

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

MAR 14 4 41 PM '84

3 WENDELL WYATT, AS TRUSTEE FOR )  
KURT VAN VLEET, KARL VAN VLEET, )  
4 GEORGE VAN VLEET: and ROBERT VAN )  
VLEET; and ALLEN B. LITWILLER; )  
5 and JACK NIBERT and ADA NIBERT, )  
husband and wife; and GEORGE R. )  
6 VAN VLEET, )  
7 Petitioners, )  
8 vs. )  
9 CITY OF CANNON BEACH, )  
10 Respondent. )

LUBA No. 83-113  
FINAL OPINION  
AND ORDER

11 Appeal from City of Cannon Beach.

12 Heather Reynolds, Astoria, filed the Petition for Review on  
13 behalf of petitioners. Harold A. Snow argued the cause for  
petitioners. With them on the brief were MacDonald,  
McCallister & Snow.

14 Steven T. Campbell, Seaside, filed a brief and argued the  
15 cause for Respondent City. With him on the brief was  
William R. Canessa of Campbell, Moberg & Canessa.

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

18 REMANDED 03/14/84

19 You are entitled to judicial review of this Order.  
20 Judicial review is governed by the provisions of Oregon Laws  
1983, ch 827.

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from action of the city council of the  
4 City of Cannon Beach amending the text of its zoning  
5 ordinance. The amendment, among other effects, eliminated most  
6 residential uses and all motels and hotels as allowed uses in  
7 the Limited Commercial Zone (C1) in the city. The appeal is  
8 brought by several owners of land in the C1 Zone.

9 FACTS

10 The city has an acknowledged comprehensive plan. Prior to  
11 the amending ordinance appealed here, the zoning ordinance  
12 allowed motels, multi-family, duplex and single family  
13 residences as permitted uses in the C1 Zone.<sup>1</sup> Of the land  
14 zoned C1 in the city, 7.14 acres are vacant. Of that amount,  
15 petitioners own 1.53 acres.

16 STANDING

17 Petitioners allege each of them own land in the Limited  
18 Commercial Zone. Each petitioner, in person or by a  
19 representative, appeared orally or in writing to contest the  
20 amendment ordinance, Ordinance 83-20. Respondent challenges  
21 standing of the petitioners saying they have alleged no facts  
22 showing petitioners are adversely affected or aggrieved.  
23 However, petitioners do not need to allege facts showing  
24 adverse effect or aggrievement when they allege they own  
25 property in the zone classification to be amended. This Board  
26 has held that residence or property ownership directly affected

1 by a land use decision, is sufficient interest to grant  
2 standing in a legislative proceeding. Bauer v. Columbia Cty.,  
3 4 Or LUBA 309, 311 (1981). In addition, ORS 197.620 grants  
4 standing to any person who participates in local government  
5 proceedings leading to the adoption of an amendment to an  
6 acknowledged land use regulation.<sup>2</sup> Respondent does not  
7 contest the facts showing each of the petitioners owns property  
8 within the area affected by the zone change and each of them  
9 participated. Therefore, each petitioner has standing.

#### 10 INTRODUCTION

11 Our review of an amendment to a zoning ordinance that  
12 implements an acknowledged comprehensive plan is controlled by  
13 ORS 197.835(3) and (4):

14 "(3) The board shall reverse or remand a land use  
15 decision subject to an acknowledged comprehensive  
16 plan and land use regulations if the decision is  
not consistent with the acknowledged  
comprehensive plan and land use regulations.

17 "(4) Notwithstanding the provisions of subsections 2  
18 and 3 of this section, the board shall reverse or  
19 remand a decision to adopt an amendment to an  
20 acknowledged comprehensive plan or land use  
21 regulation or a new land use regulation if the  
amendment or new regulation does not comply with  
the goals. The board shall find an amendment or  
new land use regulation in compliance with the  
goals, if:

22 "(a) The board determines that the amendment to  
23 an acknowledged land use regulation or the  
24 new land use regulation is consistent with  
specific related land use policies contained  
in the acknowledged comprehensive plan; or

25 "(b) The amendment to an acknowledged  
26 comprehensive plan or land use regulation or  
a new land use regulation, on the whole,

1           comply with the purposes of the goals and  
2           any failure to meet individual goal  
            requirements is technical or minor in  
3           nature."

4           We read these sections to allow review of all land use  
5           decisions subject to an acknowledged comprehensive plan for  
6           consistency with the acknowledged plan and regulations. In  
7           addition, if the land use decision is an amendment to an  
8           acknowledged plan or regulation or a new land use regulation,  
9           this Board may then also review the decision for compliance  
10          with the goals. If reviewed for goal compliance, however,  
11          consistency with the goals must be found if the amendment or  
12          new regulation is consistent with specific related policies in  
13          the acknowledged plan. In that event, further review of the  
14          decision under ORS 197.835(4)(b) for compliance with the  
15          purposes of the goals is not required.

16          Because the portions of ORS 197.835 suggests the sequence  
17          of review as above described, we will consider the assignments  
18          of error in that sequence. The challenge based on alleged  
19          inconsistency with the comprehensive plan will be taken first.

20          THIRD ASSIGNMENT OF ERROR

21          Petitioners allege Ordinance 83-20 is not consistent with  
22          the comprehensive plan for the City of Cannon Beach. The  
23          comprehensive plan utilizes policies, recommendations and  
24          guidelines. Policies are defined as follows:

25                 "Policies have the force of law and are definite [sic]  
26                 statements of intent on the part of the city. They  
                  are to be implemented by the planning commission or by  
                  the city through its legislative acts." City of

1 Cannon Beach Comprehensive Plan, Adopted March 1979,  
p. 2.<sup>3</sup>

2 The plan includes the following policies:  
3

4 "The general size of the downtown commercial and motel  
5 areas shall remain the same. Expansion shall be  
6 contiguous to the existing area based on a showing of  
need." Downtown Area Policy 8.

7 "Incentives for low income housing in or near  
8 commercial centers or other high intensity areas shall  
include the use of public lands, increased densities  
9 or reductions in parking standards." Midtown Area  
Policy 7.

10 "The Tolovana Park area of Cannon Beach shall remain  
11 primarily residential, with limited expansion of  
motels and commercial uses within the presently  
12 designated areas..." Tolovana Park Policy 1.

13 "Motels shall be allowed to expand only within the  
14 presently designated motel or commercial zones. Such  
expansion shall be architecturally compatible with  
15 surrounding residential uses. No increase of motel  
zoning shall be permitted." Tolovana Park Area Policy  
2.

16 "Housing in the commercial areas of the city,  
17 particularly downtown, is encouraged as a means of  
providing needed housing, diversity and security to  
18 commercial areas and better use of public  
facilities." Housing Policy No. 5.

19 "The city recognizes limits on the ability of the area  
20 to absorb tourism during the summer. Efforts shall be  
made to increase the quality, rather than the quantity  
21 of tourism. This shall be done by supporting  
activities which appeal to visitors who stay over  
22 night and by the discouragement of a carnival-type  
atmosphere." Economy Policy No. 2.

23 "Motels interspersed among residential neighborhoods  
24 shall be allowed to expand only on a small scale basis  
on existing property." Economy Policy No. 4.

25 "The zoning ordinance shall designate an area outside  
26 the three commercial centers for commercial activities  
requiring large land uses. Such as storage, wholesale

1 uses, or perhaps light manufacturing such as boat  
2 building." Economy Policy No. 5.

3 Petitioners claim Ordinance No. 83-20 violates these plan  
4 policies because it deletes hotels, motels, and all residential  
5 uses except for limited use in connection with commercial  
6 activities as allowed uses in the C1 Zone. Petitioners contend  
7 the policies generally encourage motel and residential usage in  
8 commercial areas of the city, and they take particular note of  
9 Downtown Area Policy No. 8 requiring the size of the downtown  
10 commercial and motel area to remain the same. Petitioners feel  
11 that policy is violated because Ordinance 83-20 indirectly  
12 decreases the size of the downtown motel area by prohibiting  
13 motel development in the Downtown Commercial Zone.

14 The city answers this last charge by contending the zone  
15 boundaries are not affected by the ordinance. However, we do  
16 not find that argument convincing. The plan policy states the  
17 downtown commercial motel areas shall remain the same. That  
18 appears to mean the portions of the downtown area designated  
19 for commercial and motel uses shall continue to remain  
20 available for both uses. Ordinance 83-20 would violate that  
21 concept by reducing the area in the downtown district available  
22 for motel uses.

23 We are not cited to anything in the record showing how the  
24 elimination of motels, hotels and non-commercial residences as  
25 allowed uses in the C1 Zone would be consistent with the plan  
26

1 policies above noted. The record does include letters from  
2 citizens expressing support for the proposed ordinance.  
3 However, those letters do not contain facts but opinions  
4 favoring adoption of the ordinance and conclusions about the  
5 need to save the vacant land in the C1 Zone for retail  
6 businesses only. Following that course appears to conflict at  
7 least with Housing Policy No. 5 which requires encouragement of  
8 housing in the commercial areas of the city, particularly  
9 downtown.

10 Respondent cites other comprehensive plan policies with  
11 which this decision may be consistent. However, consistency  
12 with other policies does not provide the rationale or  
13 explanation to show how the decision is consistent with the  
14 policies cited by petitioner and quoted supra. Since those  
15 policies seem to be applicable to the situation, the city is  
16 obligated to consider them. The record does not show such  
17 consideration, and we therefore do not find the ordinance to be  
18 consistent with the comprehensive plan.

19 This assignment of error is sustained.

20 FIRST ASSIGNMENT OF ERROR

21 The challenge by petitioners in this assignment of error is  
22 on the grounds there is no factual basis to support the  
23 amendment, stating the following arguments:

24 "(i) The record contains no adequate factual basis  
25 or rationale for the decision to adopt  
Ordinance 83-20, in violation of Goal 2;

26 "(ii) The record shows that the city failed to

1 provide feedback to its citizens, as required  
2 by Goal 1 and the Cannon Beach Comprehensive  
Plan;

3 "(iii) The decision to adopt Ordinance 83-20 is not  
4 supported by substantial evidence."

5 (1) Goal Compliance

6 As noted in the introductory comments, ORS 197.835 first  
7 provides for a review of an amendment to a land use regulation  
8 to consider consistency with an acknowledged plan and also  
9 provides for a review for compliance with the goals. The  
10 provisions for review on the issue of compliance with the  
11 goals, however, allows two alternate tests to assess goal  
12 compliance. The first test, in ORS 197.835(4)(a), mandates a  
13 finding of goal compliance if the amendment is consistent with  
14 specific related policies in the acknowledged comprehensive  
15 plan. The second test, ORS 197.835(4)(b), requires a finding  
16 of goal compliance if the amendment complies on the whole with  
17 the purposes of the goals. We will consider both tests and  
their applicability.

18 (A) First Test - Plan Consistency

19 (ORS 197.835(4)(a)).

20 In the discussion of petitioners' third assignment of  
21 error, we noted the applicable comprehensive plan policies with  
22 which the amending ordinance appeared to be inconsistent. We  
23 found nothing in the record to show how Ordinance 83-20 is  
24 consistent with those policies, and therefore concluded the  
25 decision must be remanded in accordance with the statute that  
26

1 requires reversal or remand for inconsistency with an  
2 acknowledged plan, ORS 197.835(3). We note here that some of  
3 those policies may be sufficiently specific so that the first  
4 test of ORS 197.834(4) could be utilized to test the decision  
5 for compliance with the goals by examining whether the decision  
6 is consistent with specific related policies in the plan.  
7 However, we do not decide the question whether the policies are  
8 "specific related policies" for the same reasons noted in the  
9 previous discussion of the third assignment of error. That is,  
10 there is no explanation, by way of findings or otherwise,  
11 sufficient to enable this Board to make a finding of  
12 consistency with the plan policies. Therefore, the first  
13 alternate test is not satisfied.

14 (B) Second Test - Compliance with Purposes of the Goals  
15 (ORS 197.835(4)(b)).

16 Petitioners raised this issue by alleging a failure of the  
17 record to show a factual basis or a rationale for the decision  
18 in violation of Goal 2.<sup>4</sup> One of the well recognized purposes  
19 of Goal 2 is to assure a rational and adequate factual base for  
20 land use decisions and actions. Because the record here does  
21 not disclose any factual base or rationale for the decision, we  
22 cannot say the ordinance complies on the whole, with the  
23 purposes of the goals.

24 The second test is not satisfied.

25 (2) Plan "Feedback" Requirement

26 Petitioners also say the comprehensive plan requires

1 "feedback," and there was none given by the City of Cannon  
2 Beach.

3 The comprehensive plan policy the petitioners contend  
4 requires feedback states:

5 "Citizens shall receive response to their comments to  
6 decisionmakers either directly at meetings, in the  
7 minutes of the meetings (which are available at city  
8 hall at no cost), or by written correspondence."  
9 Citizen Involvement Policy No. 4, City of Cannon Beach  
10 Comprehensive Plan, March, 1979.<sup>4</sup>

11 Petitioners claim there was no response to the comments  
12 made by petitioners at the public hearing. Although one  
13 councilman stated prior to adoption that he had made an  
14 investigation of citizens' comments and was satisfied that the  
15 comments were either taken out of context or were a  
16 misinterpretation of the ordinance, Record 5, petitioners feel  
17 that response does not meet the plan policy requirements.

18 Respondent argues the manner and form for responses by the  
19 city is covered by provisions of another comprehensive plan  
20 policy which states:

21 "A taped record of each meeting shall be kept in City  
22 Hall and made available to persons wishing to listen  
23 to it. A written summary of the meeting shall be made  
24 available through the city recorder or city clerk at  
25 the individual's expense."  
26 Citizen Involvement Policy No. 5, City of Cannon Beach  
Comprehensive Plan, March, 1979.

27 This policy, however, requires only that a tape and written  
28 summary of meetings be made available to the public. If  
29 council members do not respond to citizen comments at the  
30 meeting, there will be no response recorded on tape or included

1 in the minutes. In that event the taped record and written  
2 summary of the meeting will not meet the requirements of Policy  
3 No. 4.

4 The difficulty we face, however, is that petitioners have  
5 not identified what issues were raised by citizen comments and  
6 sufficiently articulated to require a response. If no  
7 particular issues were raised and the comments were merely in  
8 opposition to the amendment, then the mere adoption of the  
9 ordinance was adequate response by the city. Here we do not  
10 know what petitioners claim to trigger the response required by  
11 Citizen Involvement Policy 4. As previously stated by this  
12 Board, we will not search the record to discover error. Turner  
13 v. Washington County, \_\_\_\_\_ Or LUBA \_\_\_\_\_, LUBA No. 83-014,  
14 (July 22, 1983). Petitioners must specify any alleged failings  
15 of the decisionmakers.

16 (3) Substantial Evidence Requirement

17 Petitioners also argue there was no substantial evidence in  
18 the record to support the adoption of Ordinance 83-20.  
19 Petitioners state the city council provided no reason for its  
20 action, and the record contains no evidence, let alone  
21 substantial evidence, to support adoption of the ordinance.  
22 While this Board may reverse or remand a decision not supported  
23 by substantial evidence in the whole record as provided in ORS  
24 197.835(8)(a)(C), the Court of Appeals has held the forerunner  
25 of that statutory provision to mean that LUBA may reverse or  
26 remand a decision not supported by substantial evidence only if

1 there is a requirement from sources outside the statute giving  
2 LUBA authority to reverse or remand a decision that there be  
3 substantial evidence. Lima v. Jackson County, 56 Or App 619,  
4 643 P2d 355 (1982). Petitioners do not cite to any statute,  
5 plan or ordinance requirements there be evidence to support a  
6 text amendment to the zoning ordinance. A decision will not be  
7 faulted for lack of what is not required.

8 This assignment of error is sustained to the extent there  
9 is no factual basis or rationale in the record showing how the  
10 amendment complies with the applicable plan policies.

11 SECOND ASSIGNMENT OF ERROR

12 Petitioners here claim the city did not follow  
13 quasi-judicial procedures in adopting Ordinance 83-20.

14 The criteria used by LUBA to consider whether a particular  
15 proceeding is legislative or quasi-judicial are those discussed  
16 in Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287  
17 Or 591, 601 P2d 769 (1979) and Neuberger v. City of Portland,  
18 288 Or 155, 603 P2d 771 (1979). In summary, they are:

19 1. Is the proceeding directed at a closely  
20 circumscribed factual situation or one involving  
a limited number of people or small area?

21 2. Are there pre-existing criteria?

22 3. Is the process a bound result in a decision?

23 First, the ordinance applies to all land zoned C1  
24 throughout the city whether developed or not. In addition,  
25 other zoning classifications would be affected by the amendment  
26 because uses prohibited in the C1 zone by the amending

1 ordinance may be concentrated in other zones - viz the  
2 residential and residential/motel zones. The ordinance,  
3 therefore, affects a substantial part of the city. Secondly,  
4 as we noted in our discussion of the third assignment of error,  
5 there are several plan policies regarding districts of the city  
6 where C1 zones are located, and those policies must be  
7 implemented in the city's legislative acts. The policies  
8 therefore comprise the criteria the ordinance must meet.  
9 Lastly, we note the ordinance was initiated as a recommendation  
10 by the planning commission and presumably could have been set  
11 aside by the city council without action at any time.

12 Even though one of the attributes of a quasi-judicial  
13 proceeding listed in Strawberry Hill 4 Wheelers and Neuberger  
14 is present, we find the other two indicators decidedly favor a  
15 finding the ordinance was a legislative decision. It was  
16 therefore not necessary for the city to follow quasi-judicial  
17 procedures in making this amendment.

18 This assignment of error is denied.

19 FOURTH ASSIGNMENT OF ERROR

20 Petitioners here claim the published notices before both  
21 the planning commission and city council hearings were both  
22 substantively and procedurally defective.

23 We first hold the decision appealed from is the ordinance  
24 adopted by the city council. The planning commission procedure  
25 resulted in a recommendation to the city council who then  
26 adopted the ordinance. The recommendation by the planning

1 commission did not bind the city council. The procedures used  
2 in making the recommendation are not under review here.

3 Before the matter came before the city council, notice of a  
4 public hearing was published once in a newspaper. The notice  
5 said the hearing would be held on a "proposed change in the  
6 allowed outright and conditional uses in the C1, Limited  
7 Commercial Zone." Record 32. The notice also stated

8 "Proposed change is intended to more clearly define  
9 those outright and conditional uses allowed in the C1  
10 Zone and will eliminate motels as a use in the Limited  
11 Commercial Zone." Record 32.

12 Petitioner contends the notice was defective because:

- 13 (1) There was a failure to disclose residences would  
14 be eliminated as an allowed use in the C1 Zone;
- 15 (2) Property owners in the C1 Zone were not notified  
16 individually; and
- 17 (3) There was only one publication.

18 Petitioners acknowledge in their petition that the only  
19 city ordinance requiring notice before the city council amends  
20 the zoning ordinance requires notice only when the proceedings  
21 are initiated by the property owner. That ordinance did not  
22 apply here as the amendment was initiated by the planning  
23 commission. Adoption of Ordinance 83-20 was a legislative act,  
24 as discussed previously, and individual notices are not  
25 required in legislative actions unless there is a statute or  
26 ordinance requirement for that type of notice. Petitioner has  
not claimed there are any such requirements.

We can assume the public meeting law applies, but that law

1 merely requires a notice must include a list of the principal  
2 subjects anticipated to be covered at the meeting.<sup>6</sup> The  
3 statute does not require the details of a matter to be  
4 disclosed in the notice. Petitioners do not claim the public  
5 meeting law, or any other statutory or ordinance provision  
6 requires such detail.

7 Petitioners also claim that notice of the city council  
8 meeting should be published three times just like notices of  
9 the planning commission are required to be published by city  
10 ordinance. No legal basis for this claim is articulated by  
11 petitioner, and it appears to be based on petitioners' sense of  
12 equity or fair play. We do not have authority to review for  
13 compliance with such standards.

14 This assignment of error is denied.

15 We note here the problems sometimes created when findings  
16 are not made merely because a land use decision is deemed by  
17 the governing body to be legislative. We do not believe it is  
18 necessary to encourage further classification of decisions or  
19 to add to the ramifications that follow when a decision is  
20 labeled as either legislative or quasi-judicial. But when a  
21 decision must be reviewed by this Board for consistency with  
22 criteria or standards, findings by the governing body showing  
23 how the decision is in compliance with those criteria may be  
24 vital to a reviewing body. Findings will eliminate speculation  
25 by this Board, or any reviewing body, whether the applicable  
26 criteria were considered or not, and they will provide a road

1 map to assist in our review.

2 In this case we have neither findings nor citations to  
3 other parts of the record showing the necessary consistency  
4 with the comprehensive plan policies of the city. We therefore  
5 remand for further proceedings. The city must provide findings  
6 or other explanation in the record showing how eliminating  
7 hotels, motels, and non commercial residences as allowed uses  
8 in the Limited Commercial Zone will be consistent with the  
9 city's comprehensive plan.

10 Remanded.

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FOOTNOTES

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4 The zoning ordinance allowed as permitted uses all uses  
5 allowed as permitted or conditional uses in the R3 Zone (High  
6 Density Residential Zone). The R3 Zone, in turn, allowed as  
7 permitted uses all permitted uses allowed in the Medium Density  
8 Residential (R2), Moderate Residential (R1), and Lower Density  
9 (RL) Zones. The R3 Zone allowed as conditional uses all of the  
10 conditional uses permitted in the RL, R1 or R2 Zones. Thus,  
11 all permitted and conditional uses in the R1, R2 and RL Zones  
12 were permitted outright in the C1 Zone prior to the amendment.  
13 The ordinance being appealed also made other changes in the  
14 uses permitted outright in the C1 zone not relevant to this  
15 appeal. The changes challenged by the petitioners are limited  
16 to the elimination of motels, hotels, and residences other than  
17 residences incidental to a commercial use.

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12 ORS 197.620(1)

13 "(1) Notwithstanding the requirements of ORS 197.830 (2)  
14 and (3), persons who participated either orally or in  
15 writing in the local government proceedings leading to  
16 the adoption of an amendment to an acknowledged  
17 comprehensive plan or land use regulation or a new  
18 land use regulation may appeal the decision to the  
19 Land Use Board of Appeals under ORS 197.830 to  
20 197.845. A decision to not adopt a legislative  
21 amendment or a new land use regulation is not  
22 appealable."

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19 3

20 The plan is not specific about the function or weight to be  
21 given recommendations and guidelines. Given the explicit  
22 language according policies the force of law to be implemented  
23 through legislative acts, we will assume the recommendations  
24 and guidelines are just that, recommendations only.

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23 4

24 A review for compliance with the goals under this test  
25 would seem to be unnecessary under the circumstances here  
26 because of the required remand pursuant to ORS 197.835(3) for  
failure of the record to show consistency with the plan  
policies. If on remand the proceedings are conducted and

1 recorded to show consistency with the plan as a whole and  
2 consistent with specific related policies, then testing for  
3 compliance directly with the goals may not be necessary. ORS  
4 197.835(4)(a).

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5 These requirements can be compared to the requirements of  
6 Goal 1 which requires "(t)he rationale used to reach land use  
7 policy decisions shall be available in the form of a written  
8 record."

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8 ORS 192.640(1) states

9 "(1) The governing body of a public body shall provide for  
10 and give public notice, reasonably calculated to give  
11 actual notice to interested persons including news  
12 media which have requested notice, of the time and  
13 place for holding regular meetings. The notice shall  
14 also include a list of the principal subjects  
15 anticipated to be considered at the meeting, but this  
16 requirement shall not limit the ability of a governing  
17 body to consider additional subjects."

14 We express no opinion on whether we may review a land use  
15 decision for compliance with the provisions of ORS Chapter 192.

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