

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

3
4 MARTIN CAINE,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 91-091
10 TILLAMOOK COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 ARNOLD MEYERSTEIN,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Tillamook County.

22
23 Scott Elliott, Lincoln City, filed the petition for
24 review and argued on behalf of petitioner. With him on the
25 brief was Green, Elliott & Ehrlich.

26
27 No appearance by respondent.

28
29 Lois Albright, Tillamook, filed the response brief and
30 argued on behalf of intervenor-respondent. With her on the
31 brief was Albright & Kittell.

32
33 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
34 Referee, participated in the decision.

35
36 REMANDED 02/20/92

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county
4 commissioners amending the county comprehensive plan and
5 zoning maps to redesignate and rezone a parcel from Small
6 Farm Wood Lot (SFW-20) to Medium Density Urban Residential
7 (R-2).

8 **MOTION TO INTERVENE**

9 Arnold Myerstein moves to intervene on the side of
10 respondent in this appeal proceeding. There is no objection
11 to the motion, and it is allowed.

12 **FACTS**

13 The subject land consists of 54 forested acres, not
14 within an urban growth boundary. The Pacific City Community
15 Growth Boundary is located to the north of the subject
16 property.¹ The property to the east is zoned SWF-20.
17 Properties to the north, west and south are zoned
18 residential.

19 Intervenor-respondent (intervenor) filed an application
20 for a plan and zone change from SFW-20 to R-2, and for a
21 "reasons" exception to Statewide Planning Goals 4 (Forest
22 Lands) and 14 (Urbanization).² The planning commission

¹Because Pacific City is an unincorporated community, the significance of the "community growth boundary" adopted by the county is unclear.

²ORS 197.732(1)(a)-(c) as well as Statewide Planning Goal 2 (Land Use Planning) and OAR division 660, chapter 4, recognize three types of goal exceptions, based on (1) physical development, (2) irrevocable commitment,

1 recommended approval of intervenor's request. The county
2 commissioners adopted the planning commission's
3 recommendation. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 "The County consistently failed to properly notice
6 hearings as required by state law and local
7 ordinances."

8 **A. ORS 197.732(5)**

9 Petitioner argues the decision is void because the
10 notices of the county hearings failed to indicate an
11 exception to the Statewide Planning Goals (goals) was
12 proposed and failed to "summarize the issues in an
13 understandable manner," as required by ORS 197.732(5).³

14 There were several evidentiary hearings concerning
15 intervenor's application. The first hearing on intervenor's
16 application was set for August 9, 1990, before the county
17 planning commission. However, that hearing was rescheduled
18 to September 13, 1990. The first notice indicating the
19 county was proposing to take exceptions to Goals 4 and 14,
20 was the September 5, 1990 notice confirming the
21 September 13, 1990 planning commission hearing date.

or (3) reasons why the policies in applicable goal provisions should not apply. Goal 2, Part II (a)-(c); OAR 660-04-020(1), 660-04-025(1), 660-04-028(1).

³ORS 197.732(5) provides:

"Each notice of public hearing on a proposed exception shall specifically note that a goal exception is proposed and shall summarize the issues in an understandable manner."

1 However, that notice failed to "summarize" any "issues"
2 related to taking a goal exception. The first notice that
3 provided an indication of the "issues" or criteria relevant
4 to the proposed goal exception was the October 19, 1990
5 notice rescheduling the September 13, 1990 planning
6 commission hearing to November 8, 1990. This notice
7 attached a summary of some of the requirements for Goal 4
8 and 14 exceptions, and set out certain county ordinance
9 requirements.

10 The notice of the first hearing before the county
11 commissioners also attached information regarding some of
12 the requirements applicable to taking an exception to
13 Goals 4 and 14. Subsequent notices that the hearings before
14 the county commissioners were being continued did not
15 include any information regarding an exception being taken
16 to any goal.⁴

17 We agree with petitioner that these notices failed to
18 comply with ORS 197.732(5). However, failure to comply with
19 ORS 197.732(5) is a procedural error. ORS 197.835(7)(a)(B)
20 provides that this Board may only reverse or remand on the
21 basis of procedural error if such error "prejudiced the
22 substantial rights of the petitioner." Petitioner does not

⁴We do not mean to suggest that in order to continue a properly noticed hearing it is necessary to provide the same notice required for the original hearing. This proposition has been squarely rejected by the Court of Appeals in Apalategui v. Washington County, 80 Or App 508, 723 P2d 1021 (1986). We simply note here that the subsequent notices were also deficient.

1 identify any way in which he was prejudiced by the failure
2 of the notices to comply with ORS 197.732(5). Therefore,
3 petitioner's allegations concerning ORS 197.732(5) provide
4 no basis for reversal or remand.

5 This subassignment of error is denied.

6 **B. ORS 197.763(3)**

7 Petitioner argues the notices of the hearings below
8 failed to comply with ORS 197.763(3) in several respects.⁵

9 ORS 197.763(3)(b) requires the notice of hearing to:

10 "List the applicable criteria from the ordinance
11 and the plan that apply to the application at
12 issue."

13 We note at the outset ORS 197.763(3)(f)(B) requires
14 that where two or more evidentiary hearings are allowed, as
15 is the case here, the required notice must be mailed "10
16 days before the first evidentiary hearing." The first
17 county notice which gave any indication of which criteria
18 the county believed applied to intervenor's application was
19 the September 5, 1990 notice confirming the September 13,
20 1990 planning commission hearing date. Since this notice
21 was mailed only 8 days before that first evidentiary
22 hearing, it fails to comply with ORS 197.763(3)(f)(B).

23 Petitioner also argues the notices fail to "list the
24 applicable criteria from the ordinance and plan which are

⁵ORS 197.763(3) imposes a number of specific requirements for notices of local quasi-judicial land use hearings.

1 applicable to the application at issue," as required by
2 ORS 197.763(3)(b). Tillamook County Zoning Ordinance
3 (TCZO) 9.020(2) requires:

4 "The proposed new zone shall not result in the
5 conversion of resource lands to non-resource use
6 without an approved exception to applicable state
7 resource protection Goals."

8 As explained infra, Goal 3 (Agricultural Lands) is
9 apparently applicable to intervenor's application and,
10 consequently, should have been listed as an applicable
11 criterion.⁶ The first notice of hearing to indicate that
12 any of the goals applied was the September 5, 1990 notice of
13 confirmation of the September 13, 1990 planning commission
14 hearing. That notice identified only Goals 4 and 14 as
15 applicable, and this is error.

16 Petitioner also argues the notices fail to "explain the
17 nature of the application and the proposed use or uses which
18 could be authorized * * *." ORS 197.763(3)(a).

19 All of the notices of the hearings below indicated that
20 the subject application requested a plan and zone change
21 from SFW-20 to R-2. We have stated that when no specific
22 use is proposed, the requirement of ORS 197.763(3)(a) that
23 notices of quasi-judicial land use hearings "explain the
24 nature of * * * the proposed use or uses which could be

⁶Further, if the TCZO or the county comprehensive plan contain additional requirements that other non-resource goals must be applied to plan amendments and rezoning actions then, of course, those goals must be listed in the notice of hearing as well.

1 authorized" does not apply, and it is sufficient if the
2 notices of hearing explain that the application is for a
3 change from one identified zoning district to another
4 identified zoning district. McKay Creek Valley Assoc. v.
5 Washington County, 19 Or LUBA 421, 443 (1990). However,
6 here the county purported to take a reasons goal exception
7 for a particular use (retirement housing for the elderly),
8 in addition to redesignating and rezoning the subject
9 property. In these circumstances, the county must list the
10 proposed use of the property in the notice of hearing. The
11 county's failure to do so is error.

12 Violations of the requirements of ORS 197.763(3) are
13 relevant to our review of a local decision in two respects.
14 First, failure to comply with the notice requirements of
15 ORS 197.763(3) is a procedural error which will result in
16 reversal or remand of a local decision only if such error
17 causes prejudice to petitioner's substantial rights.
18 ORS 197.835(7)(a)(B). See Forest Park Estates v. Multnomah
19 County, ___ Or LUBA ___ (LUBA No. 90-070, December 5, 1990)
20 (violation of ORS 197.763 requirement that staff report be
21 available twenty days before the evidentiary hearing is a
22 procedural error). Second, we may consider issues that were
23 not raised below, if the "local government failed to comply
24 with the requirements of ORS 197.763." ORS 197.835(2)(a).

25 Petitioner does not contend that any of the alleged
26 violations of ORS 197.763(3) caused prejudice to any of

1 petitioner's substantial rights. Therefore, those alleged
2 violations provide no basis for reversal or remand.
3 However, because the county's notices of its hearings below
4 failed to comply with ORS 197.763(3)(a), (b) and (f)(B),
5 petitioner is not precluded from raising new issues before
6 this Board.

7 This subassignment of error is sustained.

8 **C. TCZO 10.060**

9 Petitioner argues the challenged decision violates
10 TCZO 10.060, which provides requirements for notices of
11 public hearings.⁷

12 Petitioner's allegations concerning TCZO 10.060 allege
13 procedural errors. As stated above, we may not reverse or
14 remand the challenged decision in the basis of procedural
15 errors unless such errors prejudice petitioner's substantial
16 rights. Petitioner does not explain how the errors alleged
17 violated his substantial rights, and we do not see that they
18 do.

19 This subassignment of error is denied.

20 The first assignment of error is sustained, in part.

21 **SECOND ASSIGNMENT OF ERROR**

22 "The County erred when it failed to provide advice
23 on all applicable goals at [the] commencement of
24 the hearing as mandated by ORS 197.763(5)."

⁷For example, petitioner argues TCZO 10.060 requires that notice of a public hearing be published in the local newspaper at least 10 days before the hearing.

1 Petitioner argues the county failed to list the
2 applicable criteria at the beginning of the public hearing
3 as required by ORS 197.763(5)(a).

4 ORS 197.763(5) provides procedural requirements.⁸ As
5 stated above, under ORS 197.835(7)(a)(B), we may not reverse
6 or remand on the basis of procedural error unless
7 petitioner's substantial rights are prejudiced. Petitioner
8 does not argue that his substantial rights were prejudiced
9 by the county's failure to comply with ORS 197.763(5)(a),
10 and we do not see that they were.

11 The second assignment of error is denied.

12 **FIFTH ASSIGNMENT OF ERROR**

13 "The County's final decision does not incorporate
14 into the County's plan findings and reasons that
15 justify a goal exception."

16 In the fifth assignment of error, petitioner points out
17 that the challenged decision does not adopt the purported
18 goal exception as a part of the county comprehensive plan.

19 Statutory, goal and administrative rule provisions
20 require that the findings and reasons justifying a goal
21 exception be adopted as part of the county comprehensive
22 plan. ORS 197.732(8); Goal 2, Part II; OAR 660-04-000(2)
23 and 660-04-015(1); DLCD v. Josephine County, 18 Or LUBA 88,
24 90 n 1 (1989); Johnson v. Tillamook County, 16 Or LUBA 855,

⁸We assume for purposes of resolving this assignment of error that the county failed to "list" the applicable criteria at the beginning of the hearing.

1 859 (1988). Here, the challenged decision includes
2 findings, but it does not adopt any findings and reasons in
3 support of the goal exception as a part of the plan itself.
4 As we pointed out in Johnson, this alone is sufficient
5 grounds for remanding the challenged decision. However, to
6 provide some guidance to the parties, we briefly address
7 petitioner's other assignments of error.

8 The fifth assignment of error is sustained.

9 **THIRD ASSIGNMENT OF ERROR**

10 "There is insufficient evidence or inadequate
11 consideration by the County to support the goal
12 exceptions taken in the final decision."

13 **FOURTH ASSIGNMENT OF ERROR**

14 "The County failed to adequately consider [Goal
15 14] and [failed to] provide sufficient evidence to
16 support [an exception to Goal 14.]"

17 According to the terms of Section 5.1 of the county's
18 plan, the SFW-20 zone is an exclusive farm use zone.
19 Consequently, petitioner is correct that the county erred in
20 failing to either (1) explain in its decision why Goal 3
21 does not apply,⁹ or (2) take an exception to Goal 3. The

⁹While there is no dispute that the subject property contains soils which are Class VI, Goal 3 defines "agricultural land" as:

"* * * land of predominantly Class I, II, III and IV soils,
* * * as identified in the Soil Capability Classification
System of the United States Soil Conservation Service, and
other lands which are suitable for farm use, taking into
consideration soil fertility, suitability for grazing,
climactic conditions, existing and future availability of water
for farm irrigation purposes, existing land-use patterns,

1 county did neither, and this is error.

2 Petitioner also argues the county erred in failing to
3 take an exception to Goal 5 (Open Spaces, Scenic and
4 Historic Areas, and Natural Resources), Goal 6 (Air, Water
5 and Land Resources Quality), Goal 11 (Public Facilities and
6 Services), and Goal 12 (Transportation).

7 We agree with petitioner that these goals appear to
8 apply to the proposed redesignation and rezoning of 54 acres
9 of forested land to a medium density residential plan
10 designation and zone. The subject property is located
11 outside of any urban growth boundary (UGB) and outside of
12 public transportation or public facility service areas.
13 Under these circumstances, the county must either find the
14 proposal complies with these goals, explain why these goals
15 do not apply, or take an exception to these goals.¹⁰

16 Finally, petitioner contends the county improperly
17 applied the seven Goal 14 factors in taking an exception to
18 Goal 14.¹¹

technological and energy inputs required or accepted farm
practices. * * *" (Emphasis supplied.)

¹⁰OAR 660-04-010(2) states that the exceptions process is "generally not
applicable" to certain goals, including Goals 5 - 12. However, it also
states that such exceptions are "possible."

¹¹Those seven Goal 14 factors require the following:

"Urban growth boundaries shall be established to identify and
separate urbanizable land from rural land. Establishment and
change of the boundaries shall be based upon considerations of
the following factors:

1 The subject property is not located within an urban
2 growth boundary¹² and, therefore, by definition is "rural
3 land."¹³ The Oregon Supreme Court has explained, where a
4 local government proposes to convert rural land to urban or
5 urbanizable land,¹⁴ it must either amend its plan to include

-
- "(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
 - "(2) Need for housing, employment opportunities, and livability;
 - "(3) Orderly and economic provision for public facilities and services;
 - "(4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
 - "(5) Environmental, energy, economic and social consequences;
 - "(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,
 - "(7) Compatibility of the proposed urban uses with nearby agricultural activities."

¹²Because Pacific City is not an incorporated city, the community growth boundary (CGB) is not an "urban growth boundary," within the meaning of Goal 14.

¹³The goals define "rural land" as lands:

- "* * * which are outside the urban growth boundary and are:
- "(a) Non-urban agricultural, forest or open space lands or,
- "(b) Other lands suitable for sparse settlement small farms or acreage homesites with no or hardly any public services, and which are not suitable, necessary or intended for urban use."

¹⁴The goals define "urbanizable land" as

1 the property within an urban growth boundary or take an
2 exception to Goal 14.¹⁵ 1000 Friends of Oregon v. LCDC
3 (Curry Co.), 301 Or 447, 477 734 P2d 268 (1986) (Curry
4 County).¹⁶ The acknowledged Tillamook County Comprehensive

"Urbanizable lands are those lands within the urban growth boundary and which are identified and:

"(a) Determined to be necessary and suitable for future urban uses

"(b) Can be served by urban services and facilities

"(c) Are needed for expansion of an urban area." (Emphasis supplied.)

The goals define "urban land" as:

"* * * those places which must have an incorporated city. Such areas may include lands adjacent to and outside the incorporated city * * *." (Emphasis supplied.)

¹⁵OAR 660-04-010(1)(c) provides that OAR 660-14-000 through 660-14-040 apply to exceptions to Goal 14. Where rural land is being converted to urban uses without first including such land within an urban growth boundary, OAR 660-14-040(2) provides that:

"A county can justify an exception to Goal 14 to allow * * * establishment of new urban development on undeveloped rural land. Reasons which can justify why the policies in Goals 3, 4, 11 and 14 should not apply can include but are not limited to findings that an urban population and urban levels of facilities and services are necessary to support an economic activity which is dependent on an adjacent or nearby natural resource." (Emphasis supplied.)

OAR 660-14-040(3) describes how the exception standards of Goal 2, Part II are to be met in taking the kind of exception to Goal 14 authorized by OAR 660-14-040(2).

¹⁶In Curry County, supra, 301 at 459, the Supreme Court stated the following with regard to "how the exceptions process should * * * work:"

"First a local government takes inventory of the resources, the existing uses, and the potential uses of its lands to determine which Goals apply. For example, it may find that an area

1 Plan purports to create a third alternative. In relevant
2 part, the plan provides as follows:

3 "3.3 Planning for the Unincorporated Communities
4 of Netarts, Oceanside, Pacific City, and
5 Neskowin in Accordance with the Urbanization
6 Goal.

7 "Findings

8 "The unincorporated communities of Netarts,
9 Oceanside, Pacific City, and Neskowin are not
10 urban as defined by the Goals because they are not
11 incorporated communities. Neither of these
12 communities fit the definition of rural lands in
13 the Goals because they are not 'non-urban
14 agricultural, forest or open space lands' nor are
15 they 'other lands suitable for sparse settlement,
16 small farms or acreage homesites with no or hardly
17 no public services.' Functionally, these
18 communities are urban and they experience the same
19 kinds of urban planning problems that incorporated
20 communities in the county face.

21 "* * * * *

22 "Planning for these unincorporated communities
23 does not fit well into the framework of the Goals.
24 Although they are not defined as urban
25 communities, development can not be planned for at
26 rural densities given the existence of urban
27 services and the need for urban housing. They do
28 not have types and levels of services appropriate
29 for rural areas as Goal 11 requires.

consists of agricultural land as defined in Goal 3 but does not contain any forest land as defined by Goal 4; the exclusive farm use requirement of Goal 3, but not the forest requirement of Goal 4 applies to that land. Second, the local government identifies the uses that conflict with requirements of the goals. For example, the county may wish to establish non-farm residences on agricultural lands, a use which generally conflicts with Goal 3. Third, for each conflict it identifies, the local government decides whether to plan and zone land consistently with the goal's requirements or to seek an exception."

1 "The Urbanization Goal is a more appropriate means
2 of planning for these communities than the
3 exceptions process. Moreover * * * the
4 Urbanization Goal roughly approximates the
5 exceptions process. This is especially true when
6 the requirements of Goal 3 for UGB's are taken
7 into account. These communities could be planned
8 for in accordance with the Urbanization Goal and
9 still be consistent with the character of planning
10 problems presented. The Urbanization Goal along
11 with Goal 3 urbanization requirements is less
12 restrictive than the exceptions process in four
13 ways: the exceptions process requires special
14 notice; there is explicit mention of the
15 consideration of alternatives; there is explicit
16 mention of conflicts that would apply to forest
17 and shoreland areas; and the exception process is
18 considered when proposing the conversion of
19 uncommitted forest or shorelands to urban use. If
20 the planning for functionally urban unincorporated
21 communities follows the Urbanization Goal along
22 with these four requirements, then the
23 requirements of the Goals will be met.

24 "* * * * *" Plan 15-19.

25 "3.9 Procedure for Establishing Community Growth
26 Boundaries Around Unincorporated Communities

27 "* * * * *

28 "Policy

29 "Tillamook County will establish community growth
30 boundaries around unincorporated communities in
31 accordance with the seven factors listed in the
32 Urbanization Goal (Goal 14) [and] with the
33 Agricultural Lands Goal (Goal 3) requirements,
34 along with the necessary modification in substance
35 and process to fulfill the procedures and
36 requirements of the Goal 2 exceptions process. * *
37 *" Plan 23-24.

38 "Changing Established Community Growth Boundaries
39 for Unincorporated Cities

40 "* * * * *

1 "Policy

2 "Tillamook County will periodically review
3 community growth boundaries, every 3-5 years, to
4 see if they meet community needs. Boundary
5 revisions will be made where necessary. Future
6 community growth boundary changes will be made in
7 accordance with the seven factors listed in the
8 Urbanization Goal (Goal 14) and the procedures and
9 requirements set forth in the Land Use Planning
10 Goal (Goal 2) for goal exceptions." Plan 25.

11 In view of the above provisions in its acknowledged
12 comprehensive plan, the county may, understandably, assume
13 those plan provisions establish the relevant procedures and
14 standards for amending the Pacific City CGB and for planning
15 and zoning the subject rural parcel to allow urban intensity
16 uses. However, when amending its plan, the county is
17 required by statute to assure that the proposed plan
18 amendment complies with the statewide planning goals. ORS
19 197.175(2)(a); 197.835(4); 1000 Friends of Oregon v.
20 Jackson County, 79 Or App 93, 718 P2d 753 (1986).

21 We seriously question whether treating the Pacific City
22 CGB as an acknowledged urban growth boundary UGB, when it
23 clearly is not, and applying the standards which govern
24 amendments to acknowledged UGBs is consistent with the
25 county's statutory obligation under ORS 197.175(2)(a) and
26 197.835(4) to assure that amendments to its acknowledged
27 comprehensive plan and land use regulations comply with the
28 statewide planning goals. However, the current acknowledged
29 plan and zoning designations applied within the Pacific City
30 CGB, and the rationale included in the plan in support of

1 those designations, may not be challenged in this appeal.
2 Nevertheless, comprehensive plan amendments are subject to
3 review by this Board for compliance with the goals.
4 Although acknowledged plan provisions may have some bearing
5 on how a county goes about demonstrating that amendments to
6 its acknowledged plan comply with the goals, this Board
7 reviews plan amendments for goal compliance.

8 On remand, the county must establish one of two things
9 before it may properly plan and zone the subject rural
10 property for urban intensity uses. First, the county may be
11 able to establish that its acknowledged plan in some way
12 obviates its obligation under ORS 197.175(2)(a) and
13 197.835(4) and Goal 14 to either amend its comprehensive
14 plan to include the property within an urban growth boundary
15 or take an exception to Goal 14 under OAR 660-14-040.
16 Second, if the county is unable to establish this, as we
17 suspect may be the case, the county must take an exception
18 to Goal 14, in accordance with OAR 660-14-040, before it may
19 plan and zone the subject property for urban uses,
20 notwithstanding the provisions in its acknowledged
21 comprehensive plan which suggest otherwise.

22 The third and fourth assignments of error are
23 sustained.

24 The county's decision is remanded.

25