

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

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

DONALD CHURCHILL,)
)
Petitioner,)
) LUBA Nos. 94-113 and 94-114
vs.)
) FINAL OPINION
TILLAMOOK COUNTY,) AND ORDER
)
Respondent.)

Appeal from Tillamook County.

Donald Churchill, Nehalem, filed the petition for review and argued on his own behalf.

John R. Putman, County Counsel, Tillamook, filed the response brief and argued on behalf of respondent.

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

REMANDED 03/13/95

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISIONS**

3 Petitioners appeal two decisions of the Tillamook
4 County Board of Commissioners amending (1) the Tillamook
5 County Land Use Ordinance (LUO) to add three new zoning
6 districts, and (2) the county comprehensive plan and zoning
7 map to apply the new zoning districts to land in the
8 unincorporated community of Neahkahnie.¹

9 **FACTS**

10 The unincorporated community of Neahkahnie is a
11 365-acre area located on the Pacific coast, directly to the
12 north of and abutting the urban growth boundary of the City
13 of Manzanita.² Neahkahnie includes 495 parcels, 332
14 ownerships and 245 dwellings. Record 173. Neahkahnie
15 contains urban-type development, and is served by community
16 sewer and water systems. Before the challenged amendments,
17 land in Neahkahnie was designated and zoned Low Density
18 Urban Residential (R-1), with a minimum lot size of 7,500
19 square feet.

¹The county has adopted a single map as both its comprehensive plan and zoning map. The county's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission (LCDC) under ORS 197.251.

²The boundaries of the Neahkahnie community are established by a "Community Growth Boundary" (CGB) identified in the county's comprehensive plan. The legal significance, if any, of the CGB is unclear. It is not an urban growth boundary (UGB), as that term is used in the Statewide Planning Goals, because UGBs must include an incorporated city.

1 The challenged amendments add three Neahkahnie Urban
2 Residential zones (NK-7.5, NK-15 and NK-30) to the LUO. The
3 three zones differ only with regard to their minimum lot
4 sizes, which are 7,500, 15,000 and 30,000 square feet,
5 respectively. Both the R-1 zone and the NK zones allow
6 single-family dwellings as an outright permitted use and
7 duplexes and planned developments as conditional uses. The
8 challenged map amendments change the plan and zoning
9 designations of all land in Neahkahnie to either NK-7.5,
10 NK-15 or NK-30.

11 **PRELIMINARY ISSUES**

12 **A. Nature of Challenged Decisions**

13 Petitioner argues the challenged decisions are
14 quasi-judicial in nature, whereas the county argues they are
15 legislative.

16 In Strawberry Hill 4-Wheelers v. Benton Co. Bd. of
17 Comm., 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon
18 Supreme Court identified three factors to be considered in
19 determining whether a local government decision is
20 quasi-judicial. Those factors may be summarized as follows:

- 21 1. Is "the process bound to result in a
22 decision?"
- 23 2. Is "the decision bound to apply preexisting
24 criteria to concrete facts?"
- 25 3. Is the action "directed at a closely
26 circumscribed factual situation or a
27 relatively small number of persons?"

28 Each of these factors must be weighed, and no single

1 factor is determinative. Estate of Paul Gold v. City of
2 Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405
3 (1987); McInnis v. City of Portland, 27 Or LUBA 1, 4
4 (1994); Leonard v. Union County, 24 Or LUBA 362, 369 (1992).

5 With regard to the second factor, it seems inevitable
6 that nearly every land use decision will be "bound to apply
7 preexisting criteria to concrete facts" to a certain extent.
8 The second factor is present in this case because, as
9 discussed infra, amendments to acknowledged comprehensive
10 plans and land use regulations must comply with any relevant
11 criteria established in the Statewide Planning Goals (goals)
12 and the comprehensive plan. ORS 197.175(2)(a);
13 ORS 197.835(5); see McInnis v. City of Portland, supra, 27
14 Or LUBA at 5.

15 However, the other two factors are not present here.
16 The process of amending the plan and LUO was initiated by
17 the county and, as far as we can tell, no local or other law
18 required the process initiated by the county to result in a
19 decision. Finally, the amendments affect hundreds of acres
20 and ownerships, not "a closely circumscribed factual
21 situation or a relatively small number of persons."
22 Therefore, we agree with the county that the challenged
23 decisions are legislative in nature.

24 **B. Applicability of Waiver**

25 The county contends that under ORS 197.835(2) and
26 197.763, we cannot review many of the issues raised by

1 petitioner, because they were not raised with sufficient
2 specificity in the county proceedings.

3 In DLCD v. Columbia County, 24 Or LUBA 32, 36 (1992),
4 we explained that ORS 197.763(1), 197.830(10) and 197.835(2)
5 do not limit the issues which may be raised before LUBA in
6 an appeal of a local government legislative land use
7 decision:

8 "The requirements of ORS 197.763, both with regard
9 to procedures for local proceedings and raising
10 issues in such proceedings, apply only to local
11 government quasi-judicial land use proceedings,
12 not to local government legislative land use
13 proceedings. Parmenter v. Wallowa County, 21
14 Or LUBA 490, 492 (1991). Therefore,
15 ORS 197.763(1) imposes no limitation on the issues
16 which may be raised before this Board in an appeal
17 of a local government legislative land use
18 decision. Both ORS 197.830(10) and 197.835(2)
19 provide that issues raised before LUBA shall be
20 limited to those raised below 'as provided in
21 ORS 197.763.' Consequently, these provisions also
22 do not limit the issues which may be raised before
23 this Board in an appeal of a local government
24 legislative land use decision."

25 Accordingly, we may review the issues raised by petitioner
26 in this appeal, regardless of whether those issues were
27 raised in the county proceedings.

28 **C. Scope of Review**

29 The county contends the challenged decisions are not
30 required to comply with the goals, because the map changes
31 amend the comprehensive plan "in a very limited sense," and
32 the LUO text amendments do not amend the comprehensive plan
33 at all. Respondent's Brief 9.

1 There is no dispute the map amended by one of the
2 decisions challenged in this appeal is part of the county's
3 comprehensive plan. All comprehensive plan amendments are
4 required to comply with the goals. ORS 197.175(2)(a);
5 197.835(4).

6 The other decision challenged in this appeal amends the
7 LUO, a land use regulation. Under ORS 197.835(5)(b),
8 amendments to land use regulations are reviewable for goal
9 compliance if the "comprehensive plan does not contain
10 specific policies or other provisions which provide the
11 basis for the regulation." In 1000 Friends of Oregon v.
12 Marion County, 27 Or LUBA 303, 305-06 (1994), we explained:

13 "Where petitioners contend challenged land use
14 regulation amendments fail to comply with the
15 statewide planning goals and implementing rules,
16 we rely on respondents to identify any specific
17 provisions in the local government comprehensive
18 plan they contend provide the basis for the
19 challenged amendment.^[3] If respondents fail to do
20 so, we will not search the plan for such
21 provisions, but rather will assume no such
22 provisions exist, and that we have authority under
23 ORS 197.835(5)(b) to reverse or remand the
24 amendment to the local government land use
25 regulation if it does not comply with the
26 statewide planning goals or the administrative

³Further, to satisfy ORS 197.835(5)(b), the identified plan provisions must call for the specific land use regulation amendments adopted by the challenged decision. If a number of different land use regulation amendments could be consistent with the identified plan provisions, the plan provisions do not "provide the basis for" the regulation, as required by ORS 195.835(5)(b). Melton v. City of Cottage Grove, ___ Or LUBA ___ (LUBA Nos. 94-055 and 94-061, September 1, 1995), slip op 5, aff'd 131 Or App 626 (1994); see Ramsey v. City of Portland, 23 Or LUBA 291, 299-300, aff'd 115 Or App 20 (1992).

1 rules adopted by LCDC to implement those goals."
2 Here, the county does not identify specific provisions in
3 its comprehensive plan which it contends provide the basis
4 for the challenged LUO amendments. Consequently, we are
5 required to reverse or remand the LUO amendments if they do
6 not comply with applicable provisions of the goals.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner contends the county failed to consider, and
9 demonstrate compliance with, several Statewide Planning
10 Goals.⁴

11 Goal 1 (Citizen Involvement) requires a local
12 government to adopt a citizen involvement program (CIP).
13 Where amendments to a local government's comprehensive plan
14 or land use regulations do not amend or affect the local
15 government's acknowledged CIP, as is the case here, the only
16 way a petitioner can demonstrate a violation of Goal 1 is by
17 demonstrating a failure to comply with the acknowledged CIP.
18 Wade v. Lane County, 20 Or LUBA 369, 376 (1990); Holland v.
19 Lane County, 16 Or LUBA 583, 597-98 (1988). Petitioner does
20 not contend the county failed to follow its acknowledged CIP
21 and, therefore, fails to demonstrate a violation of Goal 1.

22 Petitioner also contends the county failed to
23 demonstrate compliance with Goals 6 (Air, Water and Land

⁴Petitioner's allegations under this assignment of error concerning Goal 14 (Urbanization) are addressed under the fourth assignment of error, infra.

1 Resources Quality), 10 (Housing) and 11 (Public Facilities
2 and Services). Petitioner's only argument with regard to
3 these goals is that the county should have considered
4 Goal 6, Guideline 4; Goal 10, Guideline 4; and Goal 11,
5 Guidelines 2 and 4. However, Statewide Planning Goal
6 "guidelines" are simply suggested approaches that local
7 governments may use in achieving compliance with the goals;
8 they are not requirements with which local governments must
9 comply. ORS 197.015(9); Goal 2, Part III. Consequently,
10 petitioner's argument provides no basis for reversal or
11 remand.⁵

12 Finally, petitioner complains the challenged decisions
13 fail to "inventory or address the conflict resolution
14 problems presented by Goal 5 [(Open Spaces, Scenic and
15 Historic Areas, and Natural Resources)]", with regard to
16 groundwater resources. Petition for Review 6.

17 Concerning the applicability of Goal 5 to
18 postacknowledgment comprehensive plan and land use
19 regulation amendments, we recently explained:

20 "[I]n adopting postacknowledgment plan amendments

⁵To the extent petitioner also argues the challenged decisions are deficient because they are not supported by findings addressing Goals 6, 10 and 11, we note that with regard to a legislative decision, a lack of findings is not in itself a basis for reversal or remand. We have consistently held there is no applicable legal standard requiring that all legislative decisions be supported by findings. Redland/Viola/Fischer's Mill v. Clackamas County, 27 Or LUBA 560, 563 (1994); Riverbend Landfill Company v. Yamhill County, 24 Or LUBA 466, 472 (1993); Von Lubken v. Hood River County, 22 Or LUBA 307, 313 (1991).

1 (other than amendments to the Goal 5 inventory
2 itself), the county is entitled to rely on its
3 acknowledged Goal 5 inventory. Urquhart v. Lane
4 Council of Governments, 80 Or App 176, 721 P2d 870
5 (1986); Waugh v. Coos County, 26 Or LUBA 300, 310
6 (1993); Davenport v. City of Tigard, 22 Or LUBA
7 577, 586 (1992). To the extent a proposed
8 postacknowledgment plan amendment affects an
9 inventoried Goal 5 resource; Goal 5 applies, and
10 its requirements must be addressed and satisfied.
11 Welch v. City of Portland, ___ Or LUBA ___ (LUBA
12 No. 94-133, December 21, 1994). On the other
13 hand, if the proposed postacknowledgment plan
14 amendment does not affect inventoried Goal 5
15 resources, Goal 5 does not apply and need not be
16 addressed." Friends of Cedar Mill v. Washington
17 County, ___ Or LUBA ___ (LUBA No. 94-142,
18 January 4, 1995), slip op 13.

19 In this case, the challenged amendments do not directly
20 affect the county's acknowledged Goal 5 inventory, and
21 petitioner does not identify any inventoried Goal 5
22 resources allegedly affected by the challenged amendments.
23 Consequently, petitioner provides no basis for reversal or
24 remand.

25 The first assignment of error is denied.

26 **FOURTH ASSIGNMENT OF ERROR**

27 Petitioner contends the decision applying the NK
28 designations to land in Neahkahnie violates Goal 14
29 (Urbanization), because it designates rural land for urban
30 uses. 1000 Friends of Oregon v. LCDC (Curry Co.), 301 Or
31 447, 724 P2d 268 (1986) (Curry County). Petitioner argues
32 that whereas the county's acknowledged comprehensive plan
33 includes exceptions to Goal 17 (Coastal Shorelands) for all
34 land in Neahkahnie, and exceptions to Goals 3 (Agricultural

1 Lands) or 4 (Forest Land) for some portions of Neahkahnie,
2 the county has never adopted an exception to Goal 14 for any
3 portion of Neahkahnie. Petitioner also argues that certain
4 goal exception data sheets in the comprehensive plan
5 demonstrate that certain portions of Neahkahnie are not
6 committed to urban levels of use. Petition for Review
7 App-20 to App-26.

8 The county argues the R-1 plan and zone designation
9 applied to the land in Neahkahnie prior to the challenged
10 decisions must be presumed, as a matter of law, to comply
11 with Goal 14, because the county's plan and land use
12 regulations have been acknowledged by LCDC.⁶ Therefore, the
13 county reasons that changing the designation of land in
14 Neahkahnie to one of the NK designations, which allow either
15 the same density of development as, or less dense
16 development than, the R-1 designation, must also comply with
17 Goal 14. According to the county, Curry County does not
18 require that "down-zoning" be shown to comply with Goal 14.

19 At the time the challenged decision applying the new NK
20 designations to land in Neahkahnie was made, Goal 14
21 prohibited allowing urban uses on rural lands. By
22 definition, all land outside an acknowledged UGB and not the

⁶At oral argument, the county argued for the first time that it has previously adopted an exception to Goal 14 for some or all of the land in Neahkahnie. However, the county does not identify any such exception in its comprehensive plan or in the record and, therefore, we do not consider this argument.

1 subject of an exception to Goal 14 is rural land. Curry
2 County, 301 Or at 498-501; Caine v. Tillamook County, 22
3 Or LUBA 687, 696-97 (1992). Neahkahnie is not within an
4 acknowledged UGB. See n 2, supra. Therefore, when amending
5 its acknowledged plan and zone designations for land in
6 Neahkahnie, the county must demonstrate that the new plan
7 and zone designations comply with Goal 14 or adopt an
8 exception to Goal 14. See Redland/Viola/Fischer's Mill v.
9 Clackamas County, supra, 27 Or LUBA at 566 (all amendments
10 to acknowledged plans and land use regulations must
11 themselves comply with the goals); Caine v. Tillamook
12 County, supra, 22 Or LUBA at 699 (1992).

13 The NK-7.5 and NK-15 designations, which allow
14 residential development on smaller than 1/2-acre lots, with
15 community water and sewer services, clearly allow urban
16 uses.⁷ Curry County, 301 Or at 505. Consequently, the
17 county erred by applying these NK designations to rural land
18 outside an acknowledged UGB without adopting an exception to
19 Goal 14.⁸

⁷Whether the NK-30 designation, which allows residential development on 30,000 square foot lots, with community water and sewer services, allows urban uses is less clear and should be addressed by the county in the first instance. See Curry County, 301 Or at 506-07.

⁸After the challenged decisions were adopted, LCDC amended Goal 14 to provide that in "unincorporated communities" outside UGBs, counties may approve uses more intensive than those otherwise allowed on rural lands by Goal 14 either by adopting an exception to Goal 14 or pursuant to LCDC administrative rule. At the same time, LCDC adopted OAR Chapter 660, Division 22 (Unincorporated Communities), which defines different types of unincorporated communities and establishes planning and zoning requirements

1 The fourth assignment of error is sustained.

2 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

3 Petitioner contends the challenged decisions fail to
4 comply with provisions of the plan (1) limiting the
5 densities and numbers of dwellings allowable in Neahkahnie,
6 and (2) requiring consideration of the effects of the newly
7 applied NK designations on development of vacant
8 residentially designated land within the adjacent Manzanita
9 UGB. Petitioner identifies the applicable plan provisions
10 as plan Goal 11, §§ 1.2(24), 2.2(2) and 2.3(5); plan Goal 14
11 §§ 2.8, 3.11 and 3.19.

12 The plan Goal 11 provisions cited by petitioner include
13 findings regarding the facilities and capacity of the
14 Neahkahnie Water District, discussion of the planning
15 requirements of Goal 11 with regard to types and levels of
16 services in urban and rural areas, and discussion of the
17 relationship between Goals 11 and 14. The plan Goal 14
18 provisions cited by petitioner are a policy on conversion of
19 urbanizable land to urban land,⁹ a policy on development
20 within CGBs, and the findings justifying the county's
21 establishment of the Neahkahnie CGB.

22 The plan provisions cited by petitioner are arguably

for such communities. On remand, these provisions may be applicable to the county's decisions regarding uses of land in Neahkahnie.

⁹As explained supra, under the Statewide Planning Goals, the land within the Neahkahnie CGB is "rural" land. However, "urbanizable land," as used in the county's plan, is defined by the plan to include land within the Neahkahnie CGB. Plan Goal 14, § 2.3.

1 relevant to decisions to create and apply new urban
2 residential plan and zone designations for the Neahkahnie
3 area. The parties cite no findings supporting the
4 challenged decisions that interpret or apply the plan
5 provisions cited by petitioner.¹⁰ As explained supra, the
6 lack of findings in support of a legislative decision is not
7 in itself a basis for reversal or remand. It is possible
8 for respondents to defend against a challenge to a
9 legislative decision through argument in their briefs and
10 citations to plan provisions, code provisions and evidence
11 in the record. Redland/Viola/Fischer's Mill v. Clackamas
12 County, supra, 27 Or LUBA at 564; see Gruber v. Lincoln
13 County, 2 Or LUBA 180, 187 (1981). However, in this case,
14 the plan provisions and arguments involved are complex and
15 we are unable to determine, in the absence of interpretive
16 findings by the county governing body, whether the plan
17 provisions cited include applicable standards and, if so,

¹⁰Each of the challenged decisions adopts as findings "Exhibit 1 and 2." Record 47, 49. Exhibits 1 and 2 to the order adopting the text of the new NK designations (Record 57-130) include virtually the entire record of the county's proceedings -- staff reports, draft ordinances, minutes of the planning commission's March 10, 1994 meeting and all letters of support and opposition received by the county. Exhibits 1 and 2 to the order amending the plan and zone map (Record 163-220) similarly include virtually the entire record of that proceeding. Adopting an entire record as findings (including conflicting documents) does not identify the standards the county found to be applicable or the facts the county found to be true and, therefore, does not aid this Board in performing its review function. Jackson-Josephine Forest Farm Assn. v. Josephine County, 12 Or LUBA 40, 42 (1984).

1 whether they are satisfied.¹¹

2 The second and third assignments of error are
3 sustained.

4 **FIFTH ASSIGNMENT OF ERROR**

5 Petitioner's entire argument under this assignment of
6 error is as follows:

7 "The petitioner alleges, without specification,
8 that contour 'slope,' [Record] 223, 225, is not
9 embraced in any part of the county's Comprehensive
10 Plan as a criterion of density for zoning land.
11 For this reason, LUBA should reverse or remand
12 these decisions pursuant to ORS 197.835(b)."
13 (Emphasis in original.) Petition for
14 Review 18-19.

15 The record pages referred to in the above quote are
16 part of the minutes of the board of commissioners' March 30,
17 1994 hearing on the proposed plan and zone map amendments.¹²
18 The statements indicate that slope was a consideration in
19 determining the staff and citizen task force recommendations

¹¹We are required to defer to a local governing body's interpretation of its comprehensive plan, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). Additionally, under Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on reconsideration 125 Or App 119 (1993), rev'd on other grounds 319 Or 308 (1994), and Weeks v. City of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992), we are required to review the governing body's interpretation of its comprehensive plan expressed in the challenged decision, and may not interpret the plan ourselves in the first instance.

¹²As explained in n 10, supra, these minutes were also adopted as findings in support of the challenged decision amending the plan and zone map.

1 concerning where to apply the different NK designations.
2 However, we see no reason why county consideration of slope
3 in determining the appropriate plan and zone designation to
4 be applied to property in Neahkahnie is a basis for reversal
5 or remand.

6 The fifth assignment of error is denied.

7 The county's decisions are remanded.