



1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioner challenges the decision of the Woodburn City  
4 Council denying a request to rezone a 13 acre parcel from  
5 multi-family (RM) to commercial general (CG) and a 1 acre  
6 parcel from commercial office (CO) to commercial general (CG).  
7 Petitioner asks that we reverse the decision and order the city  
8 to make the requested zone changes.

9 FACTS

10 Petitioner owns some 14 acres of land in the City of  
11 Woodburn. One acre of the property is designated as commercial  
12 office (CO), and 13 acres are designated as multi-family (RM).  
13 These designations are at variance with the Woodburn  
14 comprehensive plan and accompanying land use map. In the plan  
15 and map, all of petitioner's 14 acres are designated as  
16 commercial. The Woodburn Comprehensive Plan has been  
17 acknowledged as being in compliance with statewide planning  
18 goals.

19 In July of 1981, petitioner requested a zone change to  
20 apply commercial general zoning to the entirety of the 14  
21 acres. A staff report was made recommending approval of the  
22 application, and the first hearing was held before the Woodburn  
23 Planning Commission in August of 1981. The planning commission  
24 recommended approval and forwarded the recommendation to the  
25 city council.

26 The council considered the matter on September 14 and

1 September 28, 1981. At the first meeting, the council accepted  
2 testimony from the audience, but ultimately no additional  
3 testimony was taken and the matter was considered on the record  
4 of the planning commission. During the September 14 meeting,  
5 the discussion centered about reasons for a denial of the  
6 application including an issue as to whether there was a "need"  
7 for the rezoning and the existence of certain traffic problems  
8 with the development or that the development might occasion.  
9 Additionally, there was some discussion of how much commercial  
10 land was already available under the commercial general zoning  
11 designation.

12 At the September 28 meeting, the council further considered  
13 the matter and also reviewed a portion of the record that had  
14 not been before them at the September 14 meeting.<sup>1</sup>  
15 Councilman Costine stated that he had reviewed the minutes,  
16 talked to members of the planning commission and had examined  
17 the area. After some discussion, the city attorney was  
18 directed to prepare findings of fact for the next council  
19 meeting, to be held October 12, 1981. Findings were submitted  
20 at that October 12 meeting, and a motion was made and seconded  
21 to approve the findings and deny the application.

22 The city's findings are as follows:

23 "1. Although the streets which would be directly  
24 affected by the proposed zone change and development  
25 thereunder [W. Hayes Street, Evergreen Road, the  
26 extension of Evergreen Road, and Oregon State Highway  
214] will at some time in the future be capable of  
supporting traffic generated by such use, they are not

1 now capable without extensive and costly development,  
widening and signalization.

2 "2. There presently exists sufficient undeveloped  
3 and underdeveloped commercial zoned lands within the  
City which have adequate assessability [sic].

4 CONCLUSIONS OF LAW

5 "Petitioner has not met its burden of proof that  
6 the parcel of land in question is, as of yet, needed for  
commercial use nor has petitioner met its burden of  
7 showing that adequate access exists for commercial  
development."

8  
9 ASSIGNMENT OF ERROR NO. 1

10 Assignment of error number one alleges that the first of  
11 the city's two findings of fact is "wholly inadequate and  
12 irrelevant" and is "unsupportive of the council's decision \* \*  
13 \* \*" This assignment of error also alleges that the finding  
14 lacks specificity sufficient to inform the petitioner of the  
15 standards against which his application was tested.

16 Petitioner's argument is that the property is designated  
17 for commercial development. The land use map, according to  
18 petitioner, shows a city council intent to make the extension  
19 of Evergreen Road a primary arterial thoroughfare. Petitioner  
20 is apparently arguing that the extension of the roadway will be  
21 sufficient to meet any traffic increase generated by the  
22 development. Petitioner also complains that the time to  
23 address traffic problems as well as storm drainage problems is  
24 not at the time of rezone, but at the time of site plan review.

25 The city replies that the finding is specific and  
26 identifies the standard for development. Respondent argues the

1 standard for development is "when Woodburn's population  
2 justifies it....," quoting the comprehensive plan for the City  
3 of Woodburn, Volume I at page 29. Respondent argues that  
4 without a growth in population, development and redevelopment  
5 of the streets is not economically feasible for the city.

6 Respondent argues that site plan is not a sufficient  
7 vehicle to address traffic problems. Respondent advises that  
8 the city's site plan ordinance concerns itself with particular  
9 on-site issues, and not the larger issues of traffic  
10 circulation. Respondent would have matters of traffic  
11 addressed at the time of rezoning.<sup>2</sup>

12 We believe the city is correct that the site plan review is  
13 limited to on site design issues and is not a sufficient  
14 vehicle for review of traffic problems. However, we agree with  
15 the petitioner that Finding No. 1 is not adequate to explain  
16 the city's use of the traffic problems as a reason for denial  
17 of the rezone request.

18 The finding simply announces that the affected streets are  
19 "not now capable without extensive and costly development,  
20 widening and signalization" of handling the traffic generated  
21 by the proposed use. The finding does not explain exactly what  
22 traffic will be generated. Indeed, we do not find a discussion  
23 of the traffic impact of this proposed development in the  
24 record. The finding does not explain what is meant by "costly  
25 development, widening and signalization." The only reference  
26 to traffic improvements that we are able to find in the record

1 concerns the use of a signaling device. The Woodburn planning  
2 staff recommended the installation of a traffic control signal  
3 at the intersection of Evergreen Road and Highway 214. Record  
4 25. The staff also advised requesting the owner of Fairway  
5 Plaza for help in the installation of a traffic signal. There  
6 is no discussion of what the traffic impact will be and how it  
7 will require the "costly development" and "widening" referred  
8 to in the finding. As such, it leaves the petitioner without a  
9 clear understanding of what facts and standards the city relied  
10 upon in denying his application in part because of traffic  
11 problems.

12 Assignment of error no. 1 is sustained.

13 ASSIGNMENTS OF ERROR 2 AND 3

14 The second assignment of error alleges that the city's  
15 second and last finding is not supported by substantial  
16 evidence. The third assignment of error alleges that the  
17 council erred in its conclusion that the petitioner had not met  
18 its burden of establishing need.

19 Petitioner argues the second of the city's two findings is  
20 not supported by substantial evidence and is simply wrong.  
21 That is, petitioner argues that since Neuberger v. City of  
22 Portland, 288 Or App 155, 586 P2d 351 (1979), "public need is  
23 no longer a criteria to be proven in the face of an  
24 acknowledged comprehensive plan." Petitioner argues, in the  
25 alternative, that he has shown a need for more commercial  
26 property in the city.

1 We view the city's second finding as a mere conclusion.  
2 Conclusions do not satisfy the requirement that the decision be  
3 supported by findings of fact. The record does show a  
4 statement as to the number of commercial acres available in the  
5 city, but the record does not show and certainly the finding  
6 does not show whether or not the number of acres quoted is  
7 sufficient or not sufficient for commercial development at this  
8 time or at any time in the future. The petitioner is left with  
9 no understanding of what the city believes to be "sufficient  
10 undeveloped and underdeveloped commercial zoned lands;" and,  
11 therefore, he is unable to present facts and arguments to the  
12 city to show whether or not his proposal will meet any need for  
13 more commercial land.

14 We note that the comprehensive plan for the City of  
15 Woodburn includes a section on implementation. This section  
16 was not referred to in the briefs, but it does provide a guide  
17 to the city in rezoning land.

18 "The key stone of plan implementation is the long used  
19 tool of zoning. Zoning code should insure that the  
20 location of various land uses and in some cases, the  
21 timing of those land uses, is in compliance with the  
22 Comprehensive Plan. Zoning ordinances should insure  
23 that incompatible uses do not occur, on the other hand  
24 they should remain as flexible as possible while still  
25 accomplishing the purpose of the plan. The Zoning Map  
26 need not be a reflection of the Comprehensive Plan  
Map. In general, it will be more specific, containing  
many more designations than the Comprehensive Plan  
Map. In addition, there will be many cases where the  
zoning ordinance will be more restrictive than the  
map. This is because there are areas which must be  
retained in a more restrictive zone until public  
facilities are developed or public need is established  
for a zone change to a less restrictive zone.

1           However, in no case should the Zoning Map allow a use  
2           which is less restrictive than that called for in the  
          Land Use Plan." Comprehensive Plan, Volume I, pg. 40.

3           This provision seems to allow the city to leave restrictive  
4           zoning in place until there are adequate public facilities or  
5           there is a need established. The city did not discuss this  
6           portion of the comprehensive plan though it may have had it in  
7           mind when drafting finding of fact no. 2. However, without an  
8           explanation in the findings as to what the city understands to  
9           be adequate public facilities or public need, the finding is  
10          not sufficient to support a conclusion under this portion of  
11          the plan that restrictive zoning should be left in place.

12          Assignments of error 2 and 3 are sustained.

13          ASSIGNMENT OF ERROR NO. 4

14          Assignment of error number four alleges that the city's  
15          decision is not consistent with its comprehensive plan and is  
16          therefore a misconstruction of applicable law. Petitioner  
17          again argues that this particular area of the city is the  
18          newest commercial sector available to meet the commercial areas  
19          in the I-5 Interchange area. The comprehensive plan provision  
20          for the area is as follows:

21                 "The third commercial area in Woodburn is the I-5  
22                 Interchange. While it contains over 85 acres of land  
23                 on both sides of the freeway for commercial  
24                 development, only a little less than 30 have been  
25                 developed to date, leaving the largest amount of  
26                 commercial land in the city for future development.  
               This is the newest commercial sector of Woodburn,  
               having developed only after the Interstate interchange  
               and Senior Estates and their attendant needs for  
               shopping facilities put pressure on this area.  
               However, as it is relatively unfettered by surrounding

1 conflicting land uses and has good transportation  
2 access, it also has one of the greatest potentials for  
3 expansion in the Woodburn area." Petition for Review,  
4 Appendix "A," pg. 8.

5 Because the city's findings are inadequate to explain the  
6 criteria used and the facts believed to arrive at the decision,  
7 we can not determine whether or not the city has misconstrued  
8 its comprehensive plan. We note that the comprehensive plan  
9 for this area as quoted recites that the area "has good  
10 transportation access" and "has one of the greatest potentials  
11 for expansion of the Woodburn area." It is important for the  
12 city to explain its apparent belief that there are serious  
13 traffic problems with the proposed development in the light of  
14 this comprehensive plan provision which appears to recognize  
15 good transportation in the area.

16 ASSIGNMENT OF ERROR NO. 5

17 Assignment of error number five alleges that the city  
18 failed to follow the procedure applicable to the matter before  
19 it and prejudiced the substantial rights of the petitioner in  
20 the following manner:

21 "a. The Council failed to give the petitioner the  
22 opportunity to present oral information "at the  
23 time the rezone is considered" in accordance with  
24 Section 16.040 of the Woodburn Zoning Ordinance.

25 "b. The Council based its decision:

26 "1. On a partial record;

"2. On matters outside the record before it  
and on erroneous information; and

1 "3. On criteria not the proper subject of a zone  
2 change denial."

3 Petitioner claims that the city zoning ordinance provides  
4 that the council may hold a public hearing on a zone  
5 change.<sup>3</sup> Petitioner argues that at the September 14 hearing,  
6 the city was told it could overturn the decision of the  
7 planning commission; it could send the matter back to the  
8 planning commission for additional hearings; it could schedule  
9 a public hearing of its own or it could favorably approve the  
10 recommendation. Petitioner argues that the council made a  
11 decision at that time to deny the application without further  
12 hearing. Petitioner claims that the city was obligated to  
13 schedule a public hearing at which petitioner could present  
14 oral and written testimony if it expected to discuss  
15 information before it from the lower body or from sources other  
16 than the public hearing held before the planning commission.  
17 Petitioner also claims that because the full record was not  
18 before the city council until the September 21 meeting, it  
19 violated its obligation to review the entire record.<sup>4</sup>

20 Petitioner also argues that the council considered matters  
21 not in the record in that:

- 22 1) The audience was asked to give their interest in  
23 the proceeding;
- 24 2) There was discussion of a previous comprehensive  
25 plan zone change;
- 26 3) Discussions were held of available acres of  
commercial general land "totally contradictory to  
record;" and

1           4)    Contacts were received by one councilman from  
2                irate constituents showing opposition to the  
3                proposal.

4           Respondent replies that there is no indication in the  
5           record that the petitioner even requested a hearing before the  
6           city council. The zoning ordinance provides that the  
7           petitioner "may" present written or oral information to the  
8           council, and respondent argues that the petitioner should have  
9           taken advantage of that provision. See footnote no. 1. As no  
10          request for such a hearing was made, the action of the city  
11          council should not be considered a remandable error, according  
12          to respondent.

13          We agree with the respondent. The record does not reveal  
14          an attempt by the petitioner to present any additional  
15          information, and the record is without showing of objection by  
16          petitioner to any of the discussions or procedures that were  
17          held. We believe the time for objection to procedural issues.  
18          should be at the time of hearing, absent some special  
19          circumstance preventing such an objection. Dobaj v. Beaverton,  
20          1 Or LUBA 237 (1980).

21          Further, we do not believe the petitioner has alleged how  
22          it is that its substantial rights have been prejudiced. We do  
23          not believe that a simple show of hands by persons in  
24          attendance at a hearing expressing interest (but apparently not  
25          opinion) in a matter shows prejudice to anyone.<sup>5</sup>

26          As to the issue of availability of commercial land, we

1 understand petitioner's concern over apparent confusion on the  
2 part of one of the city council members as to the amount of  
3 available commercial land. There appears to be a discrepancy  
4 between the councilman's understanding of the number of  
5 available acres and the number of acres recited in the staff  
6 report.<sup>6</sup> Given the poor state of the findings, however, we  
7 do not know whether this information had any bearing on the  
8 outcome of the case. In any event, adequate findings on remand  
9 should cure this issue. We need not, therefore, resolve the  
10 issue here. We do note, however, it is procedurally improper  
11 for the city to base its decision on evidence not in the record  
12 and to which a party has no opportunity to respond.

13 Lastly, we do not understand how one councilman's receipt  
14 of communications from "irate constituents," without more,  
15 prejudices the petitioner. Petitioner has not explained how  
16 these contacts improperly influenced the council to the  
17 detriment of the petitioner.

18 The decision of the City of Woodburn is remanded for action  
19 not inconsistent with this opinion.  
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FOOTNOTES

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There is not evidence to suggest the missing part of the record was because of anything other than mere inadvertance.

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The zoning ordinance for the City of Woodburn provides that a site plan review is required of all structures in the commercial zones of the city. The site plan requirements are as follows:

- "a) A site plan, drawn to scale, showing the proposed layout of all structures and other improvements including, where appropriate, driveways, pedestrian walks, landscaped areas, fences, walls, off-street parking and loading areas, and railroad tracks. The site plan shall indicate the location of entrances and exits and the direction of traffic flow into and out of off-street parking and loading areas, the location of each parking space and each loading berth and areas of turning and maneuvering vehicles. The site plan shall indicate how utility service and drainage are to be provided.
- "b) A landscape plan, drawn to scale, showing the location of existing trees proposed to be removed and to be retained on the site and the location and design of landscaped areas, and other pertinent landscape features.
- "c) Architectural drawings or sketches, drawn to scale, in sufficient detail to permit computation of yard requirements and showing all elevations of the proposed structures and other improvements as they will appear on completion of construction.
- "d) Specifications as to type, color and texture of exterior surfaces of proposed structures.
- "e) A sign plan, drawn to scale, showing the location, size, design, material, color and methods of illumination of all exterior signs." Woodburn Zoning Ordinance, Ch 37, Site Plan Review, Sec 37.020.

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Section 16.040 states:

"The petitioner may present written or oral information to the common council at the time rezone or reclassification is considered."

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It should be noted that the city did not make its motion and vote to deny the application until the October \_\_\_ meeting. Also, the full record was before the city council at the September 28 meeting. The September 28 meeting included discussion of the merits of petitioner's application.

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We also do not understand how it is that discussion of a previous zone change request prejudiced the petitioner. Indeed, petitioner has not explained how this discussion has prejudiced his case.

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We believe the error to which petitioner refers to is a statement by councilman Constine as follows: "There is probably 117.5 acres available under Commercial and 117.17 acres undeveloped under Commercial General." Petitioner claims the comprehensive plan shows a figure of 107 acres of vacant and available commercial land, and a staff report shows:

"The city presently has 9.16 acres of undeveloped commercial general land and 30.26 of undeveloped commercial general land." Record 25.