

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 CUDDEBACK LUMBER CO., and RANDY)
5 CUDDEBACK,)
6)
7 Petitioners,)
8)
9 vs.) LUBA No. 96-119
10)
11 CITY OF EUGENE,)
12)
13 Respondent.)
14 _____) FINAL OPINION
15) AND ORDER
16 GEORGE COLE and SUZANNE COLE,)
17)
18 Petitioners,)
19)
20 vs.) LUBA No. 96-120
21)
22 CITY OF EUGENE,)
23)
24 Respondent)

Appeal from City of Eugene.

29 Bill Kloos, Eugene, filed a petition for review and
30 argued on behalf of petitioners Cuddeback. With him on the
31 brief was Johnson Kloos & Sherton

33 Michael E. Farthing, Eugene, filed a petition for
34 review and argued on behalf of petitioners Cole. With him
35 on the brief was Gleaves Swearingen Larsen Potter Scott &
36 Smith.

38 Glenn Klein and Emily K. Newton, Eugene, filed the
39 response brief and argued on behalf of respondent. With
40 them on the brief was Harrang Long Gary Rudnick.

HANNA, Chief Referee; GUSTAFSON, Referee, participated in the decision.

44
45 AFFIRMED 02/18/07

1
2 You are entitled to judicial review of this Order.
3 Judicial review is governed by the provisions of ORS
4 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's decision to apply overlay
4 zoning to 201 tax lots in west Eugene.

5 **FACTS**

6 The city developed watercourse and wetland area
7 protection planning for west Eugene in three steps. In
8 1992, the city adopted the West Eugene Wetlands Plan (WEWP).
9 The WEWP is a refinement plan of the city's comprehensive
10 plan. All 201 tax lots, including those tax lots that are
11 the subject of this appeal, are governed by the WEWP.¹ In
12 1995, to implement the WEWP the city adopted the Natural
13 Resources Implementation Code Amendments. The two
14 subdistricts at issue, the Waterside Protection subdistrict
15 (WP) and the Wetland Buffer subdistrict (WB), were adopted
16 as part of those amendments.² The final step, the subject
17 of this appeal, is the city's 1996 application of the WP and
18 WB to the 201 tax lots.³

19 The application for the zone change, to maintain the

¹The record indicates that petitioners Cole own two tax lots. The record does not indicate which or how many tax lots petitioners Cuddeback own.

²The WP protects areas adjacent to identified watercourses and the WB protects areas adjacent to identified wetlands.

³The WP and WB are applied to the entire tax lot, any portion of which is affected by a subdistrict. Notwithstanding that the subdistricts are applied to the entire tax lot, it is only the actual area subject to regulation that is limited for purposes of development and uses allowed.

1 underlying zoning and impose an overlay zone for either or
2 both the WP and WB subdistricts, was made by the city
3 planning commission.⁴ The initial decision to impose the
4 overlay zone was made by a hearings officer. Petitioners
5 appealed the hearings officer's decision to the planning
6 commission which heard the appeal on the record, adopted the
7 hearings officer's findings and additional findings of its
8 own, and affirmed the hearings officer's decision.

9 **FIRST ASSIGNMENT OF ERROR (CUDDEBACK)**

10 **THIRD ASSIGNMENT OF ERROR (COLE)**

11 Petitioners argue that the city was required to apply
12 Statewide Planning Goals 5, (Open Spaces, Scenic and
13 Historic Areas, and Natural Resources), 9 (Economic
14 Development) and 10 (Housing) to the rezoning decision.
15 Specifically, petitioners argue that ORS 197.835(7)(b)
16 requires application of the goals directly to each rezoning
17 decision because the comprehensive plan does not contain
18 specific policies that provide the basis for the rezoning
19 decision.⁵

⁴The record indicates that the underlying zoning for the 201 tax lots varies among industrial, commercial and residential designations.

⁵ORS 197.835(7)(b) states:

"The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

"(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for

1 The city responds that "Goal findings are not required
2 for land use decisions involving application (rather than
3 amendment) of refinement plans or land use regulations."
4 (Emphasis in original.) Respondent's Brief 10.

5 As explained in the hearings officer's findings:

6 "Goal findings are not made here for the reason
7 that an amendment to the comprehensive plan is not
8 involved. Application of a previously adopted
9 refinement plan and Implementation Code Amendments
10 do not require such findings. This is a quasi-
11 judicial decision applying particular criteria of
12 the Eugene Code for a zone change. A challenge to
13 the effects of the legislation on various land use
14 inventories could have been made, first, when the
15 refinement plan was adopted. It was at that point
16 that a case could be made that implementation of
17 these policies which would become, in effect, part
18 of the [comprehensive plan] would have significant
19 effects on the inventories. A challenge might
20 have been made at the time of the adoption on the
21 natural Resources Implementation Code Amendments
22 which required that the areas identified in the
23 refinement plan receive the subdistrict
24 designations. This latter course may have been
25 too late. The contention, in the context of
26 application of districts, is definitely too late."
27 Record 149-50.

28 The city now argues,

29 "At issue here is not a refinement plan or a land
30 use regulation amendment, but instead, only the
31 application of the overlay subdistricts called for
32 by the previously-adopted refinement plan, and
33 required by the previously-adopted land use
34 regulations." Respondent's Brief 10.

35 If the city contends that the challenged decision is

the regulation, and the regulation is not in compliance
with the statewide planning goals."

1 not an amendment of a land use regulation, the city is in
2 error. By its terms, the challenged decision amends the
3 city's land use regulations. However, ORS 197.835(7)(b)
4 dictates that land use regulations need not be independently
5 measured against the goals if the proposed enactment "is
6 consistent with specific related land use policies contained
7 in the acknowledged comprehensive plan." 1000 Friends of
8 Oregon v. Jackson County, 79 Or App 93, 98-99, 718 P2d 753
9 (1986).

10 Petitioners argue that neither WEWP Policy 3.12 nor
11 WEWP Policy 3.15 constitute a "specific policy" on which the
12 city can rely under ORS 197.835(5)(b) in lieu of an
13 independent showing of goal compliance. Petitioners
14 Cuddeback state:

15 "Policy 3.12 anticipates the adoption of buffers,
16 but it is too broadly worded to trigger the
17 exemption. * * * It provides no guidance as to how
18 those buffers should be crafted in terms of their
19 physical dimensions or the scope of their
20 restrictions. It provides no guidance as to what
21 mechanisms should be used to afford relief to
22 [affected] property owners[,] or how conflicts
23 between the goals should be balanced. Petitioners
24 Cuddebacks' Petition for Review 4.

25 Petitioners Cuddeback contend that Policy 3.15 is
26 inapplicable because it anticipates a single implementing
27 scheme that is set forth in one particular study.

28 The challenged decision addresses the city's reliance
29 on Policies 3.12 and 3.15 as follows:

30 "Policy 3.12 states:

1 ''3.12 Protect and create buffer areas
2 between regulated wetland boundaries and
3 adjacent uses or developments.'

4 "The Wetland Buffer subdistrict is specifically
5 designed to accomplish the objective of this
6 policy and by action here will be applied to
7 provide buffers between wetland boundaries and
8 adjacent uses or developments.

9 "Policy 3.15 states:

10 ''3.15 The Waterside Protection setback
11 proposed in the Natural Resources special
12 study shall be applied to streams recommended
13 to be protected in this plan as identified on
14 map 3, Wetlands Recommendations.'

15 "The Waterside Protection subdistrict is being
16 applied to properties that are within the West
17 Eugene Wetlands Plan area, within the City limits,
18 and adjacent to a waterway identified for
19 protection on the WEWP. These waterways include
20 Amazon Creek, Willowcreek, Dead Cow Creek, and the
21 A-3 Channel. All are indicated as streams to be
22 protected on Map 3 of the Wetlands Recommendation
23 portion of the West Eugene Wetlands Plan. The
24 above policy provides clear direction that the
25 Waterside Protection subdistrict shall be applied
26 to the subject properties, due to their proximity
27 to protected waterways. As such, the current
28 request is consistent with the above policy."
29 Record 149.

30 Petitioners rely on several cases to support their
31 contention that the challenged decision must comply with the
32 goals. In Melton v. City of Cottage Grove, 28 Or LUBA 1, 6
33 (1994), we looked to several plan provisions generally
34 urging planning for tourist-commercial activities, and
35 concluded that they were not specific policies which could
36 provide a basis for an interstate-oriented major retail

1 facility. In Ramsey v. City of Portland, 23 Or LUBA 291,
2 299, aff'd 115 Or App 20, 836 P2d 772 (1992), we found no
3 specific plan policies that could provide the basis for
4 case-by-case evaluation of development applications under a
5 general provision urging conservation of natural resources.
6 In both Melton and Ramsey, the cities relied on general plan
7 policies rather than specific plan policies as required by
8 ORS 197.835(7)(b). Therefore, we determined in both
9 instances that the goals were directly applicable.

10 In Opus Development Corp. v. City of Eugene, 28 Or LUBA
11 670, 676-77 (1995) (Opus I), we determined that amendment of
12 a refinement plan was reviewable for compliance with the
13 goals because the refinement plan was adopted as part of the
14 comprehensive plan. Unlike Opus I, however, the challenged
15 decision adopts a land use regulation necessary to implement
16 a refinement plan and comprehensive plan provisions that
17 were previously determined to comply with the goals. The
18 application of the refinement plan through this decision
19 directly implements WEWP Policies 3.12 and 3.15. These
20 policies need not specify exactly how the refinement plan
21 should be implemented in order to be specific policies that
22 provide the basis for the challenged decision. Because
23 these comprehensive plan policies provide the basis for the
24 challenged decision, the city was not required to
25 independently apply the goals.

26 This assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR (CUDDEBACK)**

2 Petitioners Cuddeback argue that the city was required
3 to apply two comprehensive plan policies to its rezoning
4 decision. Economic Element Policy 5 requires that the city
5 "[p]rovide existing industrial activities sufficient
6 adjacent land for future expansion." Economic Element
7 Policy 6 requires that the city "[i]ncrease the amount of
8 undeveloped land zoned for light industrial and commercial
9 uses correlating the effective supply in terms of
10 suitability and availability with the projections of
11 demand." Petitioners argue that Economic Element Policy 5
12 requires the city to consider "how the imposition of the
13 setbacks will impact the individual properties," and that
14 Economic Element Policy 6 requires it to examine "the
15 suitability and availability of these lands in relation to
16 the projections of demand." Petitioners Cuddebacks'
17 Petition for Review 12-13.

18 The city responds that the two challenged policies do
19 not apply to this decision. It contends "the only possibly
20 applicable Eugene Code provision (EC Section 9.678(2)(b))
21 does not require consideration * * *" of Economic Element
22 Policies 5 and 6. Respondent's Brief 11.

23 EC Section 9.678(2)(b) sets forth the criteria for zone
24 changes:

25 "The proposed change is consistent with the
26 [comprehensive plan] (1) applicable text, (2)
27 specific elements related to the uses listed in

1 the proposed zoning districts, and (3) applicable
2 designation. * * *

3 Petitioners have not established that Economic Element
4 Policies 5 and 6 are applicable to the challenged decision.

5 This assignment of error is denied.

6 **FIRST ASSIGNMENT OF ERROR (COLE)**

7 Petitioners Cole argue that the city's findings
8 relating to EC 9.678(2)(c) are insufficient and are not
9 supported by substantial evidence in the record.

10 EC 9.678(2)(c) states:

11 "The proposed zone change is consistent with
12 applicable adopted neighborhood refinement plans,
13 special area studies, and functional plans. * * *

14 Petitioners argue that the city violated EC 9.678(2)(c)
15 by failing to address the Industrial Lands Study and
16 Commercial Lands Study since those studies are refinement
17 plans. The city responds that EC 9.678(2)(c) requires
18 consistency with neighborhood refinement plans and not
19 refinement plans generally. Alternatively, the city
20 responds that there is evidence in the record to support
21 that the rezoning is consistent with the Industrial Lands
22 Study and Commercial Lands Study.

23 Petitioners have not established that the Industrial
24 Lands Study and Commercial Lands Study are neighborhood
25 refinement plans for purposes of EC 9.678(2)(c).

26 This assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR (COLE)**

2 Petitioners Cole argue that the city's findings
3 relating to EC 9.678(2)(a) are insufficient and are not
4 supported by substantial evidence in the record. A
5 component of petitioners' argument is that the city was
6 required to make individual findings for each tax lot that
7 was rezoned.

8 EC 9.678(2)(a) states:

9 "The uses and density that will be allowed in the
10 location of the proposed change (1) can be served
11 through the orderly and efficient extension of key
12 urban facilities and services prescribed in the
13 [comprehensive plan], and (2) are consistent with
14 the principles of compact and sequential growth."

15 In its decision the planning commission addressed this
16 criterion by stating:

17 "This zone change criteria focuses on ensuring the
18 provision of key urban facilities and services to
19 properties when the zone change involves the
20 expansion or intensification of allowable uses
21 under the 'parent' zoning district. This request
22 to apply the Waterside Protection (/WP) and
23 Wetland Buffer (/WP) subdistricts does not involve
24 any change in the existing 'parent' zoning
25 districts, nor does it involve an expansion or
26 intensification of allowable uses under the
27 applicable 'parent' zoning districts of affected
28 properties. The ability of urban services and
29 facilities to serve properties will be unchanged
30 as a result of the approval of this request."

31 "Moreover, in his appeal, the appellant [the
32 Coles] misreads the criteria. Appellant
33 incorrectly frames the issues of whether 'sewer
34 service is available to serve' the property, or
35 whether the property has 'access to a public
36 street.' The question under this criteria,

1 however, is not whether the properties *currently*
2 have the services, but instead whether the uses
3 and density for the property can be serviced
4 through the orderly *extension* of services. As
5 noted above, this request has no bearing on the
6 ability of properties to be served." (Italics in
7 original.) Record 25.

8 This criterion does not require a demonstration that
9 facilities and services will be provided to each tax lot; it
10 is only necessary to that the tax lots can be served through
11 the extension of facilities and services. The challenged
12 decision meets the requirements of EC 9.678(2)(a).

13 This assignment of error is denied.

14 The city's decision is affirmed.