 Lobdell, 36 Or App 397, 584 P2d 4 (1978).

12 Petitioner does not direct its constitutional attack at ORS  
13 215.503 and 215.060, the statutory provisions setting out the  
14 notice standards governing respondent's activities in adopting  
15 its comprehensive plan. Those statutes indicate petitioner was  
16 given all the notice required by the laws of this state. ORS  
17 215.503(2) states in pertinent part:

18 "Except as otherwise provided by county charter:

19 a. All legislative acts relating to  
20 comprehensive plans, land use planning or zoning  
21 adopted by the governing body of a county shall  
22 be by ordinance.

23 b. In addition to the notice required by ORS  
24 215.060, at least 20 days but not more than 40  
25 days before the date of the first hearing on an  
26 ordinance that proposes to amend an existing  
comprehensive plan or any element thereof or to  
adopt a new comprehensive plan, the governing  
body of a county shall cause a written individual  
notice of land use change to be mailed to each  
owner whose property would have to be rezoned in  
order to comply with the amended or new

1 comprehensive plan if the ordinance becomes  
2 affective."

3 ORS 215.503(2)(b) was complied with when in September, 1979  
4 the county mailed to the petitioner notice that a zone change  
5 was being proposed and the change would affect his property.  
6 That notice, as set forth in the facts section of this opinion,  
7 indicated that the change was "proposed" to be to SR. It did  
8 not say that the zoning on petitioner's property was in fact  
9 going to be SR. In the ensuing months, before final adoption  
10 of the comprehensive plan, numerous hearings were held and  
11 notices of those hearings published in the Madras Pioneer.  
12 According to ORS 215.060 such non-individual notice is all that  
13 was necessary. ORS 215.060 states:

14 "Action by the governing body of a county  
15 regarding the plan shall have no legal effect unless  
16 the governing body first conducts one or more public  
17 hearings on the plan and unless ten days advance  
18 public notice of each of the hearings is published in  
19 a newspaper of general circulation in the county or in  
20 case the plan as it is to be heard concerns only part  
21 of the county, is so published in the territory so  
22 concerned and unless a majority of the members of the  
23 governing body approves the action. The notice  
24 provisions of this section shall not restrict the  
25 giving of notice by other means including mail, radio  
26 and television." (Emphasis added).

21 Read together, 215.503 and 215.060 require that in adopting  
22 a comprehensive plan, only the first public hearing need be  
23 proceeded by individual notice to each property owner. After  
24 that all that is required is public notice, in a newspaper of  
25 general circulation, that subsequent hearings will take place.

26 Petitioner was put on notice that a change was going to be

1 made in the zoning designation of its property. Whether the  
2 ultimate change decided upon was the same as initially  
3 anticipated when the first notice of hearing was sent out is  
4 not controlling. Petitioner was put on notice that action was  
5 being taken which would impact its ability to use its land.  
6 Petitioner chose not to monitor the development of the county's  
7 comprehensive plan. Had it done so it would have been aware of  
8 the change in proposed zoning.

9 Petitioner should note that the legislature made the  
10 requirement of individual notice set forth in ORS 215.503  
11 optional depending upon the availability of funds from the Land  
12 Conservation and Development Commission. In ORS 215.508 the  
13 Oregon Legislature stated:

14 "Except as otherwise provided by county charter,  
15 if funds are not available from the Department of Land  
16 Conservation and Development to reimburse a county for  
17 expenses incurred in giving additional individual  
18 notices of land use change as provided in ORS 215.503,  
19 the governing body of the county is not required to  
20 give those additional notices."

21 ORS 215.508's provisions indicate the legislature did not  
22 intend that individual notice provided for by ORS 215.503 be  
23 viewed as the standard for notice of subsequent hearings on the  
24 proposed comprehensive plan.

25 We do not view petitioner's due process attack as presented  
26 to be questioning the constitutionality of the legislature's  
27 plan for giving notice as set forth in the above discussed  
28 statutes. Those statutes control and were complied with.

29 / /

1 SECOND ASSIGNMENT OF ERROR

2       Petitioner next asserts that "respondent has created a zone  
3 designation that does not meet any of the statewide goals."  
4 Petitioner does not mention, however, to which goals it is  
5 referring. Specifically, petitioner states on page 3 of it  
6 brief:

7       "a) Failure to meet state-wide goals.  
8       Respondent has created a zone designation that does  
9 not meet any of the state-wide goals. The Development  
10 Reserve zone created initially exclusive farm use  
11 zone, and allows what presumably was designated EFU to  
12 become residential property when other residential  
13 areas have been developed. This ambivalent zone would  
14 allow destruction to agricultural property and does  
15 not preserve agricultural land. If the excuse for  
16 allowing this is that the property included in  
17 Development Reserve is not good agricultural land,  
18 putting the property in a 'reserve' as far as use is  
19 concerned is not planning, its avoiding planning.  
20 This zoning technique puts two completely incompatible  
21 property uses together. The purpose of zoning is to  
22 set aside the land to its current permissible use,  
23 which if the legislative process is correct will  
24 determine its best use. This determination is  
25 avoided. The use of a "contingency" in zoning does  
26 not interrelate all functional and natural systems and  
activities relating to the use of lands \* \* \* as  
required by ORS 197.015."

19       Then on page 5 of its brief it states:

20       "It seems impossible that 40 acres of  
21 petitioner's land is classified as within urban growth  
22 area for residential on one planning hand and the  
23 balance of the land contiguous to city services and  
24 city growth and of the same land use be on the other  
25 hand classified exclusive farm land in a Development  
26 Reserve Zone, which patently recognizes the land as  
rural residential development property. The result is  
a complete failure on the part of respondent in  
meeting statewide planning goals in that this zone  
permits conflicting goals as contingent use of the  
property."

1 In response, respondent states in its brief:

2 "Petitioner attacks the Comprehensive Land Use Plan of  
3 Jefferson County because it fails to meet the  
4 state-wide goals. No where in Petitioner's brief does  
5 he state with specificity why Respondent failed to meet  
6 state-wide goals. For Respondent to respond to  
7 Petitioner's allegation of error he must point out  
8 with some clarity how the state-wide goals have not  
9 been met. The specificity required has not been met."

10 It is not possible from the way petitioner presents its  
11 argument to understand exactly what goals it is concerned  
12 about. As we said in Lee v. Portland, 3 Or LUBA 31, 38 (1981):

13 "We will not find fault with a city or county  
14 based upon a conclusory allegation that a goal has  
15 been violated."

16 In Lee the petitioner went one step further than petitioner  
17 herein and actually named the goal he contended had been  
18 violated. In this case, petitioner does not set forth with any  
19 specificity the goals it seems to be concerned about. An  
20 interpretive reading of its petition for review, however, does  
21 indicate that the petitioner is concerned about the destruction  
22 of agricultural property. But, there is no indication of what  
23 exactly petitioner feels is wrong with respondent's decision  
24 regarding agricultural land.

25 At oral argument, after questioning by the Board,  
26 petitioner indicated its concern was with the exception  
27 respondent took to Statewide Goal 3. Respondent objected to  
28 petitioner first raising the issue of the Goal 3 exception at  
29 oral argument and we sustain that objection. Since Oregon Laws  
30 1979, chapter 772, section 4(6)(c) and section 5 indicate that

1 the issues relating to the statewide goals which petitioner  
2 seeks to have reviewed must appear in its petition for review,  
3 this Board does not have authority to address goal issues first  
4 raised at oral argument.

5 THIRD ASSIGNMENT OF ERROR

6 Petitioner next claims that there is no evidence in the  
7 record to support respondent's decision to zone the  
8 petitioner's property Development Reserve. Petitioner argues  
9 the respondent is required to support its decision by  
10 substantial evidence in the whole record. Petitioner next  
11 asserts that the record is devoid of any planning consideration  
12 as to what property should be designated Development Reserve or  
13 why the subject property was selected for Development Reserve  
14 classification.

15 The record does contain an explanation of the purpose for  
16 the Development Reserve zone and indicates why the subject  
17 property was so chosen. In a communication to the planning  
18 commission the planning director discussed the Madras Urban  
19 Growth Boundary which had already been acknowledged by LCDC.  
20 He expressed concern that a too small Madras UGB might have a  
21 negative impact on its planning responsibilities. He stated:

22 POPULATION

23 "In reviewing the Madras Comprehensive Plan, it  
24 becomes apparent that the population projections upon  
25 which the UGB was defended are quite conservative.  
26 This is because the Madras program did not have the  
benefit of the preliminary 1980 census figures which  
we now have. The result is that Madras defended a  
2.75% per year growth rate while the county has grown

1 at 3% per year over the last ten years. Further, the  
2 intent of the urban growth boundary concept (Goals 3,  
3 11, 12, 13, 14) is that urbanizable areas are to  
4 accommodate increasing percentages of the population  
5 when compared to rural areas. Given the statistical  
6 analysis following, Madras and its UGB would contain  
7 basically the same percentage of the county population  
8 as that area does today.

#### 9 UGB Expansion

10 "Another idea needing consideration is that if the  
11 entire area around the UGB is developed into 2 or 2  
12 1/2 acre parcels, any subsequent expansion of the city  
13 will be imposed over platted land. This presents some  
14 difficult services and ownership problems, i.e. each  
15 two acre owner needs to subdivide to 7,500 square foot  
16 lots in an assumedly random fashion.

17 "A possible approach to handle both of the above  
18 problems is to designate reserve areas for expansion  
19 of the urban growth boundary. It is acknowledged that  
20 such an idea, while good planning, can be difficult  
21 politically. Staff suggests this concept so the  
22 commission can consider it and act on it if desired.

#### 23 DR Areas

24 "If a decision is made to not designate specific UGB  
25 expansion areas, I then suggest DR designation for an  
26 area south of Madras UGB. With a sizable DR area to  
the north, and one to the south, I believe that there  
will be unplatted land available when the UGB requires  
expansion. This will still leave the option for land  
owners to convert to RR on specific parcels within  
these areas before expansion of the UGB. DR  
designation will also allow us to calculate these  
areas at 2 or 2 1/2 acre density, instead of UGB or  
city densities.

27 "If this option is taken staff suggests designation of  
28 47 acres of 11-13-12 and 216 acres in the N 1/2 of  
29 11-13-13 as DR. This would increase the number of  
30 people accounted for in the DR zone within the Madras  
31 area by 337, and reduce the RR number by that same  
32 amount.

33 "If completely within the UGB at some later date, the  
34 area would accommodate 674 people. It is understood  
35 that it is unlikely that all of the area would go into  
36 the UGB as unplatted land."

1       The record, therefore, indicates that consideration was  
2 given as to why a Development Reserve zone was necessary and  
3 why the property owned by petitioner should be designated as  
4 Development Reserve. Petitioner's property appears from maps  
5 in the record to be included in the 216 acres located in "the N  
6 1/2 of 11-13-13." The DR zone is to serve a purpose which  
7 apparently was considered by the planning commission and  
8 ultimately Jefferson County.<sup>2</sup>

9       This Board has already stated its scope of review in  
10 situations where a person attacks the designation given  
11 specific property by a comprehensive plan and implementing  
12 ordinances. In Gruber v Lincoln County, 2 Or LUBA 180, 186  
13 (1981), we said:

14           "We believe it important at this point to note  
15 again that these plan and zone designation actions are  
16 legislative actions. While we have said that  
17 'findings' are needed to show compliance with  
18 applicable criteria whether the land use act be  
19 legislative or quasi-judicial (1000 Friends of Oregon  
20 v. Marion County, 1 Or LUBA 33 (1980)), we do not mean  
21 to say that a broad legislative enactment must contain  
22 a list of justifications for each and every property  
23 designation. We view the need for "findings" in a  
24 plan adoption to be met when the record shows facts  
25 and policies which, when read together, show a factual  
26 base for particular land use designations.

21           "Of course, there are occasions when detailed  
22 findings are required as part of a broad legislative  
23 enactment. Detailed findings are needed when an  
24 exception is taken for particular properties in order  
25 to comply with goal 2's requirement that 'compelling  
26 reasons and facts' justifying the exception 'be  
27 completely set forth in the plan...' Similarly, a  
28 plan itself may require detailed findings to justify  
29 particular land use designations. It is not uncommon  
30 to find a plan policy allowing certain uses only upon

1 'a finding that the use is compatible with secondary  
2 uses, etc. etc.'

3 "We do not find these circumstances evident  
4 here. The exception taken by the county is not  
5 challenged, no violation of a goal requiring findings  
6 is alledged and no plan policy requiring findings has  
7 been cited."

8 As noted previously in this opinion, we do not view the  
9 petition for review as an attack on the exception taken to the  
10 agriculture goal. If the petitioner is concerned about the  
11 goal exception process used by the county, it will have an  
12 opportunity to express those concerns when LCDC reviews  
13 Jefferson County's comprehensive plan during acknowledgment  
14 proceedings.

15 Affirmed.

FOOTNOTE

1  
2 1

"The Planning Commission shall be available to hear a zone change request for a change from DR to RR, or may initiate such change on their own initiative when the following conditions have been met.

"1. Consideration of the change shall be in conformance with Article 8 of this Ordinance.

"2. The Commission shall only hear a DR zone change request when:

"a. At least 75% of the land in the existing RR Zone in the planning area (as shown on Map H) within which the request is made is subdivided to lot sizes of 6 acres or less, and is sold out of the developer's interest.

"b. Approximately seventy-five percent of the 2 to 6 acre lots which are sold out of the developer's interest are developed with residences as provided for in the RR Zone.

"c. Requests for zone changes from DR to RR shall be accompanied by a preliminary subdivision plat which meets the intent of the RR Zone, and contains lots of 6 acres or less.

"3. If a situation arises in which one of the conditions listed in #2 above are not met, but the need for additional RR land appears obvious, the Planning Commission may initiate a zone change from DR to RR.

"4. If an individual property owner feels that additional RR acres are needed in a given planning area, he may initiate a zone change from DR to RR even though the conditions listed in #2 above are not met. The proposal shall be reviewed in compliance with Article 8 of this Ordinance."

23 2

We express no opinion as to the validity of the county's decision to use rural agricultural land to accommodate what appears to be Madras' urban population demands. See Rudd v. Malheur Co., 1 Or LUBA 322 (1980). Petitioner does not challenge this decision as an inappropriate vehicle under any of the goals to achieve the stated purpose.