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

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ROBERT LIMA, PAULA WILLIAMS)
CINDY GERBER, LAUREN GERBER,)
and VAL MENCAS,)
Petitioners,)
V.)
JACKSON COUNTY, OREGON,)
Respondent.)

LUBA NO. 80-127
FINAL OPINION
AND ORDER

Appeal from Jackson County.

Ronald K. Cue, Ashland, filed a brief and argued the cause for Petitioners. With him on the brief were Cottle, Howser & Cue.

John L. Dubay, Medford, filed a brief and argued the cause for Respondent.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

Affirmed.

5/12/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioners appeal designation of their properties to Open
4 Space Development-5 (OSD-5) in the Jackson County Comprehensive
5 Plan. Along with their challenge to the comprehensive plan, it
6 is a challenge to the companion zoning ordinance. The
7 particular portion of the county involved in this appeal is
8 known commonly as the "North Ashland Interchange" area, north
9 of the City of Ashland and near Interstate Highway 5.

10 FACTS

11 The property in question had a general commercial zoning
12 designation. In May of 1978, the Jackson County Board of
13 Commissioners put into effect a moratorium on building activity
14 and other land use decisions in the particular area. The
15 moratorium was apparently for the purpose of providing some
16 breathing space during the development of the comprehensive
17 plan. The moratorium was to expire on the 1st of April of
18 1979, the target date for completion of the comprehensive
19 plan. However, the plan was not adopted until much later.
20 Apparently because of that delay, the Board of Commissioners
21 initiated a comprehensive plan change and zoning change in May
22 of 1979 changing the designation on the subject property from a
23 general commercial to its present designation of Open Space
24 Development.¹ Then Jackson County Commissioner Doty
25 initiated the proceedings and took part in the vote on the zone
26 change in 1979.

1 The land uses in the area are varied. The area to the
2 north of the interchange includes limited development and
3 farming activities, while the area to the south and closer to
4 the City of Ashland has some commercial development, including
5 a state office building, truck repair, service stations, and a
6 horse boarding facility. In the words of the petitioners, the
7 land uses on the subject properties are as follows:

8 "The Gerber property consists of 12 acres,
9 approximately 6 acres in each of tax lots 600 and
10 601. These were formerly zoned General Commercial and
11 are now zoned OSD 5. Tax lot 600 contains 32 dwelling
units in a mobile home park served by a well on tax
lot 601. It is located directly across the highway
from teh 2 car dealerships (Supp. Rec. 73).

12 "The Williams property is commonly known as
13 Jackson Hot Springs. It consists of a mobile home
park, a swimming pool, a motel, and camping and
14 tourist facilities. It is bounded on one side by
Highway 99 and on the other by the Southern Pacific
15 Railroad tracks and a steep bluff. To the south is a
cafe and bar and a car dealership. This was rezoned
16 from General Commercial to OSD-5 (Supp. Rec. 79-80).

17 "The Lima property is located between an auto
18 body shop (tax lot 904) and a restaurant (tax lot
902). It is located across the highway from the
shopping center. It was zoned from General Commercial
19 to Agricultural. Further, the original staff report
proposed a dividing line between General Commercial
20 and Agriculture (Rec. 114). The final ordinance zoned
it entirely Agriculture (Rec. 86).

21 "The Mencas property is located at the corner of
22 Valley View and Highway 99. Tax lot 400 is
undeveloped. It lies across the highway from a car
23 dealership and the bar and cafe. It was rezoned from
Interstate Commercial to OSD-5. Tax lot 301 was also
24 rezoned OSD-5."

25 ASSIGNMENTS OF ERROR

26 Petitioner attacks the designations on four grounds:

1 "A. The Board failed to follow the procedure
2 applicable to the matter before it in that, because
3 this was a quasi-judicial hearing, it was not heard
4 before a fair and impartial tribunal.

5 "B. The Board failed to follow the procedure
6 applicable to the matter before it in that the
7 original proposed Comprehensive Plan amendment did not
8 include all of petitioner Lima's property, but the
9 ordinance changed the designation of all of Lima's
10 property from General Commercial to Agriculture.

11 "C. In designating the land Open Space Development,
12 the decision was not supported by substantial evidence
13 in the record.

14 "D. In designating the land Open Space Deveopment
15 [sic], the decision violated Goals 2, 5, 8 and 9.

16 A.

17 Petitioner characterizes the land use decision as a
18 quasi-judicial action. This characterization is a result of
19 the petitioners' belief that the "actual decision was made on
20 May 30, 1979 * * * *" Petition for Review 6. Petitioners
21 claim that as the zoning designations (for the most part) were
22 made in a quasi-judicial proceeding initiated by the Board of
23 Commissioners on that date, the comprehensive plan simply echos
24 that older decision and should not be considered a separate
25 act. Petitioner alleges Fasano v. Board of Commissioners, 264
26 Or 574, 507 P2d 23 (1973) is applicable and particularly
applicable is the requirement of an "impartial tribunal."

The county responds by claiming that if in fact this
challenge is to the 1979 action, the petitioners are too
late.² If the attack is considered legislative and an attack
on the comprehensive plan, respondent claims there were no

1 procedural errors prejudicial to petitioners. The fact that
2 the individual commissioners were evidently aware of the 1979
3 action (the record of that action is included in the record of
4 this case) does not indicate there was a violation of Fasano
5 procedural criteria. The commissioners did only what they were
6 supposed to do, according to respondent. They read the staff
7 report prior to the hearing. The fact that the commissioners
8 may have supported the staff, as disclosed by the commissioners
9 in the meeting, "did not impair the right of any members of the
10 public to present rebutting evidence on the issues at that
11 meeting." Respondent's Brief 3.

12 We must agree with the respondent. To the extent the
13 petitioners are challenging the May 30, 1979 action, they are
14 too late. The fact that a similar matter was considered two
15 years ago under different circumstances does not change this
16 proceeding from legislative to quasi-judicial.³ The concern
17 over the fact that the Board of Commissioners themselves
18 initiated proceedings leading to the zoning eventually used on
19 this property does not show prejudice. Commissioners and city
20 council members must be free to initiate changes they feel are
21 appropriate, and the fact that they must sit in judgment over
22 the changes they propose is nothing more than a fact of
23 procedure as the law has it in this state. Assignment of Error
24 "A" is denied.

25 B.

26 Petitioners challenge the notice provided to Petitioner

1 Lima. Petitioners claim that notice to Petitioner Lima was
2 particularly required. Again, petitioners rely on their belief
3 that this action was quasi-judicial and that petitioners were
4 "parties" and entitled to notice of the proceedings. The Board
5 is not cited to any portion of the county comprehensive plan or
6 zoning ordinance requiring notice to individual property owners
7 under the comprehensive plan adoption process.

8 Respondent replies to this allegation by saying that the
9 proceedings were legislative, "and no notice to Petitioner Lima
10 was required." Respondent's Brief 4.

11 Because we characterize this comprehensive plan and zoning
12 change to be legislative and not quasi-judicial, we must agree
13 with the respondent. There has been no allegation that the
14 notice requirements for legislative action in ORS Chapter 215
15 were violated in the adoption of this comprehensive plan and
16 accompanying zoning ordinance.

17 C.

18 Petitioners challenge the findings in support of the
19 decision. The allegation of error would appear broad enough to
20 attack the designation of open space development in the
21 comprehensive plan and zoning ordinance, but the discussion
22 under that assignment of error appears to be limited to the
23 findings made in support of the Commissioner's decision in May
24 of 1979. Petitioners recite their belief as to the inadequacy
25 of findings made as part of the commissioner's order rezoning
26 the affected property on the 30th of May, 1979. As mentioned

1 above, that order is beyond our reach, and our consideration
2 must be of the comprehensive plan and zoning ordinance as it
3 exists now and as it was adopted in August of 1980.

4 If we consider this assignment of error as an allegation
5 that findings were necessary as part of the comprehensive plan
6 adoption process, then we must find for the respondents.

7 As respondent notes, the area in question "is rural land
8 under goal definitions since it lies outside of an urban growth
9 boundary * * * *" Respondent's Brief 6. The policies of the
10 Jackson County Comprehensive Plan are "to limit development to
11 urban-centered growth forms and to restrict further development
12 of commercial areas outside of urban growth boundaries." Ibid.

13 Policy 5, the Rural and Suburban Lands Element of the
14 County Plan states as follows:

15 "Policy: Existing committed general commercial areas
16 outside of urban growth boundaries should not expand
17 except for fill-in development, and where possible
should be upgraded, improving appearance, safety and
neighborhood compatibility."

18 Policy 6 of that same element provides:

19 "Policy: Commercial development located in
20 unincorporated urban areas shall be limited in scope
and intensity to serve the needs of the surrounding
unincorporated population."
21

22 Policy 4 of that element discusses mobile homes.

23 "Policy: Existing mobile home parks which do not meet
24 current development standards or zone density shall be
encouraged to improve by allowing some expansion in
trade for general upgrading of the existing park."
25

26 These policies, in sum, limit development in the area of

1 the North Ashland Interchange. The designation applied in the
2 comprehensive plan appears to be in keeping with these
3 policies. The purpose of the open space development
4 classification is as follows:

5 "The official Plan and Zoning Map designates open
6 space development areas to encourage desirable and
7 appropriate land uses which will retain an open and
8 rural environment and be consistent with the physical
9 capacity of the land resource to accommodate open
10 space, recreational, aggregate and limited low
11 intensity uses. Typically these lands, by reason of
12 location, soil, topography, geology, and other
13 physical characteristics and natural factors and
14 associations, are not suited to intensive land
development, which may require special management
and/or development techniques. Furthermore, in some
instances, open space development will also serve to
buffer the interface between forest and woodland
resource lands and adjacent lands committed to or
designated for higher intensity uses where such uses
would impede the efficient operation of
forestry-related activities."

15 There are twelve characteristics for OSD-5 land, and
16 respondent claims the following are applicable to the
17 petitioners' properties:

18 "(1) Lands located on valley terrace.

19 "(3) Lands having marginal or limited suitability for
20 intensive residential, commercial or industrial
21 development due to subsurface, geologic or
22 permeability characteristics making them
unsuitable for conventional subsurface sewage
disposal systems.

23 "(5) Lands where parameters of (C) or (D) in Policy 1
24 of the Public Facilities and Services Element
would apply regarding sewer and water facilities.

25 "(10) Lands adjoining stream courses.

26 "(11) Lands that serve as a buffer interface between
the forest and/or woodland resource and

1 proximate areas committed to, or designed for,
2 higher intensity development.

3 "(12) Lands generally not subject to seasonal flood or
4 inundation, but susceptible to occasional
5 torrential stream flooding."

6 We are not cited to a portion of the record showing, in
7 fact, those characteristics of petitioners' properties.

8 However, maps submitted as a supplement to the record herein
9 show the property to be composed of predominantly Class I-IV
10 soils and to be bordered by lands bearing agricultural, rural
11 residential and large open space use designations. We are not
12 certain what "valley terrace" lands are, but aerial photographs
13 and topographic maps of the area show the subject properties to
14 be generally flat. Arguably, then, items 3 and 11 above are
15 supported by the record.

16 Additional support may be found in the May 30, 1979 order
17 of the Jackson County Board of Commissioners redesignating
18 these properties. In that order, intensive use of the property
19 was found not appropriate as follows:

20 "C) The following findings relate to Open Space
21 Development:

22 "1) The Jackson Hot Springs Mobile Home Park and
23 the mobile home park on the north side of the
24 highway are nonconforming uses when zoned
25 commercial. They cannot be expanded in that
26 zoning designations due to state law limitations
and subsequent required amendments to the Jackson
County Zoning Ordinance. Applying the Open Space
Development designation and zone allows mobile
home parks as conditional uses. This may give
them a better opportunity, although still
limited, to alter and expand their facility.
Applying Open Space Development may not be the

1 best solution, but it's the best currently
2 available.

3 "2) The remainder of the Jackson Hot Spring
4 facility is a resort. While portions of the
5 activity are permitted in the General Commercial
6 zone, the campground and picnic areas could only
7 be expanded by a conditional use permit. The
8 Open Space Development classification gives the
9 same option by allowing expansion of resorts
10 under conditional use permits. Additionally, the
11 open aesthetic qualities of the facility best fit
12 the Open Space Development category which has a
13 purpose to preserve natural features or areas
14 subject to flooding yet be improved as
15 recreational development. The geothermal
16 potential, if one exists, can also be
17 accommodated by a conditional use permit as a
18 utility facility.

11 "3) Applying Open Space Development to the
12 hillside better fits the topography and the
13 intent of the Open Space Development zone.
14 Generally, this area will not be developed.
15 Certainly it is not desirable for commercial use,
16 nor rural residential as currently planned.

14 "4) The Open Space Development category best
15 applies to areas subject to flooding. The
16 temporary uses generally allowed by conditional
17 use permits in the Open Space Development district
18 are frequently compatible with flooding; for
19 example, camping and recreation activity.

18 "5) Tax Lot 601, which is currently vacant,
19 falls almost entirely within the 100-year
20 floodplain of Bear Creek. A smaller portion
21 falls within the floodway. Under the Federal
22 Flood Insurance Act, no structures are allowed in
23 the floodway. Additionally, all mobile homes or
24 other structures must be placed at an elevation
25 which lies above the 100-year flood-plain level.
26 This would require filling of the land varying in
27 depth from two to four feet. Furthermore, any
28 filling or altering of the floodway can only
29 occur when there is [sic] ample assurances that
30 other properties will not be affected by the
31 action.

25 "6) Access to Tax Lot 601, occurs via a narrow
26 road which has a very poor and hazardous

1 intersection angle with Highway 99. Commercial
2 activity, if allowed on this tax lot, would
3 increase the hazard potential at the intersection
due to increase in traffic volumes.

4 "D) The following finding relates to agriculture:

5 "1) Tax Lots 900 and 902 satisfy the currently
6 proposed agricultural criteria. Tax Lot 902 has
7 a historic use on the site. These lots are,
8 therefore, included in the agricultural
9 category. Should the agricultural criteria be
changed, these areas will need further
consideration. Additionally, some future
attention should be given to preserving the
historic site."

10 Support for these findings exists in a staff report at
11 pages 113-124 of Volume 1 of the record in this case.⁴ The
12 staff report provides sufficient information on the area
13 generally for us to conclude that the property may not be
14 suitable for the intensity of development permitted under the
15 general commercial and interstate commercial designations.
16 Also, the record does show portions of the petitioners'
17 properties to be in a flood plain. See Record, Flood Insurance
18 Study for Jackson County of June, 1980 (made a part of the
19 zoning ordinance by section 254.020 of the ordinance).

20 We conclude the county has sufficient facts in the record
21 to support designating the subject properties for other than
22 commercial use. Further, the county plan designation of Open
23 Space Development appears, in part, to match the facts about
24 the properties as we have found them in the record.⁵

25 D.

26 Petitioners here allege a violation of several Statewide

1 Goals. Petitioners allege Goal 2 was violated because there
2 was little factual basis for the action taken. Goal 5 has
3 alleged to have been violated because, petitioners claim, the
4 properties involved "are not the type of land contemplated as
5 open space." Petition for Review 16. Goal 8 is alleged to
6 have been violated because the change in land use designation
7 to Open Space Development removes the possibility of enlarging
8 upon recreational facilities petitioners claim exist on the
9 subject property. Goal 9 is alleged to have been violated
10 because the tourist economy of the area will be damaged by the
11 land use designation, and because the City of Ashland has a
12 shortage of land for commercial uses.

13 As mentioned in the discussion of the last assignment of
14 error, there is no specific inventory that might provide "an
15 adequate factual basis" for the decisions made regarding the
16 North Ashland Interchange area. However, the record of the
17 1979 Plan Amendment proceeding does provide sufficient
18 information from which we can conclude that a factual basis for
19 the decisions does exist. As we stated in Gruber v. Lincoln
20 County, ____ Or LUBA _____ (LUBA No. 80-088) in a broad
21 legislative plan enactment proceeding such as this one, we will
22 not require a local jurisdiction to make specific findings of
23 fact as to each individual piece of property affected by the
24 plan enactment. What must appear, however, is enough facts in
25 the record to show that when the facts are compared with plan
26 policies, the reader is lead to the conclusion that the county

1 acted properly in designating the property as it has. That is,
2 there must be enough facts in the record such that when
3 compared with plan policies, the compliance of the county's
4 decision with applicable goals is evident.

5 With that view of goal 2's requirement for an adequate
6 factual base in mind, we will consider petitioners' assertion
7 that goals 5, 8 and 9 were violated.

8 Goal 5 is essentially a conservation goal. The petitioners
9 equate the designation of their properties as Open Space
10 Development 5 to be tantamount to a statement by the county
11 that goal 5 is applicable and controls the use of their
12 properties. The county responds that this conclusion is not
13 correct. The county states that the purpose to protect open
14 space in goal 5 does not correspond to the purpose of the OSD
15 classification in the comprehensive plan. As we understand the
16 argument, the properties were not zoned in accordance with goal
17 5, but in accordance with a Jackson County Comprehensive Plan
18 policy of limited development in certain areas.

19 Our review of the record suggests there is sufficient open
20 space in the area so that the county might indeed have applied
21 goal 5 had it desired to do so. However, it does not appear
22 that the county's decision relied on goal 5, but relied instead
23 on the belief that the property was not suited for the kind of
24 intense commercial development allowed by the zones requested
25 by petitioners. The record supports that conclusion also.

26 We conclude that goal 5 was not violated as alleged in this

1 action.

2 Petitioner alleges goal 8 was violated because the change
3 from General Commercial to Open Space Development removes the
4 possibility of additional tourist related development. The
5 area is claimed to support tourist activity, and there is a
6 need for additional facilities.

7 The county responds that there is a recreation element in
8 the Jackson County plan. Two policies of that recreation
9 element encourage development of recreational facilities.
10 However, respondent points to the record wherein it is made
11 clear that there are problems with sewage disposal in the North
12 Ashland Interchange area which might preclude high density
13 recreational usage. It would appear that the staff report
14 included in the 1979 plan amendment proceeding supports the
15 county's conclusion. Also, the county points out that
16 conditional uses allowed in the OSD-5 zone include recreation
17 facilities of varying kinds. In other words, the petitioners
18 are not precluded from using their property for recreational
19 purposes, they simply must meet the requirements of the
20 county's conditional use procedure.

21 We decline to find a violation of goal 8 where it appears
22 that the county plan provides for recreational activities,
23 indeed, it provides for recreational activities on the
24 properties owned by petitioners.

25 The allegation that goal 9 has been violated is based, as
26 we understand it, on the fact that tourist facilities are only

1 conditional uses in the OSD-5 uses. Further, petitioner says
2 there was evidence that there was a problem finding space for
3 commercial uses in the City of Ashland, and this problem has
4 not been addressed in the findings.

5 Respondent says that the goal is relevant to planning
6 processes but should not be used to justify decisions at which
7 other more critical goals are applicable. Respondent notes
8 that the petitioners' properties are outside of the Ashland
9 Urban Growth Boundary. As such, the property is rural land and
10 is not available for urban uses. Respondent cites City of
11 Sandy v. Clackamas County, LCDC No. 79-029 (1979) for this
12 proposition. Respondent states that to "allow the full range
13 of general retail and service establishments allowed in a
14 general commercial zoning designation in this area immediately
15 outside an urban growth boundary would clearly be a violation
16 of the urbanization goal." Respondent's Brief 14. Respondent
17 says that where goal 14 and goal 9 conflict, the Board of
18 Commissioners is within its authority to find in favor of goal
19 14.

20 We agree with respondents. The property is outside the
21 established urban growth boundary for the City of Ashland, and
22 any change to a more intensive urban use would have to include
23 a redrawing of that urban growth boundary. Additionally, not
24 all commercial activities are precluded by the OSD-5
25 designation. Absent a showing of a need in the county for such
26 an amendment, we will not find the county in error to have left

1 the property outside the City of Ashland urban growth boundary.

2 CONCLUSION

3 Assignment of Error "D" is denied. The comprehensive plan
4 and zoning ordinance of Jackson County is sustained as to the
5 designations given to the property subject to this appeal.

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FOOTNOTES

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4 There is one exception. The Lima property was rezoned to
5 Farm 5 in the 1979 action, and Open Space Development in the
6 comprehensive plan.

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8 2
9 Petitioner has 30 days to challenge a land use decision
10 under Oregon Laws 1979, ch 772. We do not understand the
11 county to concede the May 30, 1979 action to be quasi-judicial.

12
13 3
14 We must, however, disagree with respondent in the sense
15 that he says even if the action were quasi-judicial, there is
16 no indication there has been a violation of Fasano procedural
17 criteria. The notice is provided and the findings of fact and
18 conclusions of law provided do not meet Fasano criteria.
19 However, that failure is not important in this case as the
20 action was entirely legislative.

21
22 4
23 By agreement of the parties, the record in this case
24 includes the record of the May 30, 1979 plan amendment.

25
26 5
27 We do not consider whether the OSD-5 designation or the
28 county's commercial designations are themselves appropriate
29 under the Statewide Land Use Goals. This issue was not
30 presented in the petition or briefed by the parties.