

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

OREGON DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Petitioner,)	
)	
vs.)	
)	LUBA No. 92-062
CLACKAMAS COUNTY,)	
)	FINAL OPINION
Respondent,)	AND ORDER
)	
and)	
)	
TERRY W. EMMERT,)	
)	
Intervenor-Respondent.)	

Appeal from Clackamas County.

Lucinda Moyano, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

Richard T. Perry, Clackamas, represented intervenor-respondent.

Jane Ard and Larry Knudsen, Salem, filed a state agency brief on behalf of the Department of Land Conservation and Development. With them on the brief was Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

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

REMANDED

06/22/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a county ordinance approving a plan map amendment from Low Density Residential to Medium Density Residential and a corresponding zone change from Low Density Residential (R-8.5) to Medium Density Residential (MR-1).

MOTION TO INTERVENE

Terry W. Emmert, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is an undeveloped parcel consisting of 14.07 acres. The property abuts a partially developed single family residential subdivision to the north and industrially zoned property to the south. Both the subdivision and industrially zoned property are owned and were developed by intervenor-respondent, the owner of the subject property and the applicant below. State Highway 212 adjoins the southern boundary of the industrially zoned land.

Intervenor wishes to redesignate and rezone the subject property to enable multifamily residential development. Clackamas County Comprehensive Plan (plan) medium density residential policy 19.0 requires that land designated Medium Density Residential have access to a major or minor arterial or collector street. Intervenor proposes to provide access

to multifamily residential development on the subject property by constructing a road through his industrially zoned property to connect to State Highway 212. Intervenor proposes this means of access because the subject property is landlocked due to the intervenor's prior developments described above. Intervenor's partially developed single family residential subdivision to the north has no streets platted to serve development on the subject property. In addition, there are no arterial or collector streets in the vicinity of the subject property, other than State Highway 212, to serve the subject property.

The county approved the proposed plan amendment and zone change, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

"The county misconstrued the applicable law, failed to make adequate findings required by ORS 197.835(4), and made a decision not supported by substantial evidence in the whole record when it approved the comprehensive plan map amendment for the proposed use."

Petitioner presents three arguments under this assignment of error. First, petitioner argues that because the challenged decision amends the county's comprehensive plan map, the county erred by failing to apply Statewide Planning Goals 6, 7, 11 and 13.¹ Second, petitioner argues

¹Petitioner also suggests the challenged decision fails to adequately apply Goal 10 (Housing). However, the challenged decision contains findings addressing Goal 10, and petitioner does not specifically challenge

the county erred by failing to apply OAR 660-12-060 to the proposal. Third, petitioner contends the county erred by failing to adequately apply Goal 12.

A. Goals 6, 7, 11 and 13

Petitioner argues the county should have identified the applicable goals, including Goals 6, 7, 11 and 13 and determined whether the proposal complies with those goals.

It is well established that all plan amendments must comply with the goals. 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 98, 718 P2d 753 (1986), rev den 301 Or 445 (1987). Here, there are no findings of compliance with the goals, other than Goals 10 and 12 (Transportation).

It is not obvious to us that Goals 6 (Air, Water and Land Resources Quality), 7 (Areas Subject to Natural Disasters and Hazards), 11 (Public Facilities and Services) and 13 (Energy Conservation) are not applicable to the proposal. It is the local government's obligation "to explain in its findings why apparently applicable Goal standards need not be addressed and satisfied as part of its decision." 1000 Friends of Oregon v. Washington County, 17 Or LUBA 671, 685 (1989), citing Jackson-Josephine Forest Farm Assn. v Josephine County, 12 Or LUBA 40, 43 (12984); Concerned Property Owners of Rocky Point v. Klamath County, 3 Or LUBA 182, 185 (1981). The county erred by failing to

those findings. It is petitioner's responsibility to explain why it believes the county's findings addressing Goal 10 are inadequate.

explain in its decision why Goals 6, 7, 11 and 13 do not apply to the proposed plan amendment or why the amendment complies with Goals 6, 7, 11 and 13, or to take an exception to those goals.

This subassignment of error is sustained.

B. OAR 660-12-060

OAR 660-12-000 to 660-12-070 are administrative rules adopted by the Land Conservation and Development Commission (LCDC) to implement Goal 12. These administrative rules were adopted by LCDC on April 16, 1991. They were filed with the Secretary of State, and became effective, on May 8, 1991. Petitioner concedes that many of the provisions in OAR 660-12-000 to 660-12-070 are inapplicable to the challenged decision. However, petitioner argues that OAR 660-12-060 is applicable, and the county erred in failing to apply it. There is no dispute that the challenged decision does not address OAR 660-12-060.²

The county argues that pursuant to ORS 197.763(1) and ORS 197.835(2) petitioner waived the right to raise in this appeal proceeding the issue of the applicability of

²OAR 660-12-060 requires that amendments to acknowledged comprehensive plans and land use regulations that "significantly affect a transportation facility" allow those uses which are consistent with the "function, capacity and level of service of the facility." OAR 660-12-060(1).

OAR 660-12-060, because petitioner did not raise that issue during the local proceedings.³

Petitioner responds to the county's contention that it waived the issue of the applicability of OAR 660-12-060 in two ways. First, petitioner claims under ORS 197.835(2)(a) it was not required to raise the issue of the applicability of OAR 660-12-060 in order to appeal to this Board on that issue, because that rule was not listed as an applicable criterion in the county's notice of hearing, as required by ORS 197.763(3)(b).

ORS 197.835(2)(a) provides that our scope of review is not limited to issues raised below where "[t]he local government failed to follow the requirements of ORS 197.763[.]" ORS 197.763(3)(b) requires that the local notice must:

³ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

"Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763.
* * *"

"List the applicable criteria from the ordinance and the plan that apply to the application at issue." (Emphasis supplied.)

We agree with the county that because OAR 660-12-060 is not part of the county's ordinances or plan, it need not be listed as an applicable criterion under ORS 197.763(3)(b).⁴ Therefore, the county's failure to list OAR 660-12-060 as an applicable criterion in its notice of hearing does not excuse petitioner from having to raise the issue of compliance with OAR 660-12-060 during the proceedings below.

Second, petitioner claims that it did raise the issue of compliance with OAR 660-12-060 below. However, while petitioner cites several references to discussions concerning the applicability of Goal 12 and of local ordinance provisions, petitioner does not cite anything in the record indicating it raised the issue of the applicability of OAR 660-12-060. None of the discussions cited by petitioner remotely suggest any party raised the issue of the applicability of OAR 660-12-060. In Boldt v. Clackamas County, 107 Or App 619, 813 P2d 1078 (1991), the Court of Appeals made it clear that the purpose of ORS 197.763(1) is to prevent unfair surprise, and that an issue is waived where the issue is not sufficiently raised below to enable a reasonable decision maker to understand

⁴We note that petitioner cites nothing in the county's plan or ordinances requiring the county to apply LCDC's administrative rules as approval criteria for plan amendments.

the nature of the issue. No party below ever referred to OAR 660-12-060 by its title, rule number or by any recognized abbreviation of either. Under these circumstances, we do not believe a reasonable local decision maker would have understood from the arguments of the parties below that the applicability of OAR 660-12-060 was raised as an issue. Accordingly, we agree with the county that petitioner waived the issue of the applicability of OAR 660-12-060, and we do not consider it further.

This subassignment of error is denied.

C. Goal 12

Petitioner challenges the adequacy of the county's Goal 12 findings.⁵ The county's findings concerning Goal 12 state the following:

"This action complies with the applicable Statewide Goals. * * * This action is not inconsistent with Goal 12 in that the comprehensive plan amendment will only be effective upon the securing of access to a roadway of adequate capacity to serve the projected multifamily development. * * *" Record 3.

The challenged decision then imposes the following condition of approval:

⁵Actually, petitioner simply asserts the challenged decision fails to comply with Goal 12 and in the balance of its arguments in this assignment of error, relies on the applicability of, and the county's alleged failure to establish compliance with, OAR 660-12-060. However, many of petitioner's arguments concerning the proposal's compliance with OAR 660-12-060 are also relevant to determining compliance with Goal 12.

"[The proposal is approved] to be effective only upon the securing of guaranteed access to a roadway of arterial or collector status." Record 3.

Goal 12 states its function is:

"To provide and encourage a safe, convenient and economic transportation system."

Petitioner argues the challenged decision fails to determine that the proposed plan amendment will result in a safe and effective transportation system. Petitioner argues the proposal will have a negative effect on existing transportation systems as it will allow much more intense residential development than is currently allowed under the existing plan designation, and thereby will allow more traffic. Petitioner contends State Highway 212 is already overburdened and cannot adequately or safely accommodate traffic from the subject property if it is replanned and rezoned for multifamily residential use.

We agree with petitioner the challenged findings and conditions, quoted above, fail to establish that the transportation systems affected by the proposed plan map amendment for the subject property will be safe and adequate. Simply conditioning the approval of the proposal upon the securing of safe and adequate transportation is not the equivalent of determining the proposed plan amendment is consistent with Goal 12.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

"The county misconstrued the applicable law, made a decision not supported by substantial evidence in the whole record and violated its comprehensive plan by granting a comprehensive plan amendment that is inconsistent with the provisions of its comprehensive plan."

Petitioner contends the challenged decision fails to establish compliance with (1) plan transportation policy 27.1, and (2) a plan transportation goal and plan transportation policy 16.0 concerning the county's obligations to coordinate with other units of government, including petitioner.⁶

Concerning transportation policy 27.1 (Sunrise Corridor),⁷ nothing in that policy purports to serve as an applicable approval standard. Plan transportation policy 27.1 requires the county to do certain things regarding "highway improvements in the Sunrise Corridor," but does not purport to govern county land use actions regarding property adjacent to the Sunrise Corridor.

⁶Petitioner also contends the challenged decision fails to comply with coordination obligations imposed by OAR 660-12-060 and Goal 12. However, we determine above that petitioner waived its right to raise the issue of the county's compliance with OAR 660-12-060. We also determine above the challenged decision does not establish compliance with Goal 12. Accordingly, we need not address Goal 12 further under this assignment of error.

⁷As we understand it, the Sunrise Corridor is an area shown on the county plan transportation maps as the site of a future inter-city expressway connecting S.E. Portland and North Clackamas County with the Mt. Hood Highway corridor to central Oregon.

Concerning the county's coordination obligations, the plan transportation section, page 2, states it is one of the county's "General Transportation Goals" to:

"Ensure continued coordination of county transportation programs including the development of projects and allocation of money for transportation, through coordination and participation with appropriate agencies * * *."
(Emphasis supplied.)

Plan transportation policy 16.0 requires the county to "coordinate with the Oregon Department of Transportation for access control on state highways."

In interpreting the coordination requirements of Goal 2 (Land Use Planning), also applicable to the challenged plan amendment, we have stated:

"Coordination requires that [the decision making local government] consider and accommodate the [involved local government's] needs as much as possible. This means that [involved local governments] must have an opportunity to raise issues, and that the [decision making local government] must address them." Tektronix, Inc., v. City of Beaverton, 18 Or LUBA 473, 484 n 9 (1989).

This Board has also stated the Goal 2 coordination obligation does not require affected units of government to agree with the decision ultimately adopted by another government. Tektronix, Inc., supra, 18 Or LUBA at 485. We believe these principles applicable to the Goal 2 coordination requirements are equally applicable to the coordination requirements imposed by plan transportation policy 16.0 and the above quoted plan transportation goal.

Here, the record is replete with evidence that the county considered and attempted to accommodate the needs of petitioner, but simply reached a result contrary to that urged by petitioner. We conclude the county met its coordination obligations.

The second assignment of error is denied.⁸

THIRD ASSIGNMENT OF ERROR

"The county misconstrued the applicable law and failed to make findings supported by substantial evidence in the whole record when it granted the zone change."

Petitioner argues the challenged decision does not establish compliance with Clackamas County Zoning Ordinance (ZDO) 1202.01(A), which requires that zone changes be consistent with the requirements of the plan. The plan's transportation Goal is to:

"Provide for the safe, efficient, convenient and economical movement of vehicles while minimizing environmental degradation and conserving energy."

This plan goal is nearly identical to the requirements of Goal 12, which we determine under the first assignment of error the county failed to satisfy. Consequently, the challenged decision also fails to establish compliance with

⁸Petitioner also argues plan transportation policy 9.0 is not satisfied by the proposal. However, in J.C. Reeves Corporation v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-072, November 20, 1991), slip op 9, aff'd 111 Or App 452 (1992), we determined that this plan policy is not an approval standard for planning actions. Rather it limits the financial participation in off-site improvements the county may require of developers.

the above quoted plan transportation goal, and fails to comply with ZDO 1202.01(A).

The third assignment of error is sustained.

The county's decision is remanded.