

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

JUL 19 4 27 PM '85

3 CARL N. HALVORSON and LITTLE)
4 WHALE COVE HOMEOWNERS)
5 ASSOCIATION,)
6 Petitioners,)
7 vs.)
8 LINCOLN COUNTY,)
9 Respondent.)

LUBA No. 84-099
FINAL OPINION
AND ORDER

Appeal from Lincoln County.

Garry P. McMurry, Portland, filed the petition for review and argued the cause on behalf of petitioners. With him on the brief were Rankin, McMurry, VavRosky & Doherty.

Nancy Craven, Newport, filed a response brief and argued the cause on behalf of Respondent County.

Catherine Riffe, Portland, filed a response brief and argued the cause on behalf of Respondent-Intervenor Thomas McDonald. With her on the brief were Lindsay, Hart, Neil & Weigler.

Michael A. Holstun, Salem, filed a response brief and argued on the cause on behalf of the Department of Land Conservation and Development.

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

REMANDED 07/19/85

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 a county ordinance approving a
4 change in the Urban Growth Boundary (UGB) for the City of Depoe
5 Bay.

6 FACTS

7 The city of Depoe Bay enlarged its urban growth boundary by
8 adding 25 acres and requested the county to make the same
9 change in the county's comprehensive plan. The added territory
10 is south of the city near Whale Cove and lies between the
11 Pacific Ocean and Highway 101. The property is identified as
12 forest land in the county comprehensive plan, but the property
13 has been excepted from the Forest Lands Goal (Goal 4). The
14 basis for the exception was that the land is either developed
15 or irrevocably committed to uses not permitted by Goal 4. The
16 exception, and the county's comprehensive plan, have been
17 acknowledged by the Land Conservation and Development
18 Commission (LCDC) as in compliance with statewide land use
19 goals.

20 The area is divided into 41 lots in 17 ownerships. The
21 median lot size is 11,000 square feet, and the largest is 4.98
22 acres. A water district provides water service to the area.
23 Sewer service is not provided, but existing sewer lines from
24 Depoe Bay extend to, or near to, the boundary of the area. The
25 county found these lines to have been sized to provide service
26 for the area in question.

1 There is an existing subdivision north of and adjacent to
2 the area. Residents of this subdivision bring this appeal.

3 APPEARANCE BY DEPARTMENT OF LAND
4 CONSERVATION AND DEVELOPMENT

5 Petitioners moved to strike the brief filed by the
6 Department of Land Conservation and Development (DLCD).
7 Petitioners contend that DLCD is neither an intervenor as
8 provided for in our rules, OAR 661-10-050, nor eligible to
9 appear under ORS 197.830(6).

10 ORS 197.830(6) states in part:

11 "If a state agency whose order, rule, ruling, policy
12 or other action is at issue is not a party to the
13 proceeding, it may file a brief with the Board as if
14 it were a party."

15 Petitioners allege their appeal is not from Goal 14, or any
16 other goal, ruling, order, rule or policy of DLCD. They also
17 assert their brief does not put any goal in issue. We disagree
18 with the contention and deny the motion.

19 We read the petition for review to challenge the
20 application of Goal 14 to the county's decision. The goal
21 states in part:

22 "Establishment and change of the boundaries shall be
23 based upon consideration of the following (seven
24 factors of Goal 14)...."

25 Whether the county properly applied the seven factors is
26 challenged in the petition for review:

27 "The land use decision extending Depoe Bay's UGB is
28 totally without evidence or findings of 'need' as
29 required by Lincoln County Comprehensive Plan and Goal
30 14 incorporated therein."

1 This challenge puts in issue whether two of the seven
2 factors of Goal 14, the "need" factors, were applicable to the
3 decision, and, if applicable, whether the county made adequate
4 findings supported by evidence sufficient to meet the goal's
5 requirements. This places Goal 14, a state agency "order,
6 rule, ruling, or policy," at issue within the meaning of ORS
7 197.830(6). We note, too, that the brief filed by DLCD
8 addresses only the applicability of the seven factors of Goal
9 14 to this decision. We therefore deny the motion to strike
10 the brief filed by DLCD.

11 FIRST ASSIGNMENT OF ERROR

12 Petitioners allege they did not receive notice of any
13 hearings regarding this matter, either before the planning
14 commission or the county commission hearings. The county
15 ordinance requires notice of quasi-judicial plan amendments to
16 all owners of land within 250 feet of the subject property.
17 Petitioners are owners of property within 250 feet of the
18 property within the boundary amendment, and they argue the
19 failure of the county to give the required notice is grounds
20 for remand.

21 Although petitioners did not receive notice of the
22 hearings, they did appear through their attorney at both
23 hearings. Nevertheless, they complain they were prejudiced
24 because they did not have sufficient notice of the planning
25 commission hearing for adequate preparation.

26 Respondent answers this charge by asserting the proceeding

1 was legislative in nature, and the notice requirements for
2 quasi-judicial proceedings were not applicable.

3 We need not examine whether the decision is quasi-judicial
4 or legislative, for even if the ordinance requiring notice is
5 applicable as petitioners contend, the lack of notice does not
6 undermine the decision. As this Board has recognized,
7 diversions from procedural requirements such as formal notice,
8 are not grounds for negating a decision without a showing of
9 prejudice to a substantial right. ORS 197.835(8)(a)(B); Fisher
10 v. City of Gresham, 10 Or LUBA 283 (1984); Okeson v. Union
11 County, 10 Or LUBA 1 (1983); Lee v. City of Portland, 3 Or LUBA
12 31 (1981). Petitioners allege they were "powerless to point
13 out to the planning commission defects contained in the...City
14 of Depoe Bay's findings,...adopted as justification for the
15 planning commission's action." Petition at 8. As noted above,
16 petitioners' attorney appeared at the hearings before both the
17 planning commission and the board of county commissioners.
18 Petitioners have not alleged they were prevented from
19 presenting evidence at either hearing or how the lack of notice
20 affected presentation of their views. Without a demonstration
21 of prejudice to a substantial right of petitioners in more
22 detail than alleged here, the lack of formal notice to
23 petitioners is not grounds for reversal or remand. This
24 assignment of error is denied.

25 SECOND ASSIGNMENT OF ERROR

26 Petitioners assign as error the failure of the county to

1 make any findings about the need for expansion of the UGB.
2 Petitioners say the necessity for these findings is in both the
3 county ordinance and Goal 14, which the ordinance mirrors.

4 Goal 14 states in part:

5 "Establishment and change of the boundaries shall be
6 based upon consideration of the following factors:

7 "(1) Demonstrated need to accommodate long range urban
8 population growth requirements consistent with
9 LCDC goals;

10 "(2) Need for housing, employment opportunities, and
11 livability;

12 "(3) Orderly and economic provisions for public
13 facilities and services;

14 "(4) Maximum efficiency of land uses within and on the
15 fringe of the existing urban areas;

16 "(5) Environmental, energy, economic and social
17 consequences;

18 "(6) Retention of agricultural land as defined, with
19 class I being the highest priority for retention
20 and class VI the lowest priority; and

21 "(7) Compatibility of the proposed urban uses with
22 nearby agricultural activities."

23 The county found there were no changes in population
24 projections for the City of Depoe Bay, and the boundary change
25 was based solely on consideration of factors 3 - 7.

26 Petitioners argue that failure to address the first two factors
is sufficient reason to invalidate the decision.

The basis for the county's approach is enunciated in City
of Salem v. Families for Responsible Government, 64 Or App 238,
243, 668 P2d 395 (1983). The court there recognized the first
two factors in Goal 14 as "need" factors to be used as a guide

1 to estimate the amount of land needed for future urban growth.
2 Factors 3 - 7 are characterized as "locational" factors used to
3 identify the lands most appropriate to accommodate that
4 growth. The court also said:

5 "(I)n certain limited circumstances, an urban growth
6 boundary may contain extra land. When existing urban
7 development or existing public facilities have
8 'committed' an 'unnecessary' piece of land to urban
9 use, the local government may include that land in the
10 boundary in order to avoid illogical development or
11 service patterns . . . To justify such a boundary, the
12 local government must demonstrate, through the
13 application of Goal 14's locational factors, that the
14 land in question is in fact 'committed' to urban
15 use." (Citations omitted). City of Salem v. Families
16 for Responsible Government, supra, at 243.¹

17 We understand the court to sanction establishment or change
18 of UGB's without considering the need factors when the land in
19 question is committed to urban uses. Respondent's defense that
20 the county was not required to consider the need factors can be
21 sustained only if the county demonstrates the affected land has
22 been committed to urban use. We do not agree the county met
23 this burden.

24 The county first argues that the area has been excepted
25 from Goal 4 and that the exception is part of the county's
26 acknowledged plan. However, land committed to nonforest uses
may not be committed to urban uses. The former does not
necessarily include the latter. We do not recognize the
exception, by itself, to show the property is committed to
urban uses.

The county also claims the property is zoned for the most

1 intensive residential uses possible under the county
2 ordinances, suburban residential. The county does not claim
3 the suburban residential zone is equivalent to zoning for urban
4 use per se, only that the zone classification allows as
5 intensive residential use as is possible under the county
6 ordinances. We do not accept this zoning classification as
7 evidence the property is committed to urban uses. The
8 conclusion an area is committed to certain uses must be based
9 on facts illustrating how past development has cast a mold for
10 future uses, not legislative determinations how property ought
11 to be used.

12 The county next argues the findings regarding the
13 locational factors of Goal 14 demonstrate a commitment to urban
14 uses. They rely on findings showing eight lots developed with
15 residences, water service in the area, sewer service at the
16 boundary and petitioners' subdivision on the north. We also
17 note the findings show that because of a high groundwater
18 table, not all of the lots can be developed until sewers are
19 available. While these facts may illustrate the property is
20 not available for resource uses, they fall short of an adequate
21 demonstration the property is committed by "existing urban
22 development or existing public facilities" to urban use, i.e.
23 uses of a kind and intensity characteristic of urban
24 development in the City of Depoe Bay. City of Salem v.
25 Families for Responsible Government, supra. Without such a
26 demonstration, the predicate for adjusting the UGB without

1 consideration of factors 1 and 2 has not been established.

2 Petitioners also claim the county erred by not following
3 the procedures and requirements set forth in Goal 2 for taking
4 an exception. Goal 14 provides, in part:

5 "In the case of a change of a boundary, a governing
6 body proposing such change in the boundary separating
7 urbanizable land from rural land, shall follow the
8 procedures and requirements as set forth in the Land
9 Use Planning goal (Goal 2) for goal exceptions."

10 As noted above, the county did not make findings the
11 subject property is committed to urban uses. Had they done so,
12 those findings would also serve to satisfy the requirements of
13 Goal 2 authorizing an exception on the basis of commitment.²
14 However, without adequate findings of commitment to urban uses,
15 or other findings sufficient to authorize such uses through the
16 Goal 2 exceptions process, the county has not met the
17 requirements of Goal 14 quoted above.³

18 In summary, we sustain the part of this assignment of error
19 challenging the decision for failure to make findings regarding
20 factors 1 and 2 of Goal 14. Such findings must be made because
21 the county has not demonstrated the property is committed to
22 urban uses. City of Salem v. Families for Responsible
23 Government, supra. For the reasons stated above, we also
24 sustain petitioners' claim the county failed to follow the
25 procedures and requirements set forth in Goal 2 for taking
26 exceptions.

27 THIRD ASSIGNMENT OF ERROR

28 Petitioners claim two of the county's findings are

1 unsupported by substantial evidence. The first challenged
2 finding states:

3 "Sewer lines are currently installed to the boundary
4 of the subject property. These lines have been sized
5 to adequately serve development on the subject
6 property. Adequate treatment capacity is presently
7 available to serve all projected development within
8 the Depoe Bay Urban Growth Boundary, including the
9 subject property."

10 Petitioners allege there is no evidence in the record to
11 support the finding that the sewer lines have been sized to
12 accommodate the development in the enlarged UGB area.

13 Respondents deny the allegation and point to a letter dated
14 August 30, 1976, presented at the county commissioners' hearing
15 on November 7, 1984. The letter is from Halvorson-Mason
16 Corporation and is directed to the State Department of
17 Environmental Quality. The letter is signed by Carl Halvorson,
18 one of petitioners herein. In it, the writer advises the
19 proposed sewer system for the subdivision north of the 25 acres
20 in question will have surplus capacity to service 70 additional
21 lots. The minutes of the November 7, 1984 hearing do not show
22 the facts were contested regarding the sewer capacity as stated
23 in the letter. Neither do petitioners point to any evidence in
24 the record refuting the contents of the letter. We accept the
25 letter as sufficient evidence to support the county's finding.
26 Braidwood v. City of Portland, 24 Or App 477, 546 P2d 777
(1976).

27 Petitioners' second claim that the findings are factually
28 unsupported challenges the following finding:

1 "A higher density of development on the subject
2 property will result in a conservation of energy."

3 Petitioners say there is neither evidence to support this
4 conclusion nor the general proposition that higher density
5 development results in the conservation of energy.

6 Respondents contend support for the finding is in the
7 county's comprehensive plan provisions that assess the impact
8 of land use planning on energy use. These provisions discuss
9 various ways in which land use planning can affect energy
10 consumption such as the location of homes and businesses, the
11 availability of efficient transportation systems, how land is
12 divided, density of development, building standards, site
13 orientation and landscaping. In particular, respondents point
14 to one sentence in the plan:

15 "According to one source, 'higher density urban
16 development consumes one half as much land, requires
17 one half as many streets, consumes one half much
18 energy, costs 44 percent less total dollars, creates
19 35 percent air pollution, and results in 35 percent
20 less water consumption,' as sprawling growth." Record
21 at 235.

22 While these statistics may have relevance in some
23 comparisions, their applicability is not apparent here. The
24 proposal is to extend the urban growth boundary to a partially
25 developed area which is conceded to be unnecessary to satisfy
26 the city's need for residential development. To say more
development will conserve energy, even though the development
is not needed, turns the principles of energy conservation
upside down. Respondents cite no evidence in the record to

1 support the challenged finding save the reference to the
2 comprehensive plan discussion of development densities on
3 energy efficiency. We, therefore, agree with petitioners' view
4 this finding is not supported by substantial evidence. The
5 assignment of error is sustained for this reason.

6 Although a remand is in order, we do not suggest the county
7 is required to find the change in the UGB must conserve
8 energy. Factor 5 of Goal 14 requires that energy consequences
9 are to be considered together with environmental, economic and
10 social consequences. The county could conclude, in appropriate
11 circumstances, that the proposal is justified even if energy is
12 not conserved, provided the county explains the weight to be
13 given such findings and the rationale for the decision.

14 REMANDED.

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FOOTNOTES

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1 The court, in City of Salem, supra, recognized the principle, set forth in LCDC Continuance Order, Metropolitan Service District Acknowledgement Request, September 28, 1979, 6 - 7, that while Goal 14 is oriented towards future events, it cannot ignore the past. In the continuance order, LCDC said that where past activities have established irregular development patterns, it may not be possible to draw a boundary for a compact urban growth form without including some "surplus" lands, i.e., lands not needed for urban uses. Pockets of vacant lands within an urban growth form are an example. LDCD advised that such "surplus" lands may be included in an urban growth boundary if they are: (1) already committed, or (2) clearly needed to establish a compact, orderly, economic, energy efficient growth form.

2 "A local government may adopt an exception to a goal when:
"(b) The land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable;..." Goal 2, Part II - Exceptions (as amended December 30, 1983).

3 Respondents, relying on 1000 Friends of Oregon v. LCDC, 73 Or App 350, ___ P2d ___ (1985), say the county's previous exception to Goal 4 obviates the necessity of another exception. 1000 Friends of Oregon, supra, is not applicable. Petitioner in that proceeding challenged LCDC's acknowledgment of a comprehensive plan in part because some rural areas outside UGB's permitted urban development without taking an exception to Goal 14 even though exceptions had been taken to resource goals. The court held an exception to Goal 14 was not necessary in order to allow the same use authorized by the exceptions to Goals 3 and 4. The court did not consider the Goal 14 requirement (applicable here) for changing UGB's, i.e., a procedural requirement for changing UGB's in accordance with Goal 14.