

POD

LAND USE  
BOARD OF APPEALS

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

Dec 29 2 35 PM '86

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CATHERINE HIGHTOWER and )  
IDA EVENSON, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CURRY COUNTY BOARD )  
OF COMMISSIONERS, )  
 )  
Respondents. )

LUBA No. 86-067  
FINAL OPINION  
AND ORDER

Appeal from Curry County.

Catherine Hightower and Ida Evenson, Brookings, jointly  
filed the petition for review and argued on their own behalf.

No appearance by Curry County.

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

REMANDED 12/29/86

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 Petitioners seek review of the grant of a conditional use  
4 permit for a video business and bed and breakfast home  
5 occupation in Curry County.

6 PROCEDURAL HISTORY

7 The applicants' request for the home occupation was heard  
8 by the Curry County Planning Commission. The planning  
9 commission granted the conditional use permit. Petitioner  
10 Catherine Hightower appealed the planning commission's decision  
11 to the board of county commissioners. The county board heard  
12 the matter on July 15, 1986 and continued the proceeding until  
13 July 21, 1986. At the July 21 meeting, the board granted  
14 approval of the conditional use.

15 FIRST ASSIGNMENT OF ERROR

16 Petitioner alleges that the Curry County Appeals Ordinance  
17 requires the county board to consider "public need" for the  
18 proposal. The ordinance provides:

19 "Section 4(B) The following criteria and factors are  
20 deemed relevant and material and shall be considered  
by the board in reaching its decision on a proposal:

21 "(1) Conformance with the comprehensive plan and  
22 county ordinance;

23 "(2) The public need for the proposal...."

24 Petitioners allege the only need for this conditional use is  
25 the personal need of the applicant. Petitioners complain that  
26 the record does not adequately address public need.

1 Petitioners add that the applicants failed to carry their  
2 burden of proof as required by the appeals ordinance.

3 The Curry County Zoning Ordinance does not list "public  
4 need" as a requirement for a conditional use permit. The  
5 public need requirement does exist in the Curry County Appeals  
6 Ordinance, however.<sup>1</sup> The county findings and order, granting  
7 approval of this request, make no mention of criteria in the  
8 Curry County Appeals Ordinance and do not address public need.  
9 The county made no appearance in this matter, and we are cited  
10 to nothing to suggest that the Curry County Appeals Ordinance,  
11 including its requirement that public need be considered, is  
12 not applicable to a conditional use application.

13 We conclude the county was obliged to consider public need  
14 for the home occupation and make appropriate findings on this  
15 issue. Without findings, we must remand the decision. Hoffman  
16 v. DuPont, 49 Or App 699, 621 P2d 63 (1980). Therefore, the  
17 first assignment of error is sustained.

18 SECOND ASSIGNMENT OF ERROR

19 Petitioners allege ORS 215.416(7) and ORS 197.835(8)(a)(C)  
20 were violated in that the findings are inadequate. Petitioners  
21 claim the statutes and case law require that the governing body  
22 prepare findings explaining why its decision is in conformity  
23 with the relevant land use criteria. Petitioners allege this  
24 requirement was not fulfilled.<sup>2</sup>

25 The Curry County Zoning Ordinance allows home occupations  
26 as conditional uses subject to particular conditions and to

1 certain approval criteria in the appeals ordinance (discussed  
2 above). We find no other restriction on establishment of home  
3 occupations. The county's ordinance addresses the required  
4 conditions, and petitioners do not explain why the county's  
5 order and findings regarding application of the conditions is  
6 not adequate.

7 To the extent petitioners challenge the county's findings  
8 on criteria other than public need (see first assignment of  
9 error), the challenge must fail. However, because the public  
10 need criterion in the appeals ordinance was not addressed, we  
11 will sustain the assignment of error.

12 THIRD ASSIGNMENT OF ERROR

13 Petitioners allege the county violated ORS 215.615,  
14 requiring inspections of buildings intended for human  
15 habitation. Petitioners claim the county took the applicant's  
16 word that certain sanitary conditions were not applicable, and  
17 petitioners allege the county was obliged to conduct an  
18 inspection and did not do so.

19 We cannot determine whether ORS 215.615 applies to this  
20 land use decision. The statute is only applicable to those  
21 counties adopting housing codes. We are cited to nothing  
22 showing whether Curry County adopted a housing code as  
23 permitted under ORS 215.605. Further, ORS 215.615 only lists  
24 requirements to be included in such housing code ordinances.  
25 The statute does not address individual land use approvals.

26 The third assignment of error is denied.

1 FOURTH ASSIGNMENT OF ERROR

2 Petitioners complain that there is "no adequate or  
3 substantial evidence in the record to show justification for  
4 such a decision, ORS 215.416(7)." Petition for Review at 9.  
5 Petitioners state the record does not show the facts relied on  
6 in rendering the decision.

7 As noted in our discussion of the second assignment of  
8 error, a conditional use for a home occupation is permitted  
9 subject to certain conditions in the county zoning ordinance  
10 and to criteria in the appeals ordinance. Imposition of  
11 conditions under such circumstances requires neither findings  
12 of fact nor evidence to support them. See Benjamin Franklin v.  
13 Clackamas Co., \_\_\_ Or LUBA \_\_\_ (LUBA No. 86-020, July 23,  
14 1986). We therefore do not find fault with the county's  
15 decision as alleged in this assignment of error.

16 FIFTH ASSIGNMENT OF ERROR

17 Petitioners allege the county violated ORS 197.835(8)(a)(B)  
18 in that the county failed to follow procedures applicable to  
19 the matter before it in a manner which prejudiced petitioners'  
20 substantial rights.<sup>3</sup> Petitioners claim they were given no  
21 opportunity to rebut new testimony introduced after the hearing  
22 was closed. Petitioners also say the county failed to announce  
23 that it would reopen the hearing to allow submittal of  
24 additional facts at its meeting on July 21, 1986. Rather,  
25 petitioners allege the record of the July 15, 1986 hearing only  
26 shows that the county stated it would make its decision at the

1 July 21 meeting.

2 Our review of the minutes of the county's July 21 meeting  
3 reveals that the county believed that "evidence has been closed  
4 with both sides having evidence in...." Record at 10.

5 Apparently one of the petitioners, Mrs. Hightower, was present  
6 and spoke at the July 21 hearing. Included in the minutes of  
7 that hearing is the following notation of a question from Mrs.  
8 Hightower:

9 "In response to Mrs. Hightower's inquiry if anyone had  
10 viewed the area, McKenzie said that point of the  
hearing was closed." Record at 10.

11 The minutes do not reveal what, if any, new evidence was  
12 received. Further, petitioners do not advise what evidence was  
13 introduced which they believe they were entitled to rebut.

14 Without a further explanation of how petitioners "substantial  
15 rights" were prejudiced, we must deny this assignment of error.

16 SIXTH ASSIGNMENT OF ERROR

17 Petitioners allege that the applicants did not "carry the  
18 burden of proof in establishing public need...."

19 This charge was discussed under the first assignment of  
20 error.

21 The decision is remanded for application of the "public  
22 need" requirement in the county appeals ordinance.

1 FOOTNOTES

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4 This criteria controls the county commissioners' review of  
5 planning commission decisions. The ordinance was enacted in  
6 1973. Feitelson v. City of Salem, 46 Or App 815, 613 P2d 489  
(1980).

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8 ORS 215.416(7) provides:

9 "(7) Approval or denial of a permit shall be based  
10 upon and accompanied by a brief statement that  
11 explains the criteria and standards considered  
12 relevant to the decision, states the facts relied upon  
13 in rendering the decision and explains the  
14 justification for the decision based on the criteria,  
15 standards and facts set forth."

16 ORS 197.835(8)(a)(C) provides:

17 "(8) In addition to the review under subsections (1)  
18 to (7) of this section, the board shall reverse or  
19 remand the land use decision under review if the board  
20 finds:

21 "(a) The local government or special district:

22 \* \* \*

23 "(C) Made a decision not supported by substantial  
24 evidence in the whole record;"

25 3

26 ORS 197.835(8)(a)(B) provides:

27 "(a) The local government or special district:

28 \* \* \*

29 "(B) Failed to follow procedures applicable to the  
30 matter before it in a manner that prejudiced the  
31 substantial rights of the petitioner;"