

LAND USE
BOARD OF APPEALS

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

DEC 10 12 07 PM '86

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LANE COUNTY SCHOOL DISTRICT 71,)
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Petitioner,)
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vs.)
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LANE COUNTY,)
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Respondent,)
)
JASPER MOUNTAIN CENTER,)
)
Respondent-Intervenor.)

LUBA No. 86-049
FINAL OPINION
AND ORDER

Appeal from Lane County.

Alan Couper, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Larry O. Gildea.

William Van Vactor, Eugene, filed a response brief and argued on behalf of Respondent County.

William Kloos, Eugene, filed a response brief on behalf of Respondent-Intervenor Jasper Mountain Center. With him on the brief were Johnson & Kloos.

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

AFFIRMED 12/10/86

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 appeals Ordinance PA 900-A, by which Lane County
4 approved a comprehensive plan and zone change on rural land in
5 Lane County. The ordinance amends the comprehensive plan
6 designation from "Forest" to "Rural" and the zoning designation
7 from F-2 "Impacted Forest Land" to RR-10 "Rural Residential-10"
8 and includes an exception to Statewide Planning Goal 4, the
9 forest lands goal.

10 FACTS AND PROCEDURAL HISTORY

11 Jasper Mountain Center (JMC) is a shelter care home. See
12 ORS 418.470.¹ It presently houses 10 children in long-term
13 foster care. It is a nonconforming use predating adoption of
14 the comprehensive plan. The proposal would expand the center's
15 facilities to accommodate up to 12 additional children. The 12
16 children would be at the center only until other homes are
17 found.

18 In August, 1985, the center requested the comprehensive
19 plan and zone change to allow expansion of the facility. The
20 planning commission considered the matter and referred it to
21 the board of commissioners. The board approved the requested
22 change in Ordinance PA 900. That ordinance was appealed to
23 this board, and upon the county's request, we remanded the
24 decision to the county board for further proceedings. The
25 county requested the remand in order to develop improved
26 findings of fact. See Record Item 2, page 2.

1 After remand, the county commissioners considered the
2 matter at a single public hearing on March 5, 1986. The board
3 again approved the proposal, and this appeal followed.

4 ASSIGNMENT OF ERROR NO. 1

5 "The findings are insufficient and not supported by
6 substantial evidence in the record. As a result, the
County took an action which is tantamount to
7 spot-zoning."

8 Petitioner notes the county findings appear to say that
9 Jasper Mountain Center will provide on-site schooling, and yet
10 the list of services to be provided by JMC, including the
11 county's order, omits the word "schooling." See Record at 3,
12 7, 11, 16 and 21. Petitioner states that the record is
13 ambiguous as to whether or not a need exists for on-site
14 schooling at Jasper Mountain Center and whether the center can
15 and will provide that schooling. According to petitioner, the
16 record clearly shows JMC can not and will not provide on-site
schooling.

17 Petitioner also alleges that county findings stating JMC
18 will be funded by the Children's Services Division are without
19 support in the record. The record shows the Children's
20 Services Division has no contractual arrangement with the
21 center, according to petitioner.

22 Petitioner claims that, taken together, the inadequate
23 findings and lack of substantial evidence in the record to
24 support the findings show the county board's action "was
25 nothing more than an effort to accommodate desires of JMC and
26

1 is tantamount to spot-zoning." (Emphasis in original)

2 Petitioner's Brief at 9.

3 Respondents argue that petitioner has failed to identify
4 any criterion violated by this land use decision. That is,
5 there is no state law, county plan or ordinance requirement
6 that JMC provide its own school or that the Children's Services
7 Division fund the facility. We agree. Petitioner cites to
8 nothing in the county's land use controls which requires that a
9 child care facility such as JMC provide its own school or be
10 funded by any particular source. Without a showing that a
11 criterion has been violated, we can not provide petitioner with
12 relief. Further, even if the findings are erroneous or are not
13 supported by substantial evidence in the record, we will not
14 remand or reverse the decision unless the challenged findings
15 are critical to the decision. Bennett v. Linn Co. Board of
16 Commissioners, 14 Or LUBA 217 (1986); Bonner v. City of
17 Portland, 11 Or LUBA 40 (1984).

18 Petitioner's claim that the land use decision constitutes
19 "spot-zoning," must also fail. By "spot-zoning" we understand
20 petitioner to mean a land use decision made in derogation of
21 established criteria or made without criteria; that is, an
22 arbitrary and capricious decision. See Jehovah's Witnesses v.
23 Mullen, 214 Or 281, 330 P2d 5 (1958).

24 The decision was made under several plan and zone criteria
25 in the county's land use regulatory scheme. Lane County's land
26 use regulations are acknowledged by the Land Conservation and

1 Development Commission to be in compliance with statewide
2 planning goals and therefore form the basis for future land use
3 decisions. The county order states reasons for the decision,
4 supported by findings of fact. Unless petitioner can show that
5 some criterion is violated by the decision, we can not grant
6 relief under this assignment of error. The petitioner has made
7 no claim cognizable under ORS 198.835. See, also City of
8 Gresham v. Realty Investment, 55 Or App 527, 638 P2d 1177
9 (1982).

10 The first assignment of error is denied.

11 ASSIGNMENT OF ERROR NO. 2

12 "The Board of Commissioners committed procedural error
13 by failing to refer PA 900-A to the Planning
Commission."

14 Petitioner states the Lane Code required the county board,
15 after our remand, to refer the application to the planning
16 commission. Lane Code Section 16.400(6) states:

17 "(a) Referral to Planning Commission. Before the
18 Board takes any action on a Rural Comprehensive Plan
19 component, or an amendment to such plan component, a
20 report and recommendation thereon shall be requested
21 from the County Planning Commission and a reasonable
time allowed for the submission of such report and
22 recommendation. In the event the Rural Comprehensive
Plan component, or any amendment applies to a limited
23 geographic area, only the Planning Commission having
24 jurisdiction of that area need receive such referral."

25 Petitioner advises the original proposal was sent to the
26 planning commission, as required. The planning commission held
a hearing and made a recommendation. That recommendation was
sent to the county board of commissioners.

1 On remand, however, the county board did not request a
2 report and recommendation from the planning commission and
3 simply proceeded to hear the matter at a de novo hearing on
4 March 5, 1986. Petitioner claims this action violates the
5 code. The point of petitioner's complaint is that new
6 information was provided at the remand hearing. Because the
7 planning commission did not have the opportunity to digest that
8 new information and make a recommendation to the board of
9 commissioners, the board was without valuable (and as
10 petitioner claims, necessary) information about the proposal.

11 We do not accept petitioner's argument. Nothing in the
12 Lane Code requires the board of commissioners to refer to the
13 planning commission a matter that has been remanded from a
14 reviewing body such as LUBA.

15 Also, petitioner was present and represented by counsel and
16 argued the merits of the application before the county board at
17 the remand hearing. We will not review an allegation of
18 procedural error where the party before the governing body had
19 legal counsel and the opportunity to raise the procedural
20 matter and thus enable the local government to cure the error
21 without the necessity of an appeal. Dobaj v. Beaverton, 1 Or
22 LUBA 237 (1980); Mason V. Linn Co., 13 Or LUBA 1 (1985).

23 The second assignment of error is denied.

24 ASSIGNMENT OF ERROR NO. 3

25 "The Board of Commissioners committed procedural error
26 by failing to refer the matter to the Lane County
Juvenile Department, Lane Educational Services

1 District, Oregon State Department of Education, and
2 Oregon State Children's Services Division."

3 Petitioner alleges the county violated Goal 11, Policy 5 of
4 the Lane County Rural Comprehensive Plan. This alleged
5 violation results from the county's failure to refer this
6 application to agencies petitioner believes are involved with
7 providing services to JMC.

8 Rural Comprehensive Plan Goal 11, Public Facilities and
9 Services, Policy 5 states:

10 "Lane County shall participate in the coordination of
11 planning and development for the various public and
12 utility services. The primary means of effectuating
13 this policy shall be through a system whereby land use
14 application shall be referred to the various providers
15 of services including cities, utilities, special
16 districts, county and other public agencies, as well
17 as the Lane County Boundary Commission."

18 Petitioner's point is that failure to follow this policy
19 resulted in approval "without adequate information to make a
20 wise decision consistent with the land use planning goals."

21 (Emphasis in original) Petition for Review at 13.

22 The county replies that it sent notice of the application
23 to the following service providers:

- 24 1. Water Pollution Control;
- 25 2. Flood Management;
- 26 3. Lane Regional Air Pollution Authority;
4. School District 71, (Petitioner herein);
5. Lowell Rural Fire Protection District;
6. Emerald People's Utility District;
7. Pacific Northwest Bell;

1 8. State Fish and Wildlife;

2 9. Rural Addressing.

3 Respondent argues further that these agencies are required to
4 be notified under the plan policies, and the failure to notify
5 the agencies cited by petitioner is either not error or is a
6 procedural error not affecting petitioner's substantial
7 rights. See ORS 197.835(8)(a)(B). Lane County argues the
8 district has not shown that any of the agencies cited by
9 petitioner provide services affected this land use
10 decision.²

11 The referral called for in the plan is a procedural
12 requirement. The plan language does not suggest the county
13 loses jurisdiction of the application without notification of
14 affected entities. Petitioner does not explain how it is
15 prejudiced by the alleged error. We therefore reject
16 petitioner's claim of error. ORS 197.835(8)(a)(B).

17 The third assignment of error is denied.

18 ASSIGNMENT OF ERROR NO. 4

19 "Ordinance PA 900-A is inconsistent with the Rural
20 Comprehensive Plan policy on financing of increased
21 levels of public service demand."

22 In this assignment of error, petitioner alleges the county
23 violated the Rural Comprehensive Plan, Goal 11, Policy 2. The
24 policy states:

25 "Any increases in the levels of public facilities and
26 services generated by application of new or revised
land use designations within an area shall, to the
extent practicable, be financed and maintained by

1 revenues generated within or as a result of those
2 designated land uses. Those land uses benefitting
3 from increased levels of public facilities or services
4 shall be expected to provide a significant share of
5 the costs associated with providing such facilities
6 and services, recognizing that in some instances,
7 resources for such provision must be obtained on a
8 wide-spread geographic or revenue basis and may
9 involve capital investments exceeding the immediate
10 needs of the area being served."

11 Petitioner says that the students placed at JMC will need
12 special educational services. Money for the children will come
13 out of the school district budget, not out of the center's
14 budget. Petitioner advises it is required by law to develop
15 "an individualized educational program (IEP) for each child
16 needing special educational services. The cost of these
17 services is high. The result, according to petitioner, is that
18 the petitioner will bear the cost of needed services, not the
19 applicant, as is allegedly required under the plan.

20 The county argues that petitioner is not hurt by the
21 approval because the approval includes a condition limiting to
22 10 the number of students needing special educational services
23 at JMC. This condition, according to the county, protects the
24 district from having to accept more special education students
25 than the district can afford.

26 The district responds that this solution to its concerns,
"while meeting the district's needs in principle, ignores the
reality of both the placement process and the state laws
governing the school district." Petition for Review at 17.
Petitioner claims there is no means to adequately identify

1 educational needs before placement of a special education
2 students at Jasper Mountain Center. Once a student is placed,
3 Oregon law requires the district to provide all needed
4 educational services. See ORS 339.165 - 339.185.

5 The plan policy does not mandate that the costs of a
6 proposal be born entirely by the user. By its terms, the plan
7 policy is to be achieved "to the extent practicable." There is
8 no requirement in the plan that a facility pay its own way.
9 Therefore, even if the center were to house more than 10
10 children requiring special education services, there would be
11 no violation of this plan policy.

12 Also, though we understand petitioner's fear that the 10
13 student limit imposed upon the center by the county may be
14 difficult to enforce, we find nothing to show that the
15 condition is lawful. A condition calculated to reasonably
16 achieve a goal in the land use scheme will be upheld. Benjamin
17 Franklin, Inc. v. Clackamas Co., ___ Or LUBA ___ (LUBA No.
18 86-020, July 23, 1986).

19 Petitioner argues federal law mandates services for any
20 special education students attending school, no matter where
21 the student may live. Petitioner says this mandate to provide
22 service pre-empts the county's attempted regulation on the
23 number of special education students placed at JMC.

24 Petitioner has cited no authority for the proposition that
25 the federal pre-emption doctrine applies under the facts of
26 this case. Derenco, Inc. v. Benjamin Franklin Savings and Loan

1 Association, 281 Or 533, 577 P2d 477 (1978), cert denied 439 US
2 1051, 99 Sup Ct. 733, 58 L Ed 2d 712 (1979); Wallowa Lake
3 Forest Industries v. Wallowa Co., 13 Or LUBA 172 (1985). We
4 decline to find the condition unenforceable upon the mere
5 speculation that it is pre-empted by federal law.³

6 The fourth assignment of error is denied.

7 Ordinance No. PA 900-A is affirmed.⁴

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FOOTNOTES

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ORS 418.470 states:

"Authority to pay for shelter-care homes.

"(1) The Children's Services Division may engage and make reasonable payment for services of persons to make available, maintain and operate shelter-care homes for the safekeeping of children taken into temporary custody pending investigation and disposition.

"(2) The services, pursuant to specific prior authorization of the division, shall be deemed actually rendered if the shelter-care home is made available, maintained and operated to receive such children.

"(3) As used in this section and ORS 418.472, 'shelter-care homes' means a certified foster home or a licensed facility contracted with by Children's Services Division for the purpose of safekeeping of children taken into temporary custody pending investigation and disposition where the circumstances are such that the child need not be kept in secure custody."

17 2

The record reveals the interim superintendent of the Lane Educational Service District testified at the March 5 hearing before the board of commissioners.

20 3

We note the restriction is a zoning restriction, not an attempt to violate a state or federal law requiring special educational services for whomever needs them. The county's condition limits the center in the number of students it may accept, it does not limit the school district or force it to accept an unlimited special education enrollment.

25 4

The county and JMC raise another defense based on ORS 418.472. The statutes provides:

1 "Siting of shelter-care home. The governing body of a
2 county or its designee in a county with a population
3 of less than 400,000 may allow the operation of a
4 shelter-care home, as defined in ORS 418.470, upon a
lot or parcel in any zone, including an exclusive farm
5 use or forest use zone, if the shelter-care home is an
existing use on that lot or parcel on September 20,
1985."

6 Respondents say this statute provides a complete defense to any
charge the approval is improper.

7 We agree the statute allows the county to approve a
8 facility such as JMC. However, the facility is already
"allowed." It is a nonconforming use. The statute seems to
9 allow but does not require the county to do what it did here,
i.e., go beyond merely allowing the use by changing the
10 comprehensive plan and zoning ordinance to permit an expansion.

11 We conclude, therefore, that ORS 418.472 does not shield an
approval such as the one at issue here from all attack.

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