

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

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TUALITY COMMUNITY HOSPITAL, )  
INC., an Oregon non-profit )  
corporation, )  
Petitioner, )  
vs. )  
WASHINGTON COUNTY, OREGON, )  
Respondent. )

LUBA No. 84-031  
FINAL OPINION  
AND ORDER

Appeal from Washington County.

DeMar L. Batchelor, Hillsboro, filed the Petition for Review and argued the cause on behalf of Petitioner. With him on the brief were Schwenn, Bradley, Batchelor, Brisbee and Stockton.

Dan R. Olsen, Hillsboro, filed a response brief and argued the cause on behalf of Respondent County.

Jack L. Orchard, Portland, filed a response brief and argued the cause on behalf of Respondent Standard Insurance Company. With him on the brief were Ball, Janik & Novack.

Thomas Nicolai, Portland, filed a response brief and argued the cause on behalf of Respondent Kaiser Foundation Hospitals.

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

AFFIRMED 10/11/84

You are entitled to judicial review of this Order.  
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from an order approving a conditional use  
4 permit for a hospital on land zoned for low density urban  
5 residential use (RU-8)

6 FACTS

7 The conditional use permit would allow construction of a  
8 Kaiser-Permanente Hospital on 50.5 acres owned by Respondent  
9 Standard Insurance Company.<sup>1</sup> The county hearings officer  
10 approved the application, and the decision was appealed to the  
11 county commissioners. Pending the appeal, the county adopted a  
12 new comprehensive plan and a new community development  
13 ordinance. Upon adoption of the new plan and ordinance the  
14 1973 Comprehensive Framework Plan and Community Development  
15 Code were repealed. The county commissioners approved the  
16 hearings officer's decision.

17 FIRST ASSIGNMENT OF ERROR

18 Petitioner claims the county failed to apply Policy 267 of  
19 the 1973 Comprehensive Framework Plan. Petitioner argues  
20 Policy 267, and its implementing strategies, have two standards  
21 which either were not addressed at all or were erroneously  
22 applied. The first standard is the requirement for an  
23 inventory analysis of community health services. The second  
24 standard is a requirement for a finding of public need that is  
25 best served in this location. This latter standard is set  
26 forth in a "strategy" following Policy 267.

1 The 1973 Comprehensive Framework Plan includes a  
2 "Utilities, Facilities and Services" section. Policy 267 is  
3 the sole policy related to services in this section.<sup>2</sup> The  
4 policy requires planning for services to be an  
5 "ongoing planning program consisting of a (b)asic  
6 inventory analysis and policy formulation within the  
7 various functional components and aimed toward a  
8 coordinated services policy and strategies."

9 Following the above statement of policy are several  
10 strategies for the "Utilities, Facilities and Services" section  
11 of the plan. They include a requirement that new services are  
12 to be evaluated by certain criteria.<sup>3</sup>

13 Respondents allege the applicability of Policy 267 is now  
14 moot because the 1973 Comprehensive Framework Plan was replaced  
15 by the 1983 Comprehensive Framework Plan during the course of  
16 these proceedings, and that no policy similar to Policy 267 is  
17 in the new framework plan.<sup>4</sup>

18 It is not necessary that we decide respondent's mootness  
19 claim because we believe Policy 267 is inapplicable here for  
20 another reason. The policy is not worded to state a criterion  
21 or standard in a particular land use action such as approval of  
22 a conditional use permit. It speaks of a "basic inventory  
23 analysis and policy formulation" as part of a continuing  
24 planning process. We read the policy to state a requirement  
25 the county flesh out existing policies and make new policies  
26 based on data analysis, and not to state a standard for  
assessing land use actions. The county made its policy

1 decisions regarding hospitals as conditional uses in the 1973  
2 zoning ordinance. The ordinance allows hospitals as  
3 conditional uses in specified zones.<sup>5</sup> We do not read Policy  
4 267 to require replication of the policy decisions previously  
5 made in the zoning ordinance.

6 We therefore deny petitioner's claim Policy 267 requires  
7 the county to make an inventory analysis and policy formulation  
8 in order to grant a conditional use permit for a hospital in an  
9 RU-8 zone.

10 Petitioner's second claim in this assignment of error, as  
11 noted above, urges that we consider strategies as criteria for  
12 allowing the hospital.<sup>6</sup> Petitioner's argument is that the  
13 strategies require a showing of public need for another  
14 hospital and the need is best served at the proposed location.  
15 As we discuss in more detail in the second assignment of error,  
16 the public need standard in the county zoning ordinance does  
17 apply to this decision. Our treatment of public need will be  
18 in that context.

19 Because Policy 267 does not state a criterion applicable to  
20 this proceeding, this assignment of error is denied.

21 SECOND ASSIGNMENT OF ERROR

22 Petitioner next claims the county failed to properly apply  
23 the ordinance provisions requiring a finding of public need.  
24 Specifically, petitioner charges the county erred because it  
25 defined public need in terms of the applicant's requirements  
26 rather than the needs of the community. Petitioner also says

1 the county erred in adopting findings based on its erroneous  
2 interpretation of the public need standard.

3 Public need is not defined in the 1973 county ordinance.  
4 The term is ambiguous. See, e.g., Neuberger v. City of  
5 Portland, 288 Or 155, 170, 603 P2d 771 (1977) (local  
6 legislative and administrative land use regulations in  
7 compliance with LCDC goals are expressions of what constitutes  
8 public need); Marbet v. Portland Gen. Elect., 277 Or 447, 469,  
9 561 P2d 154 (1977) (need is a conclusion that involves policy  
10 judgment). This Board has struggled with the meaning on  
11 several occasions. See e.g., Ford v. Polk County, 7 Or LUBA  
12 232 (1983); Weyerhaeuser v. Lane County, 7 Or LUBA 42 (1982);  
13 and concurring opinion in Dept. of Land Conservation and Dev.  
14 v. Tillamook Cty., 3 Or LUBA 138, 143 (1981). Accordingly, in  
15 our review, we give weight to the county's interpretation of  
16 its own ordinances as expressed in the findings.

17 Respondents argue that public need is no longer a criterion  
18 after adoption of the 1983 Comprehensive Framework Plan, the  
19 Sunset West Community Plan, and the Community Development  
20 Ordinance. While such circumstances may render ordinance  
21 criteria irrelevant in some cases, a transition clause in the  
22 new Community Development Ordinance preserves criteria that  
23 were applicable before repeal of the 1973 ordinance.<sup>7</sup> We  
24 understand the transition clause to mean the decision continues  
25 to be measured by the criteria in the repealed zoning  
26 ordinance. One such criteria states that conditional uses must

1 fill a probable need of the public at this time and place.<sup>8</sup>

2 The county found the Kaiser-Permanente Hospital  
3 organization operates primarily to serve its health plan  
4 members.<sup>9</sup> The findings show the number of subscribers in the  
5 Portland area, including Washington County, is projected to  
6 increase from 251,500 by 1985 to 343,000 in 1995. The two  
7 existing Kaiser-Permanente Hospitals are projected to be full  
8 before that time. The findings then conclude the proposed  
9 location is appropriate to meet the needs of both existing and  
10 anticipated Washington County subscribers.

11 These findings indicate the county interpreted its public  
12 need standard to take into account needs of certain county  
13 residents, i.e., residents of the county subscribing to the  
14 Kaiser-Permanente Health Plan.

15 Petitioner says this interpretation is focused only on the  
16 internal needs of the Kaiser-Permanente organization and is,  
17 therefore, a need of the organization rather than a public  
18 need. Petitioner cites to Ruef v. City of Stayton, 7 Or LUBA  
19 219 (1983). There, a zone change permitting construction of a  
20 cannery warehouse was at issue. The Board said:

21 "There is...a statement in the findings that the  
22 cannery has a need for warehouse space. That is the  
23 cannery's need, however, and though the cannery's need  
24 may also be the community's need, that link is not  
25 established in the finding. We, therefore, believe  
26 the city has failed to comply with its ordinance  
requiring it to show that a public need exists for the  
use." Ruef v. City of Stayton, supra, at 229.

25 See also Sunnyside Neighborhood v. Clackamas Co.  
26 Comm., 250 Or 314, 569 P2d 1063 (1977).

1           The relationship between the community's need and that of  
2 the applicant is more interdependent in this case than was  
3 apparent in Ruef. Here, the community is said to include  
4 members of Kaiser-Permanente's Health Plan. These subscribers  
5 are the principal users of the Kaiser-Permanente Hospital. We  
6 understand the county to have considered the need of these  
7 residents for a Kaiser-Permanente Hospital to be within the  
8 meaning of public need as used in the zoning ordinance.<sup>10</sup>

9           Although petitioner would have the county define public  
10 need differently, the county's interpretation of the need  
11 standard is reasonable and not in contravention of any other  
12 ordinance provision.<sup>11</sup> We accept the county's interpretation.

13           We therefore deny this assignment of error.

14 THIRD ASSIGNMENT OF ERROR

15           In its final claim, petitioner points to Section  
16 2201-3.3(b)(2) of the 1973 Community Development Code. This  
17 section places the burden on all applicants to prove:

18           "(2) The public interest is best carried out by  
19           granting the petition for the proposed action,  
20           and that interest is best served by granting the  
              petition at this time."

21           This standard also applies to this matter by virtue of the  
22 transition clause in the new code discussed above.<sup>12</sup>

23           Petitioner charges the county failed to articulate a public  
24 interest standard distinguished from the standard for public  
25 need, and the county failed to address testimony that the  
26 public interest would not be best served by the proposal.

1 The county's findings addressing this code section are  
2 summarized as follows:

- 3 (1) The site is within an acknowledged urban growth  
4 boundary and has or is getting all essential  
services for development.
- 5 (2) The hospital is one of the uses designated for  
6 the area in the community plan.
- 7 (3) The hospital association states a need exists for  
the hospital.
- 8 (4) The proposed use meets requirements of the  
9 comprehensive plan, including requirements of the  
map elements.<sup>13</sup>

10 Petitioner argues other factors should have been considered  
11 by the county on this issue. The other factors urged by  
12 petitioner generally are about availability of other health  
13 services in the area and the economic impact on existing  
14 medical facilities and health care costs to consumers if  
15 another hospital is built. The criterion itself does not  
16 suggest consideration of the public interest requires the  
17 county to analyze the effects of competition between providers  
18 of health services or the economic effects, such as the price  
19 to consumers. Neither has petitioner pointed to other plan or  
20 ordinance provisions to that effect. The approach taken by the  
21 county that the public interest criterion is met by a proposal  
22 satisfying applicable plan and ordinance provisions and  
23 consistent with neighboring land uses is not unreasonable.  
24 Alluis v. Marion County, 640 Or App 478, 481, 668 P2d 1242  
25 (1983)); Ford v. Polk County, 7 Or LUBA 232 (1983).

1 This assignment of error is denied.

2 The decision is affirmed.

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FOOTNOTES

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4 The 50.5 acre hospital tract is within a 397 acre planned  
5 unit development. The planned unit development application and  
6 the conditional use application for a hospital were processed  
7 by the county at the same time.

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7 Services include, among other things, "community health  
8 involving environmental, mental and physical." 1973  
9 Comprehensive Framework Plan at 144.

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10 "The requested change can be justified by proof that:

11 "The change or location of the facility is in conformance  
12 with the comprehensive plan and also the goals and policies  
13 of the plan.

14 "The change is in conformance with the factors set forth in  
15 ORS 215.055, and have been consciously considered.

16 "The showing of public need for the facility and whether  
17 that public need is best served in this location under  
18 consideration.

19 "The public need is best served by this proposal as  
20 compared with other alternatives or sites.

21 "The potential impact upon the area resulting from the  
22 facility has been considered and an environmental  
23 assessment statement prepared." 1973 Comprehensive  
24 Framework Plan at 145.

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22 Respondents argue that the basic inventory analysis and  
23 policy formulation called for in the policy has been  
24 accomplished in the process leading to adoption and  
25 acknowledgment of the new comprehensive plan. They point out  
26 the new plan mentions the possibility of a hospital at this  
27 location. This begs the question, however, as respondents do  
28 not show the inventory of existing hospitals was analyzed, what  
29 new policy controls the siting of a hospital at this location,  
30 or any other provisions of the new plan satisfying Policy 267.

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Section 1908-29 of the 1973 Community Development Code allowed hospitals as conditional uses in the following zones: RS-1, RS-2, R-30, RU-2, RU-3, RU-4, RU-6, RU-8, RU-15, RU-20, RU-30.

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6  
We have some doubt strategies in the Comprehensive Framework Plan are criteria here. Section 2201-3.3(b) of the former ordinance requires a proposal to be in accord with goals and policies of the plan, not strategies. We note, too, the plan defines strategies as "an approach to implementing the plan." 1973 Comprehensive Framework Plan at 147. It is, therefore, not clear from the plan provisions whether strategies are goals, policies, or neither.

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"All applications filed under former Ordinances, for which a hearing has been conducted on or before the effective date of this code, or a decision rendered if no hearing was required, shall continue to be processed pursuant to the provisions of the former Ordinance, except procedures, until a final decision is rendered by the county or the application is withdrawn...." Section 110-2.1, 1983 Community Development Ordinance.

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8  
The chapter in the 1973 Community Development Code regarding conditional use permits includes the following:

"1902 Goals

"The provisions of this chapter are designed to provide siting criteria for the Conditional Uses specified herein and guidelines for the imposition of additional conditions not specifically provided for herein, to the end that such uses will:

"1902-1 Be consistent with the intent and purpose of the zoning district in which it is proposed to locate such use, and shall meet the requirements of the Comprehensive Plan with regard to providing benefit to the general welfare of the public and will fill a probable need of the public which can best be met by conditional use at this time and in this place." (Emphasis supplied).

This language appears to state a purpose for the

1 conditional use ordinance provisions and not state criteria.  
2 Nevertheless provisions of a purpose clause may be used as  
standards if the local government chooses to do so. See  
Anderson v. Peden, 284 Or 313, 320, 587 P2d 59 (1978).

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The hospital is also open to the public.

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Public need in these circumstances is also distinguishable  
7 from market demand as described in Still v. Board of County  
Commissioners, 42 Or App 115, 600 P2d 433 (1979). The county  
8 there approved a subdivision on Class III and IV soils. Based  
9 on a finding of scarcity of similar lots on the market, the  
county found a need for the proposed development. The court  
10 held a market demand for rural residential development does not  
constitute a need for it as that word is used in Statewide  
11 Planning Goal 2, saying "(1) and is not excepted from the  
agricultural goal merely because somebody wants to buy it for a  
house." Still v. Board of County Commissioners, supra, at  
12 122. The public need found by the Washington County  
commissioners was not the need of the general public for  
13 another hospital. It was described in the findings as a need  
by a segment of the community for a hospital as part of an  
14 overall health plan arrangement.

15 11

Respondents claim any finding of public need is precluded  
16 by the provisions of ORS Chapter 442, particularly the  
17 provisions regarding issuance of a certificate of need for  
certain medical facilities by the State Health Planning and  
18 Development Agency. See ORS 442.320-355. The state agency is  
required to make particular findings, set forth in ORS  
19 442.340(2), as part of the evaluation for a certificate of  
need. We do not read ORS Chapter 442 as prohibiting a local  
20 government from making findings of need related to land use  
planning. While it is conceivable some findings of need could  
21 be inconsistent with the findings of the state agency made  
pursuant to ORS 442.340, that occasion is not before us now.  
22 The county has taken no action that will interfere with the  
duties of the state agency required by ORS Chapter 442. We  
23 decline to speculate on this issue now.

24 12

The county says that Section 2201-3.3(b) is a part of the  
25 former ordinance regulating procedural matters. Because  
26 Section 110-2.1 of the new ordinance excludes procedures from

1 its transition provisions, the county contends Section  
2 2201-3.3(b) is no longer applicable. We do not read Section  
3 110-2.1 to exempt all provisions in the procedure chapter. The  
4 section states decisions "shall continue to be processed  
5 pursuant to provisions of the former ordinance, except  
6 procedures...." (Emphasis supplied). Where substantive  
7 criteria are spelled out, the obligation to demonstrate how the  
8 criteria are met is not a matter of procedure.

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7 The findings are included in the Staff Report at  
8 page 148-149 of the Record. Findings in the Staff Report were  
9 adopted and incorporated as part of the hearings officer's  
10 decision. Record 12. The hearings officer's decision was in  
11 turn incorporated into the county commissioner's order. Record  
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