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

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SPALDING & SON, INC.,)
)
Petitioner,)
)
vs.)
)
JOSEPHINE COUNTY and BYERS)
CONSTRUCTION, INC.,)
)
Respondents.)

LUBA No. 85-028
FINAL OPINION
AND ORDER

Appeal from Josephine County.

Walter L. Cauble, Grants Pass, filed the petition for review and argued the cause on behalf of Petitioner. With him on the brief were Schultz, Salisbury & Cauble.

No appearance by Respondents Josephine County or Byers Construction, Inc.

REMANDED 11/01/85

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner requests we reverse a decision by the Josephine
4 County Board of Commissioners rezoning an 88.3 acre parcel from
5 Rural Residential 5 Acre Minimum (RR-5) to Rural Residential
6 2.5 Acre Minimum (RR-2.5).

7 FACTS

8 This rezoning decision was initiated by the Applicant,
9 Byers Construction, Inc. The original request included
10 application for a planned unit development with 49 housing
11 units and a rezoning of the subject property to Rural
12 Residential One Acre Minimum (RR-1). The county board of
13 commissioners modified petitioner's rezoning application
14 without taking action on the planned unit development
15 application. Instead of granting applicant's request for RR-1
16 zoning, the board of commissioners granted a zone change to
17 RR-2.5 zoning.

18 The subject property is outside the urban growth boundary
19 for the City of Grants Pass. Mixed residential and commercial
20 uses exist to the north across Highway Interstate 5, and there
21 are small farms to the west of the property. A lumber mill,
22 owned by petitioner, lies to the southwest of the property.

23 ASSIGNMENT OF ERROR NO. 1

24 "The Board of County Commissioners failed to consider
25 the requirement of showing a public need for the zone
26 change."

1 Petitioner asserts the county was required to articulate a
2 public need for this zone change. Petitioner's argument is
3 based on its view that because the county's plan has not been
4 acknowledged as being in compliance with statewide planning
5 goals, the goals still apply. Guideline 5 of Statewide
6 Planning Goal 2 provides:

7 "B. Minor Changes

8 Minor changes, i.e., those which do not have
9 significant effect beyond the immediate area of
10 the change, should be based on special studies or
11 other information which will serve as the factual
12 basis to support the change. The public need and
justification for the particular change should be
established. Minor changes should not be made
more frequently than once a year, if at all
possible." Goal 2, Guideline 5(13).

13 Petitioner acknowledges that the guidelines are not
14 mandatory. See ORS 197.015(9). However, if the county
15 provides no alternate means of compliance with the goals, the
16 guidelines must be followed, according to petitioner.
17 Petitioner adds the Josephine County Zoning Ordinance does not
18 provide criteria for determining whether zone change requests
19 should be approved or rejected.¹ Petitioner concludes that
20 because there is nothing in the county ordinance providing an
21 alternative to compliance with Goal 2 (other than through
22 Guideline 5) the county should have addressed the public
23 need.²

24 We do not agree that Guideline 5 of Goal 2 is an approval
25 standard. ORS 197.015(9); Gayken v. City of Portland, 1 Or
26

1 LUBA 313 (1980). However, the Josephine County Comprehensive
2 Plan provides, in part, that

3 "[l]and use allocations will, to the greatest extent
4 possible, accommodate the identified need and public
5 desire for rural residential homesites, while
6 preserving the rural character of the area.
Appropriate minimum lot sizes for rural residential
areas shall be determined by land limitations,
including the following:

7 "a. Ability to provide adequate sewage disposal.

8 "b. Availability of water supplies for domestic
purposes.

9 "c. Suitability of the area for development,
10 including proximity of public roads, and the lack
11 of development hazards, such as floodwater
inundation, steep slopes, erosive soils, or
extreme wildfire hazard.

12 "d. The character of the area and the desire of the
13 property owner." (Emphasis added). Goal 3,
Policy 3.

14
15 This provision is directly applicable to zone change
16 proceedings in rural areas in Josephine County. It requires
17 identification of need for the proposed land use allocation.
18 Therefore, while we do not agree with petitioner on the source
19 of a public need requirement in this case, we do agree public
20 need is an applicable criterion.

21 The county concluded need was not a criterion, citing
22 Neuberger v. City of Portland, 288 Or 115, 603 P2d 771
23 (1980). However, the county's reliance on Neuberger is
24 misplaced. Where the local jurisdiction chooses to adopt a
25 public need criterion in its land use regulatory scheme, it may
26 not ignore the requirement thereafter. Feitelson v. City of

1 Salem, 46 Or App 815, 613 P2d 489 (1980). Because the county
2 failed to address the need requirement in its own plan, this
3 case must be remanded.

4 We therefore sustain this assignment of error.

5 ASSIGNMENT OF ERROR NO. 2

6 "The Board of County Commissioners' findings are
7 inadequate because they do not identify the proper
8 criteria, they simply recite evidence rather than make
9 findings of fact, and they are conclusory in nature."

10 Petitioner complains that "the findings as a whole are
11 defective" and lists the following reasons:

12 "A. They contain mere recitations of evidence without
13 conclusions as to the law. The basic facts were
14 not tied to the criteria and standards of law.

15 "B. All applicable criteria was not identified and
16 addressed.

17 "C. There was merely a restating of the criteria
18 rather than a explanation of how the criteria was
19 [sic] met.

20 "D. The findings in many respects are conclusory in
21 nature." Petition for Review at 14.

22 Petitioner takes several findings in turn and argues each is
23 inadequate. For example, petitioner complains that findings
24 addressing Josephine County Comprehensive Plan Goal 3, Policy 3
25 are mere recitations of evidence and do not show compliance
26 with the goal. Petitioner cites a county finding referring to
the expertise of Mr. Byers, of Byers Construction, Inc., and
concluding from his testimony that "he would provide a quality
development which would more than satisfy the conditions of

1 this goal." Record, p. 21. Petitioner argues this finding,
2 and others like it, do not address relevant criteria.

3 Petitioner is correct that the county's conclusion about a
4 "quality" development and another conclusion about the
5 project's "unique" character do not show compliance with the
6 goal. Such findings are not, however, objectionable if other
7 findings do address the relevant criteria.³ We are unable to
8 remand or reverse the county's decision unless petitioner
9 convinces us that the findings fail to discuss applicable
10 criteria.⁴ Later in this assignment of error, however,
11 petitioner complains about findings which are critical to the
12 county's decision.

13 Petitioner argues the county findings on Comprehensive Plan
14 Goal 3, Policy 3 are not adequate. Goal 3, Policy 3 requires,
15 among other things, adequate water supply and adequate sewage
16 disposal. Petitioner claims the county's discussion simply
17 does not show these needed services are available.

18 We agree with petitioner that the findings about water and
19 sewage disposal are not sufficient. The county board did not
20 make a finding there would be adequate water supply for
21 domestic purposes. Instead, the county conditioned the zone
22 change on a later showing of an adequate water supply. There
23 is, however, no means to insure the condition has been met and
24 there is no provision insuring the petitioner (and the public)
25 will have an opportunity to review whether the condition was
26 indeed satisfied. See Margolis v. City of Portland, 4 Or LUBA

1 89 (1981), and Turner v. Washington County, 8 Or LUBA 234, 70
2 Or App 689 P2d 1318 (1988).

3 Similarly, there is no finding that adequate sewage
4 disposal is available. The county board relies, instead, on
5 later approval by state and local authorities. The board's
6 finding is as follows:

7 "The Board found that the applicant's intentions for
8 the proposed system, as explained and demonstrated by
9 Bilsborough, Gantenbien, and substantiated by
10 Pescador, and Costanzo were adequate to support the
11 development, if the minimum lot size were placed at
12 2.5 acre zoning. Ultimately, the plans must be
13 approved by County and State authorities, most
14 notably, the DEQ, who are more familiar with this type
15 of plan, as stated by Mr. Costanzo, of County
16 Environmental Health."

17 These findings are not sufficient to demonstrate
18 conformance with the plan policy. They do not explain what
19 facts the county believes to be true about the water supply and
20 sewage disposal and how those facts show that adequate water
21 and sewage disposal is available. See South of Sunnyside
22 Neighborhood League v. Clackamas County Comm. 280 Or 3, 569 P2d
23 1063 (1977).

24 The second assignment of error is, therefore, sustained as
25 to petitioner's challenge under Goal 3, Policy 3.

26 THIRD ASSIGNMENT OF ERROR

"The Board of County Commissioners erred in granting
the rezoning because the rezoning application was
premised upon the granting of approval of a specific
planned unit development to accommodate one acre
zoning. The board did not grant approval of the
planned unit development proposed."

1 Petitioner's chief complaint is that there are inadequate
2 findings and no substantial evidence in the record to support
3 the decision to rezone the property from RR-5 to RR-2.5.
4 Petitioner argues that the original application for a planned
5 unit development called for clustering the development on
6 hillside property. This clustering "seemed to compel the Board
7 to grant a rezoning." Petition for Review at 21. Nonetheless,
8 the county board rezoned the property to 2.5 acres instead of
9 the one acre zoning as requested.

10 Goal 3, Policy 3 requires that a public need exist for
11 residential homesites. If the county's order choosing one lot
12 size over another is objectionable, it is objectionable because
13 it does not explain how the choice of 2.5 acre zoning is
14 consistent with a need for rural residential homesites, as
15 required by Goal 3, Policy 3.

16 Because this case is to be remanded, we believe it is
17 incumbent upon the county to explain the need for RR-2.5 acre
18 zoning, assuming the county concludes that this particular lot
19 size is appropriate for the subject property after careful
20 consideration of all applicable criteria.

21 The third assignment of error is sustained.

22 ASSIGNMENT OF ERROR No. 4

23 "The board of county commissioners failed to fully
24 consider the suitability of the area for development,
25 and, there was no substantial evidence in the record
26 to support the conclusion that the area was in fact
suitable for development at a density of 2.5 acres."

1 Petitioner argues the county's order violates Statewide
2 Planning Goals 6 and 11 and Josephine County Comprehensive Plan
3 Goal 3, Policy 3. Statewide Planning Goal 6 concerns "Air,
4 Water and Land Resources Quality," and Statewide Planning Goal
5 11 establishes a requirement for adequate "public facilities
6 and services." Petitioner repeats his complaint that the
7 county's order does not show adequate consideration of water
8 supply and sewer service requirements, and this inadequacy
9 results in a violation of both Goals 6 and 11. Petitioner also
10 argues the county failed to adequately address evidence of soil
11 instability existing on the property.

12 The county's order does not adequately address water supply
13 and sewage systems. It does not articulate facts which show
14 that Goal 6's requirement for protection of water quality, Goal
15 11's requirement for adequate public facilities and services
16 and Josephine County Goal 3, Policy 3 are satisfied. Rather,
17 as discussed under Assignment of Error No. 2, the county relies
18 on future review by state and county officials to insure safe
19 development, adequate water and adequate sewer. This reliance
20 is inappropriate. There is nothing in the county plan
21 permitting approval of new lot sizes without a showing that all
22 of the requirements of Goal 3, Policy 3 are satisfied.
23 Similarly, applicable statewide planning goals must be found to
24 be satisfied before approval is granted. Constant v. Lake
25 Oswego, 5 Or LUBA 311 (1982).

26 We do not sustain petitioner's challenge to county findings

1 about soil instability. The county order mentions testimony by
2 "Pescador" that the soils are stable. The finding is as
3 follows"

4 "The Board also found that the applicant has taken
5 sufficient steps to mitigate the possibility of slope
6 failure, eorsion, etc. with the utilization of the PUD
7 concept, which allows for clustering of homes and
8 buildings with the end result being less cuts and
9 fills than standard development practices would result
10 in. Additionally, it has been shown in the testimony
11 of Pescador that the surface, which has been disturbed
12 in the cutting in of the road some years ago, has
13 remained stable, and that the soils, although termed
14 potentially erosive, have remained stable. Therefore,
15 the stable condition of the soil, combined with the
16 careful planning of applicant's staff, leads the Board
17 to the finding that the development will not cause
18 undue erosion on the hillside."

12 This finding states facts leading to the conclusion the
13 soil has remained stable. We do not understand the county plan
14 to require more on this issue.⁵

15 We therefore deny Assignment of Error No. 4.

16 This matter is remanded to Josephine County. The county
17 must explain in written findings how the application complies
18 with its comprehensive plan and the applicable statewide
19 planning goals.

FOOTNOTES

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We do not agree with petitioner that the zoning ordinance provides no criteria for this change. Included in the introduction to the rural residential district section of the zoning ordinance, is Section 22.010 which provides as follows:

6 "SECTION 22.010 Purpose of Rural Residential District.

7 The purpose of this District is to preserve the rural
8 character of Josephine County while providing areas
9 for rural residential living. This District provides
10 a classification for lands already committed to
11 residential development or for lands which have been
12 excepted from the Statewide Planning Goals on
13 Agriculture and Forest Lands. Densities established
14 by this District for developing areas are intended to
15 ensure that development does not exceed the physical
16 capability of the land to support sewage disposal
17 systems, consumptive groundwater withdrawal, and
18 environmental quality."

13 While not specific this section does provide guidance to the
14 public seeking application of one of the rural residential
15 zones. Also, the Josephine County Comprehensive Plan Goal 3
16 provides specific criteria we believe are applicable to zone
17 change decisions. Anderson v. Peden, 30 Or App 1063, 569 P2d
18 633, aff'd, 284 Or 313, 587 P2d 59 (1978).

17 2

18 Petitioner develops this argument because of a discussion
19 in Neuberger v. City of Portland, 288 Or 115, 603 P2d 771
20 (1980). In that case, the court held that once a comprehensive
21 plan and its implementing ordinances have been acknowledged to
22 be in compliance with statewide planning goals, specific land
23 use decisions will not be governed by statewide planning goals,
24 but by the governing local plan and ordinances. Because the
25 Josephine County plan and implementing ordinances have not been
26 acknowledged, the goals apply. Petitioner then cites us to
Goal 2, Part 3 providing:

23 "Governmental units shall review the guidelines set
24 forth for the goals and either utilize the guidelines
25 or develop alternative means that will achieve the
26 goals. All land use plans shall state how the
guidelines or alternatives means are utilized to
achieve the goals."

1 From this provision petitioner concludes Guideline 5 is
2 directly applicable.

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4 Petitioner also attacks a finding in which the county
5 concludes, without any supporting facts, that 2.5 acre zoning,
6 and not the one acre zoning requested by the applicant, was
7 appropriate for the planned unit development and therefore for
8 this property. See our discussion under Assignment of Error
9 No. 3, infra.

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11 Petitioner also attacks several findings about Statewide
12 Planning Goals 5, 6, 10 and 11. However, petitioner does not
13 claim, in this assignment of error, that the county violated
14 these statewide planning goals. Rather, petitioner simply
15 quarrels with the individual findings. Without an allegation
16 of goal violation, we see no point in reviewing each of
17 petitioner's several challenges. But see our discussion under
18 Assignment of Error No. 4, infra.

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20 We add that petitioner has not challenged the county's
21 evidence to support this finding, and we make no comment on
22 whether the finding is supported by substantial evidence in the
23 record.