

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

OCT 1 1 35 PM '81

1 DENNIS J. PHILLIPS,)
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Petitioner,

vs.

COOS COUNTY BOARD
OF COMMISSIONERS,

Respondent,

and

GILBERT and BETTY LENTZ,

Intervenors.

LUBA No. 81-063

FINAL OPINION
AND ORDER

Appeal from Coos County.

Dennis J. Phillips, Coos Bay, filed the Petition for Review and argued the cause on his own behalf.

John K. Knight, Coquille, filed the brief and argued the cause on behalf of Repondent.

Gilbert and Betty Lentz, Coos Bay, filed the brief on their own behalf.

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

REMANDED

10/01/81

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

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner appeals Coos County's grant of a zone change for
4 a six acre parcel of land located between the Cape Arago
5 highway and the Coos Bay estuary in Coos County. Coos County's
6 decision changed the zoning on the property from IMC (Interim
7 Marine Commercial) to IR-3 (Interim Residential 3). Petitioner
8 requests that the decision of Coos County be reversed.¹

9 Petitioner's brief contains three major subparts: a
10 summary of arguments, a statement of material facts and eight
11 assignments of error. Fairly read, we construe the Petition
12 for Review as challenging the county's decision to rezone the
13 property IR-3 on the basis the decision violates Goals 5 (Open
14 Spaces, Scenic and Historic Areas and Natural Resources), 6
15 (Air, Water and Land Resources Quality), 7 (Areas Subject to
16 Natural Disasters and Hazards), 16 (Estuarine Resources), and
17 17 (Coastal Shorelands). Petitioner also alleges that the
18 decision violates the Coos County estuary plan. Generally
19 speaking, petitioner argues the county's decision is legally
20 inadequate because the county failed to consider the impact
21 development at the densities permitted within an IR-3 zone
22 would have on the tidelands and estuary. Petitioner also
23 contends the evidence in the record establishes that a good
24 portion of the property is subject to flooding and that, as a
25 result, the county's conclusion that development would not
26 conflict with Goal 7 was in error. Petitioner's allegations of

1 error concerning the Coos Bay Estuary Plan are that the county
2 failed to adequately consider policies in the plan pertaining
3 to protecting the tidelands and continuing the present mix of
4 residential and commercial uses.

5 STATEMENT OF FACTS

6 The property subject to this appeal consists of six acres
7 bordered on the west by the Coos Bay estuary and on the east by
8 the Cape Arago highway. The parcel is adjacent to a
9 residential area referred to locally as "Crab Flats." Crab
10 Flats is characterized as providing low income housing for
11 approximately 50 to 80 people. Petitioner owns approximately
12 two acres adjacent to the subject six acre parcel and within
13 "Crab Flats." Apparently, the six acre parcel and "Crab Flats"
14 are part of a much larger area known as "Empire Homesites."

15 Mr. and Mrs. Lentz stated in their application for the zone
16 change that the purpose of the request was to sell lots for
17 residential uses. They stated there were no natural resources
18 (defined in the application as "minerals, aggregate, timber,
19 wildlife habitats, watersheds; scientifically significant
20 natural areas, etc.") and that the rezone would have no effect
21 on maintaining or improving the quality of the air, water or
22 land resources. They also stated the property was not located
23 within an area subject to natural disasters or hazards. The
24 applicants said the request would encourage the availability of
25 adequate numbers of housing units on buildable lands and that
26 the proposal would protect the unique environmental, economic

1 and social values of the estuary and associated wetlands. As
2 to why they felt it would be appropriate for the proposed use
3 to be situated on the estuary or its adjacent shorelands given
4 the requirements of Goal 16, the applicants stated:

5 "Waterfront homesites are almost nonexistent and
6 highly desirable for residences, also this is a very
7 run down neighborhood and is very much in need of
8 improvement."

9 The planning department prepared a staff report prior to
10 consideration of the rezone request by the Coos County Planning
11 Commission. The staff report noted that the "most appropriate
12 statewide goals in the absence of an acknowledged comprehensive
13 plan" were Goals 6, 7, 8, 10, 11, 12, 13, 14, 16, 17 and 18.

14 The report analyzed the request under each of these goals.

15 Under Goal 6, the report stated:

16 "The request conforms to Goal No. 6. Goal No. 6
17 is to 'maintain and improve the quality of the air,
18 water and land resources of the state.' The proposed
19 project is within an urbanizing area, on both city
20 water and sewer. It should in no way be detrimental
21 to air, water and land resources."

22 Under Goal 7, the county staff stated:

23 "The request conforms to Goal No. 7. Goal No. 7
24 is, 'to protect life and property from natural
25 disasters and hazards.' The subject property is
26 within an area of 0 - 5% slopes. 'Land forms include
27 beaches and marine terraces; hazards include flooding,
28 erosion, deposition, ponding and high ground water,
29 compressable soils and possible amplification of
30 earthquake vibrations; land use potential is excellent
31 to good in areas of minimal hazards.' This particular
32 area should be considered as such. The site is
33 subject to some tidal flooding along the beach area."

34 The staff report addressed Goal 10 as follows:

35 "The request conforms with Goal No. 10. Goal No.

1 10 is, 'to provide for the housing needs of citizens
2 of the state.' Under alternative number 3 the area is
3 considered urban residential, (controlled
4 development). As such residential uses could be
5 allowed. The project conforms with the proposed
6 estuary task forces' plan. Residential use is one of
7 the listed uses for this area. It is considered
8 allowable with standards. These standards are:

9 "A. Residential structures and associated
10 parking must be set back at least 30 feet from
11 the line of non-aquatic vegetation for the
12 purpose of maintaining riparian vegetation.
13 Where erosion or flood hazard exists, the
14 required setback is subject to a case by case
15 site design review that will include both hazard
16 and riparian vegetation considerations.

17 "B. Removal of existing vegetation along
18 the stream or river bank will not be permitted
19 except as necessary for property access or
20 placement of residential structures. Applicants,
21 particularly for subdivisions, will show how they
22 plan to preserve and/or replace riparian
23 vegetation.

24 "C. Storm drainage systems will be
25 separated from sewage disposal systems. Sewage
26 disposal systems will be designed so that water
quality of adjacent coastal waters will not be
impaired.

"D. Adjacent aquatic areas will not be used
to compute lot area or density."

18 The staff report addressed Goals 16 and 17 in the
19 following:

20 "The request conforms to Goals No. 16, No. 17 and
21 No. 18. These goals are basically to protect,
22 maintain and where appropriate develop and restore in
23 relationship to estuaries, shorelands and beaches and
dunes. The request is in accord with the proposed
estuary task force plan for this area, with certain
standards as stated under Goal No. 10."

24 The staff report concluded that Goal No. 5 was "not applicable
25 for the above stated reasons." The "findings" section of the
26 staff report said that the rezone would conform to Goals 6, 7,

1 10, 17 and 18, along with other goals not pertinent to this
2 appeal.

3 The planning commission conducted a hearing at which no
4 additional evidence concerning compliance with the goals was
5 offered by the applicant. All that was before the planning
6 commission in support of the application was, therefore, the
7 planning staff's conclusions concerning the goals, quoted
8 previously, and the applicants' application for the zone
9 change. Petitioner appeared at the planning commission
10 hearing, however, and testified at length concerning the
11 adverse impacts which development of the property allowed by
12 IR-3 zoning would have on the tidelands and estuary.

13 Petitioner informed the planning commission that he was
14 testifying not only as a neighboring homeowner but as a
15 population biologist with a degree in biology. He testified
16 from his own personal knowledge based upon living in the
17 Chesapeake Bay area as to the erosion impact development can
18 cause:

19 "Another effect of putting a lot of people on
20 space I observed personally, standing on a hilltop
21 watching highways wash away on the Chesapeake Bay,
22 which is one reason why I came here. Because that was
23 pretty devastated by the time I was old enough to
24 notice, and uh, I saw where alot of asphalt and alot
25 of roofing washed off alot of water in the Bay in a
26 very short period of time in one storm taking out four
lane highway bridges, threatening the interstate and
devastating several industries, like oysters, crabbing
and so on, I don't know that all of them have ever
recovered from the amount of sediment that was dumped
and if you look at the statement that this will not
impact the estuary and you look at the land the way it
was, and the spruce trees, the alder and the

1 salmonberries (inaudible) that has held back the soil,
2 and you look at what has happened right next to my
3 house on the northside now, how much beach has eroded
4 in three months, since it was cut, you'll find that
5 there is alot of sedimentation going to take place and
6 it is going to effect alot of crustations and mullosks
7 that live on that beach area, and it is an extensive
8 estuary."

9 The planning commission approved the rezone request and so
10 notified the applicants. Petitioner appealed this decision to
11 the Board of County Commissioners. The Board of Commissioners
12 reviewed the record of the planning commission and received
13 additional testimony.

14 Petitioner appeared in writing before the Board of
15 Commissioners. The record indicates he was unable to attend
16 the meeting due to work commitments. Petitioner indicated in
17 his written submittal that he was not opposing all residential
18 zoning on the parcel, only a residential zoning which would
19 allow development at the density permitted by IR-3. Petitioner
20 informed the Board of Commissioners of his degree in botany and
21 two years of graduate work in plant taxonomy and ecology and
22 related sciences at the University of Oregon. He testified
23 that based upon his own personal observation of the property as
24 well as discussions with Crab Flats' residents that the flood
25 plain covered more than just the beach area and in fact
26 extended across the entire property "up to the foot of the
slope at the base of Arago Highway." He testified that HUD
maps showed that the entire property was within the flood plain
of the Coos Bay estuary. He testified that if natural flooding

1 action is prevented by development (e.g., fill) that certain
2 plant life growing in the area would not be allowed to flow
3 into the estuary when flooding occurred and that this, along
4 with destruction of the plant life by development, "will cut
5 off the orderly nutrient flow from the marsh into the tidelands
6 and estuary." He also testified:

7 "The removal of vegetation now underway, and the
8 replacement of that natural blanket and filter with
9 large areas of paving, roofing and lawn will cause
vastly increased erosion of the land sedimentation on
the adjacent tidelands." (Emphasis in original).

10 The net effect of the erosion, sedimentation and loss of plant
11 life, according to petitioner, would be to severely harm the
12 animal life of the adjacent tidelands, including particularly
13 productive clam beds.

14 Petitioner also testified concerning compliance of the
15 proposed request with the draft estuary plan. Petitioner
16 testified that the proposed zoning would violate the policy
17 contained in the estuary comprehensive plan pertaining to
18 "continuation of the present mix of residential and commercial
19 uses." The proposed zoning would allow an increase of from 145
20 to 300 people in an area of five or six acres. Petitioner
21 testified:

22 "At a minimum this would tripple or quadruple the
23 population density of the area. That is far from a
24 'continuation of the present use pattern' referred to
in findings, pages III-IX and in fact would represent
the destruction of Crab Flats."

25 Petitioner also testified with respect to the estuary plan that
26 the development allowed under the IR-3 zone would violate that

1 part of the plan stating:

2 "This large very productive aquatic resource area
3 consisting of seagrass/algal beds, herring spawning
4 and clam beds is a major aquatic production area that
5 must be protected under Goal 16."

6 In addition to petitioner, two others testified before the
7 County Board of Commissioners as to the effect of the IR-3
8 zoning on the tidelands and estuary. Both of these people
9 testified to many of the same concerns as petitioner, although
10 not in as much detail. They testified as to the richness of
11 the marine life on the tidelands and in the estuary and
12 expressed concern that the development would seriously threaten
13 if not eliminate much of the estuarine resources which existed.

14 Others who testified before the Board of Commissioners
15 included the Oregon Shores Coastal Conservation Commission and
16 the League of Women Voters for Coos County. Both of these
17 groups expressed concern about development of the property
18 which would be permitted under the IR-3 zoning, but said their
19 concerns would be alleviated if the county adopted the
20 standards for development contained in the estuary plan quoted
21 previously from the staff report. No further testimony was
22 received by the Board of Commissioners pertaining to the impact
23 of development under the IR-3 zone on the estuary or the
24 tidelands.

25 The Board of County Commissioners voted to affirm the
26 decision of the planning commission adopting, in large part,
the same findings as those set forth in the planning department

1 staff report. The county found that there were no known
2 natural resources on the property and that the property was
3 subject to some tidal flooding along the beach area. The
4 county found that the proposed estuary task force plan
5 designated residential use of the property as an allowable use,
6 provided the standards set forth in the planning staff report
7 could be satisfied.

8 The county listed and summarized the goals which it
9 believed were applicable. The summary for each applicable goal
10 and the findings made by the county pertaining to each are as
11 follows:

12 1. Goal 5

13 "The purpose of Goal 5 is to conserve open
14 space and protect natural and scenic resources.
15 'Natural area' includes land and water that is
16 important as habitats for plant, animal or marine
17 life. Consideration should be given to
18 conservation of renewable and non-renewable
19 natural resources as well as the physical
20 limitations of the land in determining the
21 quantity, quality, location, rate and type of
22 growth allowed in the area."

23 "Rezoning this parcel to IR-3 is consistent
24 with statewide planning Goal 5, open spaces,
25 scenic and historic areas and natural resources,
26 because the subject property does not include the
tidelands and will thus not disturb the habitats
of the marine life indigenous to the area."

27 2. Goal 6

28 "The purpose of Goal 6 is to maintain and
29 improve the quality of the air, water and land
30 resources of the state. Goal 6 requires that
31 consideration be given to the air, water and land
32 resources so that long range needs in the area
33 will not degrade or threaten the availability of
34 such resources."

1 "Rezoning this property to IR-3 will not
2 conflict with Goal 6, air, water and land
3 resources quality, because the proposed project
4 is within an urbanizing area and is on both city
5 water and sewer. It should in no way be
6 detrimental to air, water and land resources."

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3. Goal 7

"The purpose of Goal 7 is to protect life
and property from natural disasters and hazards.
The goal prohibits or limits development in areas
of known natural hazards without proper
safeguards. This goal also requires evaluation
of natural hazards which could result from new
developments."

"Rezoning this parcel to IR-3 is consistent
with statewide planning Goal 7, areas subject to
natural disasters and hazards, because the
subject property is within an area of minimal
hazards and land use potential is thus considered
excellent to good."

4. Goal 10

"Goal 10 requires that the housing needs of
the citizens of the state be considered when
actions concerning land use matters are being
taken. This goal requires that action be taken
to insure that housing of different types, and at
a variety of prices, is available to the citizens
of this state."

"Rezoning this property to IR-3 conforms
with statewide planning Goal 10, housing, because
under alternative number 3 of the Coos County
Comprehensive Plan, the area is considered urban
residential (controlled development). As such,
residential uses could be allowed when the
standards set out in the proposed estuary task
force plan are complied with (see finding fact
number 13, above)."

5. Goal 16

"The purpose of Goal 16 is to protect,
maintain, where appropriate develop and where
appropriate restore the long term environmental,
economic and social values, diversity and

1 benefits of Oregon's estuaries. Permissible uses
2 in these areas include non-dependent, non-related
3 uses which do not alter, reduce or degrade the
4 estuarine resources and values."

5 "Rezoning this property to IR-3 would not
6 conflict with statewide planning Goal 16,
7 estuarine resources, because one of the permitted
8 uses in this area is for non-dependent,
9 non-related uses which do not alter, reduce or
10 degrade the estuarine resources and values. The
11 requested rezone is in accord with the proposed
12 estuary task force plan for this area with
13 certain standards imposed as stated under finding
14 of fact number 13."

15 6. Goal 17

16 "The purpose of Goal 17 is to reduce the
17 hazard to human life and property, and the
18 adverse effects upon water quality and fish and
19 wildlife habitat, resulting from the use and
20 enjoyment of Oregon's coastal shorelands. The
21 priorities for the overall use of coastal
22 shorelines include provisions for development."

23 "Rezoning this parcel to IR-3 is consistent
24 with statewide planning Goal 17, coastal
25 shorelands, because the goal's priority for
26 overall use of shorelines includes provisions for
development including non-dependent, non-related
uses in urban area compatible with existing or
committed uses. The request is in accord with
the proposed estuary task force plan for this
area when developed within the standards stated
under finding of fact number 13."

27 OPINION

28 The county's findings in this matter are conclusory in
29 nature and inadequate as findings of fact. We have repeatedly
30 said, as have the Court of Appeals and Supreme Court of this
31 state, that for findings to be adequate they must explain not
32 only what the decision maker found to be the facts but why
33 those facts lead the decision maker to the conclusion reached.
34 Conclusions are not sufficient. See: Sunnyside Neighborhood v

1 Clackamas County Board of Commissioners, 280 Or 3, 569 P2d 1063
2 (1977); Homeplate v OLCC, 20 Or App 188, 530 P2d 862 (1975);
3 City of Ashland v Bear Creek Valley Sanitary Authority, 2 Or
4 LUBA 121 (1981).

5 The findings in this case are particularly deficient in
6 light of the extensive evidence in the record submitted by
7 petitioner and others as to adverse impacts on the estuary and
8 the tidelands which may well result from development of the
9 property in accordance with the IR-3 zoning designation. The
10 only "evidence" submitted to the contrary was the applicants'
11 application and the staff report whose findings were at least
12 as conclusory as the findings adopted by the county. No where
13 did the county address petitioner's evidence. No where did the
14 county state whether it accepted or rejected the evidence of
15 petitioner and others or why it did so.

16 Viewed in a light most favorable to the county and to the
17 applicant, the best we can say is that there may have been some
18 evidence presented which may be adequate to support a finding
19 that the IR-3 zone would not violate Goals 5, 7, 16 and 17. We
20 can only conclude, however, that based on the record before us
21 the overwhelming weight of the evidence (as opposed to
22 conclusory statements) supports a finding that the IR-3 zone
23 would very likely violate the aforementioned goals. At a
24 minimum, therefore, the county was under an obligation to
25 address the evidence presented by both sides, make findings of
26 fact with respect to this evidence and explain why it made the

1 findings which it did. See: Norvell v Portland Metro ALGBC,
2 43 Or App 849, 604 P2d 896 (1979); City of Wood Village v
3 Portland Metro ALGBC, 48 Or App 79, ___ P2d ___ (1980); Sane
4 Orderly Development v Dougals County Board of Commissioners, 2
5 Or LUBA 196 (1981). Failure to make findings was error and
6 requires that we remand this case to the county for further
7 proceedings.

8 The county attempted in its order to bolster its findings
9 by reference to the "proposed" Coos Bay estuary plan. No
10 inventories from that plan, however, nor any other portions of
11 the plan were included in the record of this proceeding. We
12 are unable, therefore, to determine of what benefit statements,
13 policies or inventories contained in that plan might be to the
14 county or to the applicant in support of the IR-3 zoning for
15 this property. Perhaps the county has in the estuary plan
16 already considered many of the concerns which the petitioner
17 and others raised in this proceeding and resolved those
18 concerns in favor of residential development of the property at
19 the density proposed by the applicant in this case. Based upon
20 this record, however, we simply do not know that this was the
21 case.

22 We do not address the issues raised by petitioner with
23 respect to compliance with the estuary plan. It is referred to
24 in the county's findings and throughout this record as a
25 "draft" or "proposed" plan. We do not know from the record
26 whether the "draft" has been adopted by the county. Because we

1 remand this decision for lack of adequate findings under the
2 goals, the county will have an opportunity to address the plan
3 once again if it is applicable. We only note here that
4 petitioner did raise issues concerning compliance with the plan
5 which were not addressed by the county in its findings. These
6 issues concern compliance with policies in the plan relating to
7 continuing the "present mix of residential and commercial uses"
8 and protecting the tidelands. If the plan is applicable,
9 during any subsequent proceedings before the county, these
10 policies must be addressed. Simply stating that residential
11 uses are permitted under the draft plan, as the county did
12 here, is not sufficient if the plan is applicable where the
13 real, fundamental question is what the density of the
14 residential use for this property should be.

15 For the foregoing reasons, this matter is remanded to the
16 county for further proceedings not inconsistent with this
17 opinion.

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FOOTNOTE

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Petitioner further requests that the applicant be required to apply for single family residential development (IR-1). We have no authority to impose such a requirement, our authority being limited to affirming, reversing, or remanding the decision. See 1979 Or Laws, ch 772, sections 2, 5(4).

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

PHILLIPS,

Petitioner(s),

v.

COOS COUNTY,

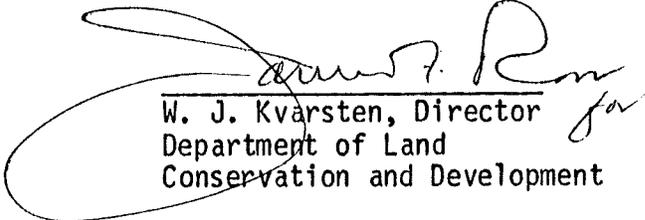
Respondent.

)
LUBA 81-063
LCDC Determination

The Land Conservation and Development Commission hereby approves
the recommendation of the Land Use Board of Appeals in LUBA 81-063.

DATED THIS 30TH DAY OF September, 1981.

FOR THE COMMISSION:


W. J. Kvarsten, Director
Department of Land
Conservation and Development

WJK:ER:af
6768A/9B



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 9/3/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: PHILLIPS V. COOS COUNTY
LUBA NO. 81-063

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

Petitioner appeals Coos County's grant of a zone change for a six acre parcel of land located between the Cape Arago Highway and the Coos Bay Estuary in Coos County. The decision changed the zoning on the property from IMC (Interim Marine Commercial) to IR-3 (Interim Residential 3).

Petitioner and others testified extensively about the adverse impact which development under the new zone would have on the adjacent estuary and tidelands. Only conclusory statements were offered by the staff and the applicant as to the lack of adverse impact development would have on the tidelands and estuary. In its order approving the zone change, the county did not address the evidence offered by petitioner and others but simply made conclusory statements that Goals 6, 7, 16 and 17 were complied with.

The Board concluded the county's findings were conclusory in nature and inadequate as findings of fact. We said that, at a minimum, the county was under an obligation to address the evidence presented by both sides, make findings of fact with respect to this evidence and explain why it made the findings which it did. Failure to make such findings was error necessitating that the case be remanded to the county for further proceedings.

The Board is of the opinion that oral argument would 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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