

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

LAND USE
BOARD OF APPEALS
FEB 1 3 54 PM '86

JOE and BETTY APALATEGUI, et al.,
Petitioners,
vs.
WASHINGTON COUNTY,
Respondent.

LUBA No. 85-043

RECEIVED
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COUNTY COUNSEL

GARY LA HAIE, et al.,
Petitioners,
vs.
WASHINGTON COUNTY,
Respondent.

LUBA No. 85-044

FINAL OPINION
AND ORDER

GREG and MARY JO BROWN, et al.,
Petitioners,
vs.
WASHINGTON COUNTY,
Respondent.

LUBA No. 85-045

Appeal from Washington County.

Edward J. Sullivan, Portland, filed the Petition for Review and argued on behalf of petitioners. With him on the brief were Sullivan, Josselson, Roberts, Johnson & Kloos.

Alan S. Bachman, Hillsboro, filed a response brief and argued on behalf of Respondent County.

BAGG, Referee; KRESSEL, Chief Referee; DUBAY, Referee, participated in the decision.

REVERSED IN PART; REMANDED IN PART 02/07/86

Judicial review of this order is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal Washington County Ordinances 292, 293
4 and 294. Ordinance 292 makes changes in certain community
5 plans and adopts additional community plans. Ordinance 293
6 makes changes in the county land development ordinance,
7 Ordinance 294 makes changes in the comprehensive framework
8 plan.

9 STANDING

10 Washington County objects to petitioners' standing.
11 Respondent asserts petitioners have merely stated that they
12 appeared before the county commission and asserted positions
13 contrary to the final decision. According to the county, these
14 assertions, without supporting facts, are insufficient to grant
15 standing. The county also claims petitioners lack standing to
16 complain about issues they failed to discuss in front of the
17 county commission.

18 Petitioners have standing to appeal the county
19 legislation. The petition alleges, and the respondent does not
20 deny, that petitioners appeared in person and in writing before
21 the county commissioners and asserted positions contrary to the
22 final decisions reached by the county commission. Petitioners
23 allege they were entitled and did receive notice of the
24 proceedings. Petitioners are aggrieved by the decision. They
25 have standing to bring this review proceeding. ORS
26 197.830(2). See also Jefferson Landfill Committee v. Marion

1 County, 297 Or 280, 686 P2d 310 (1984).

2 "FIRST ASSIGNMENT OF ERROR

3 "Ordinance 294 violates section 103(a) of the
4 Washington County Charter."

5 Section 103(a) of the charter provides:

6 "Notwithstanding the provisions of section 102, the
7 board may elect to adopt not more than three annual
8 land use ordinances within any calendar year. Each
9 such ordinance shall embrace only one of the following
10 topics:

11 "(1) Adoption or amendment of the county comprehensive
12 plan or any element thereof; or

13 "(2) Rezoning of property; or

14 "(3) Amending the text of the county zoning code or
15 the adoption of a new code."

16 Petitioners argue Ordinance 294 adopts new zoning
17 designations for certain areas of the county and amends
18 others. Petitioners add "[T]he ordinance also deals with other
19 plan issues." These "other plan issues" are not specified.
20 Petitioners conclude the amendment of the plan, along with the
21 rezoning in one ordinance, violates Section 103(a) of the
22 charter. In other words, petitioners argue the county must
23 change zones by one ordinance and change the plan by another.

24 The comprehensive plan includes a map which bears land use
25 designations for properties within the county. There is no
26 separate zoning map.¹ Although, changing the plan's land use
designation is technically a rezoning and a comprehensive plan
amendment, we do not construe the charter to require separate
ordinances to effectuate what in substance is a single act,

1 i.e., the redesignation of property.²

2 We are uncertain of what petitioners mean when they charge
3 that "other plan issues" are part of the changes effected in
4 Ordinance 294. Ordinance 294 is a change in the comprehensive
5 plan map. Without more specificity by petitioners as to what
6 other plan "issues" are involved, we can proceed no further.
7 Gann v. City of Portland, 12 Or LUBA 1 (1984). See also City
8 of Salem v. Families for Responsible Government, Inc., 64 Or
9 App 238, 668 P2d 395 (1983).

10 This assignment of error is denied.

11 "SECOND ASSIGNMENT OF ERROR

12 "The notices for these amendments to the Washington
13 County Comprehensive Plan and Zoning Ordinances did
14 not comply with ORS 215.060 and 215.223."

15 "TWENTY NINTH ASSIGNMENT OF ERROR

16 "Article Six of the CDC was not adopted in accordance
17 with the notice requirements of ORS 92.048, to the
18 extent that article concerns minor partition
19 regulations, and thereby violates ORS 92.048."

20 ORS 215.060 and 215.223, controlling changes to
21 comprehensive plans and implementing ordinances, and ORS 92.048
22 controlling enactment of land division ordinances, require
23 publication of notice 10 days before each hearing to adopt the
24 changes. ORS 215.060 and ORS 215.223 provide that without such
25 notices, the county legislation is not effective. Petitioners
26 claim the county failed to follow these requirements and ask us
to reverse the challenged decisions.

On October 18, 1984, the county published notice of a

1 hearing for October 29, 1984. After that, a second notice was
2 published on March 30, 1985 announcing a hearing on April 9.
3 Thereafter, the county commission announced continuances of the
4 April 9 hearing but did not publish other notices prior to the
5 final hearing on May 21, 1985.

6 A hearing continued to a date certain does not require
7 additional notice. A continuance does not involve a new
8 hearing. Only where the county closes a hearing does the
9 statute call for a new notice prior to taking up the
10 comprehensive plan or implementing measure. Harter v. Bayless
11 Investment and Trading Co., 86 Or 13, 379, 346 P2d 1101 (1959).

12 The Second and Twenty Ninth Assignments of Error are denied.

13 "THIRD ASSIGNMENT OF ERROR

14 "The notice sent did not comply with the specificity
15 requirements of sections 100(c) and 103(c) of the
County Charter."

16 Section 100(c)

17 "Charter Section 100(c) provides as follows:

18 "'General notice of land use change' means a notice
19 drafted by the Property Rights Commission and approved
20 by the board to be mailed to those persons identified
21 on the current assessment and tax records. Notice
22 shall be sent at least 20 days, but not more than 40
23 days prior to the first reading of the ordinance. The
24 notice shall include a general description of the
25 classes of land or existing zoning districts affected
by the proposed annual land use ordinance, maps or
other relevant information. The notice shall be
designed so that it can be reasonably expected that an
owner can determine if the proposed land use changes
included within the ordinance will affect the use of
his property." (Emphasis in original.)

26 The notice states that

1 "it is impossible in the Notice to give a complete
2 description of the effect of these Ordinances. If you
3 wish to learn more about how they may affect you,
4 please contact the Washington County Department of
5 Land Use and Transportation...." Record at 3.

6 The changes made in these three ordinances essentially
7 revamp the county's plan and implementing ordinances. The
8 notice provided is brief, but does advise that sweeping changes
9 which might affect property are contemplated. We find the
10 ordinance sufficient to warn readers of potential important
11 changes. Fifth Avenue Corp. v. Washington Co., 282 Or App 591,
12 581 P2d 50 (1978). We do not understand the charter to require
13 more.

14 Section 103(c)

15 Charter Section 103(c) provides as follows:

16 "No ordinance proposed under the provisions of this
17 section shall be effective unless the board has caused
18 to be mailed to those persons and mailing addresses
19 identified in the current assessment and tax records,
20 at least 20 days but not more than 40 days prior to
21 the first reading the ordinance, a general notice of
22 land use change proposed by the ordinance."

23 Petitioners do not argue that the notice was not mailed.
24 As we understand the argument, petitioners argue that because
25 the notice was defective, the mailing under Section 103(c) of
26 the charter was also defective. Because we find the notice to
be sufficient, we find no violation as alleged.

"FOURTH ASSIGNMENT OF ERROR

24 "The County failed to notify cities of the three
25 challenged ordinances, as required by Charter section
26 104, and failed to coordinate with affected cities,
state agencies and special districts, as required by
Goal 2."

1 Charter Section 104(a) requires that a copy of any
2 ordinance amending the plan or code be mailed to every city
3 council, within five days after its introduction.³

4 Petitioners assert the record does not show that this
5 requirement was carried out.

6 The county charter does not state the consequences of
7 failure to follow this procedure. Satisfaction of the
8 requirement is not a sine qua non of the effectiveness of an
9 ordinance or the county commission's authority to adopt an
10 ordinance. Compare Section 103(c). Petitioners have not
11 explained how they are injured by any failure of a county to
12 follow the procedure in question. We are only permitted to
13 reverse or remand a decision for procedural error when
14 petitioners show prejudice to their "substantial rights." ORS
15 197.835(8)(a)(B). We therefore deny this challenge.

16 "FIFTH ASSIGNMENT OF ERROR

17 "The challenged ordinances violate County Charter
18 sections 103(b) and 50(b)."

19 Section 103(b) of the charter provides:

20 "(b) Any ordinance proposed under the provisions of
21 this section shall be drafted and available for
22 public inspection by August 1 and shall be
introduced for first reading at one of the
regular meetings of the board in November."

23 Section 50(b) of the charter provides, in pertinent part:

24 "(b) A proposed ordinance shall be filed in the office
25 of the department of records and elections and
26 public notice shall be given of its pendency by
inclusion in the posted agenda for the regular or
special meeting of the board of county

1 commissioners at which the proposed ordinance
2 will be introduced. Upon its introduction,
3 copies of the proposed ordinance shall be
4 available to members of the board and to all
5 persons who so desire."

6 Petitioners complain that the ordinances on file in August
7 1984 were mere "shells" of ordinances. There was only an early
8 draft of the proposed amendments to Ordinance 293, but no draft
9 of either Ordinance 292 or 294.

10 Petitioners claim violation of another procedural
11 requirement in the charter. However, petitioners fail to
12 explain how their substantial rights have been violated by the
13 alleged procedural error. Relief is unavailable without such a
14 showing. ORS 197.835(8)(a)(B).

15 "SIXTH ASSIGNMENT OF ERROR

16 "The amendments to each of the challenged ordinances
17 were not adopted in accordance with section 103(d) of
18 the Charter."

19 Section 103(d) states:

20 "(d) The board may amend a proposed annual land use
21 ordinance after public hearing and before
22 adoption provided that the general notice of land
23 use change mailed to all real property taxpayers
24 advised the owners affected by the proposed
25 amendment that their property would be affected
26 by the ordinance. Amendments shall be subject to
the provisions of section 50 of Chapter V."

27 Petitioners complain that the notice does not meet the
28 standard because it did not tell the recipient that his
29 property may be affected. The notice included the following
30 caution:

31 "PLEASE NOTE: THE FOLLOWING DESCRIPTIONS ARE GENERAL
32 AND ARE BASED ON CURRENT INTENT. PRIOR TO FINAL

1 ADOPTION, THE BOARD WILL HEAR TESTIMONY. BASED ON
2 THIS TESTIMONY, THE BOARD WILL LIKELY CONSIDER
3 SUBSTANTIAL AMENDMENTS TO THESE ORDINANCES WHICH MAY
4 AFFECT YOUR PROPERTY. THEREFORE, EVEN IF YOUR
PROPERTY IS NOT AFFECTED BY THESE ORDINANCES AS
INTRODUCED, SUBSEQUENT AMENDMENTS MAY AFFECT YOU."

5 We find no error. The notice adequately warns the reader
6 that his land may be the subject of action by the county. In
7 the context of comprehensive re-planning of the county, this
8 notice is sufficient.

9 We construe the section to be procedural in nature.
10 Petitioners have not explained how they are injured or
11 prejudiced by any failure to follow the procedure. ORS
12 197.835(8)(a)(B). Indeed, petitioners participated throughout
13 the adoption process.

14 We find no error as alleged.

15 "SEVENTH ASSIGNMENT OF ERROR

16 "Portions of ordinance 293 violate section 101(a) of
the County Charter."

17 Charter Section 101(a) requires that "legislative acts
18 which relate to land use" be adopted by ordinance. (Emphasis
19 added.) Petitioners claim particular sections of Ordinance 293
20 violate this provision.

21 1. Section 104-3. This section provides for automatic
22 amendment of the community development code to conform to
23 changes in mandatory state law. In Brinkley v. Motor Vehicles
24 Division, 47 Or App 25, 613 P2d 1071 (1980), the court held a
25 similar rule of the state Department of Transportation, Motor
26 Vehicles Division, to be an unconstitutional delegation of

1 authority. We therefore sustain petitioners' challenge.

2 2. Section 202-4.2. This section provides that "Type IV"
3 actions may be made through either resolution and order or
4 ordinance. A Type IV action is a legislative act described as
5 follows:

6 "Type IV actions are legislative. They involve the
7 creation, broad scale implementation or revision of
8 public policy. These include amendments to the text
9 of the Comprehensive Plan, Comprehensive Plan or the
10 Community Development Code. Large scale changes in
planning and development maps may also be
characterized as legislative where a larger number of
property owners are directly affected." CDC Section
202-4.1.

11 The county claims that it has interpreted this section to
12 allow only non-binding policy guidelines to be adopted by
13 resolution and order, but this policy is not codified.

14 We conclude the challenged provision is too broad. It
15 allows legislative acts to be adopted outside ordinance-making
16 procedures. We agree with petitioners that Section 202-4.2
17 violates Section 101(a) of the charter.

18 3. Section 204-1.4. This section provides

19 "[i]n addition to any other notice, the applicant
20 shall post the subject property in conformance with
21 standards established by Resolution and Order of the
Board."

22 The county ordinance does not make clear whether the
23 standards are to be made on a case-by-case basis or whether the
24 standards are to be generally applied. Since we find no
25 language limiting the procedure to a case-by-case approach, we
26 find the posting regulation to be a "permanent rule of conduct

1 or government, to continue in full force until...repealed." 5
2 McQuillin, Municipal Corporations, Section 1502 (3d Ed,
3 1981).⁴

4 We conclude that Section 204-1.4 purports to authorize the
5 exercise of legislative power by resolution and order. The
6 charter provision requiring formal ordinance adoption for any
7 legislative act relating to land use bars the county from
8 taking this approach.

9 4. Section 210-3. This section allows the establishment
10 of a reconsideration fee by resolution and order. Enactment of
11 fees is a legislative function because it is generally
12 applicable throughout the county. The charter limits the
13 county's ability to legislate fees if those fees concern land
14 use planning. We conclude that the charter prohibits the
15 action contemplated in Section 210-3. If the county is to
16 establish fees controlling land use planning activities, the
17 county must do so by ordinance, according to the charter.

18 5. Section 421-14.3. This section allows the board of
19 commissioners to establish flood plain regulatory standards by
20 resolution and order. The code establishes broad approval
21 standards, but technical standards and implementation measures
22 may be controlled by resolution and order. Engineering
23 standards are permanent (until changed) and control development
24 generally in flood plain areas. They must be adopted by
25 ordinance under the charter.

26 6. Section 501-8. This section allows certain fees to be

1 levied for the county road system. The section also allows the
2 county to introduce an ordinance relating to road
3 improvements.

4 Petitioners allege but do not explain how this section
5 violates the charter. We will not speculate on the nature of
6 the alleged violation.

7 This assignment of error is sustained, in part. Because
8 the charter prohibits the action taken, these provisions in
9 violation of charter requirements must be reversed. OAR
10 660-10-070.

11 "EIGHTH ASSIGNMENT OF ERROR

12 "Exhibits 'A' and 'B' of Washington County Ordinance
13 292, entitled 'Hillsboro-Washington County Urban
14 Planning Area Agreement' and 'Washington
15 County-Tualatin Urban Planning Area Agreement'
(hereinafter 'the Agreements') are not supported by
findings and conclusions as required by Goal 2."

16 Petitioners direct attention to Ordinance 292, claiming the
17 record does not show that amendments to certain planning area
18 agreements comply with statewide planning goals. Statewide
19 Planning Goal 2 requires that land use decisions be supported
20 by a factual base, and petitioners argue this goal requirement
21 has been violated. Petitioners add that the county completely
22 failed to address Goal 11 (Public Facilities and Services).

23 Petitioners do not fully explain why findings are
24 required. The amendment to the Hillsboro Area Agreement is
25 about procedures in certain utility annexations to eliminate
26 health hazards. Petitioners do not explain how this provision,

1 which eliminates certain procedural requirements in later city
2 annexations, requires particular findings of fact. We note, in
3 any event, that Record Exhibit 68 discusses the need for the
4 amendment and furnishes factual support for the enactment.

5 Similarly, changes to the Tualatin Area Agreement are
6 discussed in a staff report included in the record as Exhibit
7 12. Petitioners do not explain how the staff report is
8 inadequate to comply with the Goal 2 requirement for an
9 adequate factual base, or to show compliance with applicable
10 goals.

11 Petitioners must do more than simply allege error.

12 Deschutes Development Co. v. Deschutes Co., 5 Or LUBA 218
13 (1982).

14 This assignment of error is denied.

15 "NINTH ASSIGNMENT OF ERROR

16 "Exhibit 'D' of Washington County Ordinance 292,
17 entitled 'West Tigard Plan,' does not comply with Goal
14 or Goal 2."

18 "ELEVENTH ASSIGNMENT OF ERROR

19 "Exhibits A and A-1 to Ordinance 294, which revise the
20 West Tigard Planning Area Land Use District Maps,
violate Goal 14 and ORS 197.175(a)."

21 In these assignments of error, petitioners complain that
22 portions of Ordinance 292, and Ordinance 294 are not in
23 compliance with Goal 14. The challenged provisions designate
24 land uses for the Bull Mountain area. They argue that Goal 2
25 requires a statement of findings setting forth the basis for
26 compliance with Goal 14. Because no findings exist for this

1 enactment, petitioners insist no basis exists for permitting
2 urban uses on the subject land, as called for in the new
3 ordinance.

4 LCDC review of the Metro Urban Growth Boundary is pending.
5 A continuance order on the Metro UGB calls for further LCDC
6 review on March 13, 1986. The commission's order will control
7 the urban growth boundary for Washington County. ORS
8 197.251.⁵ We therefore defer review as to the county's
9 compliance with Goal 14 and Goal 2 as it relates to the UGB.
10 ORS 197.840(4).

11 "TENTH ASSIGNMENT OF ERROR

12 "Exhibit 'F' of Washington County Ordinance 292,
13 entitled 'Rural/Natural Resource Plan Element,'
14 violates ORS 197.175, Goals 4 and 5, and the Goal 5
administrative rule and conflicts with the county's
acknowledged comprehensive plan."

15 "THIRTEENTH ASSIGNMENT OF ERROR

16 "Ordinance 294 violates ORS 197.175(2) and 197.250 and
17 Goal 2 in that 'mistake' is not a sufficient rationale
18 for amendment without a showing a compliance with the
statewide planning goals."

19 Petitioners argue that the the county failed to make
20 findings supporting changes made to the Rural/Resource plan
21 element. The changes remove Goal 5 protection from certain
22 kinds of areas. According to petitioners, the changes allow
23 mineral and aggregate extraction without regard to nearby
24 natural resources. They allege that this violates Goal 5 and
25 Goal 4 (forest lands shall be preserved for forest use).

26 The county argues the ordinance complained of was also part

1 of Ordinance 278, a previously acknowledged ordinance.
2 However, in 1000 Friends of Oregon v. LCDC, 76 Or App 577, ___
3 P2d ___ (1985), the court overturned the acknowledgment of the
4 Washington County Comprehensive Plan for noncompliance with
5 Goal 5. Therefore, even if the new provisions mirror those
6 adopted under Ordinance 278, the reenacted provisions are
7 subject to our review for compliance with Goal 5.⁶

8 The county has included facts about Goal 5 compliance as an
9 appendix to its brief, Appendix "K." These materials, entitled
10 "Appendix I-F," justified the county's Goal 5 policies in
11 Ordinance 278.

12 The appendixes are not part of the record in this appeal.
13 Respondent has not moved to supplement the county's record.
14 Our review is limited to "the record" of the county's
15 proceeding. ORS 197.830(11). For this reason, we decline to
16 review the appendixes to respondent's brief. On remand, the
17 county must insure an adequate factual basis exists for its
18 Goal 4 and Goal 5 policies and implementing measures.

19 We sustain the challenges in the Tenth and Thirteenth
20 Assignments of Error.

21 "TWELFTH ASSIGNMENT OF ERROR

22 "Exhibit 'I,' entitled the 'Sunset West Community
23 Planning Area Transit Corridor Overlay District Map,'
24 expands the transit corridor overlay zone without
25 justification, thereby violating Goals 2 and 12, ORS
26 197.175(2)(a), and its own comprehensive plan and
development code."

Petitioners complain that the county has not shown

1 compliance with Goal 12 Transportation). Further, they say
2 that the county's findings on Goal 12 are not supported by
3 substantial evidence in the record. Petitioners add there is
4 no showing the county ever made an inventory of transportation
5 needs or considered the impacts of certain plan policies on
6 transportation as required by the goal.

7 Respondent explains that the challenged part of Ordinance
8 294 does nothing more than apply Metro's choice of a
9 transportation corridor to the county land use planning map.
10 According to the county's argument, the county board was
11 technically obligated to apply the Metro plan; no independent
12 justification of the action was needed.

13 We believe it is the county's duty to comply with Goal 12.
14 Under ORS 268.390(2), Metro is responsible for adopting
15 "functional plans...to control metropolitan area
16 impact on air and water quality, transportation and
17 other aspects of metropolitan area development the
18 council may identify."

19 The statute does not permit the county to rely entirely on
20 Metro. On remand, the county must show compliance with Goal
21 12. If the county chooses to adopt the Metro plan, it must
22 still find that the plan satisfies Washington County's
23 transportation needs in accordance with Goal 12.

24 This assignment of error is sustained.

25 "FOURTEENTH ASSIGNMENT OF ERROR

26 "Exhibits 'E' and 'E-1' to Ordinance 294, entitled
'Raleigh Hills-Garden Home Community Planning Area
Land Use District Maps,' violate Goals 2 and 10, as
well as ORS 197.175(2)(a), in that these map

1 amendments replace certain residential uses with
2 industrial and commercial zoning uses without adequate
3 findings and conclusions regarding the effect on
4 Washington County's housing inventory."

5 Petitioners complain that residential zoning removed as
6 part of Ordinance 294 alters the amount of land available for
7 housing. This alteration violates Goal 10, according to
8 petitioners.⁷ In addition, petitioners allege a violation of
9 Goal 2 because the county failed to make findings supporting
10 these changes.

11 Respondent's brief includes an inventory of the housing
12 needs in the Raleigh Hills-Garden Home area. It is not clear
13 that this information was part of the county board's record for
14 the reasons discussed at page 16, supra. We remand this
15 matter for a showing of compliance with Goal 10.

16 "FIFTEENTH ASSIGNMENT OF ERROR

17 "Ordinance 293 amended CDC section 204-5 to require
18 that a 'notice of decision' is to be provided only to
19 those parties of record who provide a stamped,
20 self-addressed envelope, thereby conflicting with ORS
21 215.416(8) and Goals 1 and 2."

22 ORS 215.416(8) requires that written notice of approval or
23 denial of an application for a land use permit be given to all
24 parties to the proceeding. Under Ordinance 293, the county has
25 chosen to give the required notice only to those parties
26 providing a stamped, self-addressed envelope. Petitioners
allege this provision violates the statute. We agree.

The statute is silent on the manner of giving notice.
However, the statute does make provision of notice a county

1 responsibility. The county may not condition performance of
2 its duty on payment of a fee.⁸

3 This assignment of error is sustained.

4 "SIXTEENTH ASSIGNMENT OF ERROR

5 "CDC section 302-2.5, and similar sections described
6 herein, violate statewide planning Goal 1, ORS
7 215.416(3), (5), and (9) and is inconsistent with CDC
8 section 202-1.1, by allowing the expansion of Type II
9 and III uses to occur as Type I proceedings without
10 notice or a hearing."

11 "NINETEENTH ASSIGNMENT OF ERROR

12 "CDC section 421-3.1 permits driveway crossings in a
13 flood plain or drainage hazard area as Type I
14 procedure, without supplying sufficient standards,
15 thereby violating ORS 215.416(6) and (7), Goals 2 and
16 7, and is inconsistent with CDC section 202-01.1."

17 "TWENTY FIRST ASSIGNMENT OF ERROR

18 "CDC section 421-3.2 allows a land disturbance permit
19 by a Type I proceeding without notice or an
20 opportunity to be heard, thereby violating Goals 2 and
21 7 and ORS 215.416."

22 In these assignments of error, petitioners complain that
23 amended portions of the county's development code allow the
24 planning director to make decisions to grant certain permits
25 under subjective criteria without quasi-judicial procedural
26 safeguards.⁹

27 Petitioners provide little detail why the powers given the
28 planning director can not be granted without quasi-judicial
29 protection. We will not pick apart the provisions to find
30 error. Deschutes Development v. Deschutes Co., 5 Or LUBA 218
31 (1982).

32 Petitioners' make goal challenges in the Nineteenth and

1 Twenty-First Assignments of Error. Again, the challenges are
2 not explained. We therefore proceed no further in these
3 assignments of error.

4 ASSIGNMENT OF ERROR NO. 17 is remanded pursuant to the
5 agreement of the parties.

6 ASSIGNMENT OF ERROR NO. 18 has been withdrawn by
7 petitioners.

8 "TWENTIETH ASSIGNMENT OF ERROR

9 "CDC section 602-8, regarding phased development,
10 allows the Director to waive a requirement that, in
11 his or her estimation, is 'not applicable,' or to
12 'defer the requirement to a later stage' without the
13 opportunity for notice or hearing and without
14 sufficient standards to guide the discretion, thereby
15 violating ORS 215.416(7) and Goals 1 and 2."

16 Petitioners state that ORS 215.416 and Goal 2 require that
17 criteria be used as a basis for approval or denial of land use
18 decisions. Petitioners say that CDC Section 602-8 permits
19 deferral or waiver of unapplicable approval criteria without
20 notice and sufficient standards to guide discretion. This
21 action deprives the public of an opportunity to be heard on
22 whether a land use proposal meets all criteria.

23 The code does not grant the planning director unfettered
24 discretion to waive land division approval criteria. Rather,
25 as we read it, the provision authorizes waiver of inapplicable
26 requirements. Petitioners seem to contend that the county must
adopt additional criteria to guide the director's application
of a single criterion, viz., whether a given requirement is or
is not applicable to a particular land division. The

1 authorities they cite do not support their claim.
2

3 "TWENTY SECOND ASSIGNMENT OF ERROR

4 "CDC section 202-1.3 allows an appeal of a Type I
5 proceeding to commence as a Type III proceeding, but
6 restricts notice of that appeal to the applicant only,
7 thereby violating CDC sections 202-3.3 and 204, Goals
8 1 and 2, and ORS 215.406 and 215.416."

9 In this assignment of error, petitioners complain about the
10 county's method of review of Type I land use applications.
11 Under the county's scheme, only the applicant can appeal a Type
12 I decision.

13 We do not find error. A Type I proceeding involves no
14 discretion by the approval authority. The appeal process
15 provides the applicant certain additional procedural rights.
16 Still, the underlying decision is ministerial. The authorities
17 relied on by petitioners do not require notice to others in
18 this context.

19 "TWENTY THIRD ASSIGNMENT OF ERROR

20 "CDC sections 414-2.5 and 414-4.4 impermissibly refer
21 to sign content as a basis for regulation, and thereby
22 violate time, place and manner restrictions otherwise
23 permitted by Article I section 38 of the Oregon
24 Constitution and the First and Fourteenth Amendments
25 to the United States Constitution. The ordinance
26 sections are facially invalid because they restrict
the content of commercial signs."

Petitioners complain, and respondent does not deny, that
the county's sign requirements are based on sign content.
Similar sign regulations were rejected in Ackerley v. Multnomah
County, 72 Or App 617, 696 P2d 1140 (1985). The case is now on
appeal to the Oregon Supreme Court.

1 We sustain petitioners' assignment of error. Content-based
2 restrictions of this type are not permitted under the Oregon
3 Constitution. Ackerley, supra.

4 "TWENTY FOURTH ASSIGNMENT OF ERROR

5
6 "CDC section 106-129, defining 'mitigation,' conflicts
7 with the definition of that same term in the Glossary
8 of Washington County Comprehensive Plan Volume III,
9 Rural/Natural Resource Plan Elements, adopted as
ordinance 292, May 21, 1985, thereby violating Goal 2
and ORS 197.175."

10 "TWENTY SEVENTH ASSIGNMENT OF ERROR

11 "CDC section 422-3.5, relating to development in
12 Significant Natural Resource Areas, merely requires
13 that development should not seriously interfere with
14 the preservation of fish and wildlife areas or that
15 these development impacts will be mitigated, thereby
16 violating Goal 5."

17
18 Petitioners first argue a conflict exists between the plan
19 and zoning regulations with regard to the definition of
20 mitigation. The county does not disagree that a conflict
21 exists and that the plan controls.

22 The conflict means the plan and the companion implementing
23 regulations are not "coordinated." See ORS 197.015(4).
24 Further, conflicts between the plan and regulations violate
25 Goal 2's mandate that plans and implementing measures must be
26 consistent. Still, the county's assertion that the plan indeed
does control and the county will follow the plan, suggests
petitioners' complaint is merely technical. Because this
decision is remanded on the other grounds, the county can

1 easily correct this flaw.

2 In the Twenty Seventh Assignment of Error, petitioners
3 complain that CDC Section 422-3.5 is violated. That section
4 provides:

5 "For any proposed use (sic) in a Significant Natural
6 Resource Area, there shall be a finding that the
7 proposed use will not seriously interfere with the
8 preservation of fish and wildlife areas had (sic)
9 habitat identified in the Washington County
10 Comprehensive Plan, or how the interference can be
11 mitigated."

12 Petitioners argue this section violates Goal 5 in that it
13 fails to require an ongoing program for resolving natural
14 resources conflicts. The provision also fails to articulate
15 what measures will meet "mitigation" standards. This provision
16 impermissibly attempts to avoid goal compliance, according to
17 petitioners.

18 CDC Section 106-129 defines mitigation as follows:

19 "Mitigation Reducing the impacts of a proposed
20 development and/or offsetting the loss of habitat
21 values resulting from development. In fish and
22 wildlife areas and habitats, mitigation may include,
23 but is not necessarily limited to, requiring: 1)
24 clustering of structures near each other and roads,
25 controlling location of structures on a parcel to
26 avoid habitat conflicts, minimizing extent of road
27 construction to that required for the proposed use;
28 and, 2) replacing unavoidable loss of values by
29 reestablishing resources for those lost, such as:
30 forage for food production, escape or thermal
31 shelter. In other areas of significant wildlife
32 value, such as wetlands, riparian vegetation and
33 special bird nesting sites, maintenance and
34 enhancement of remaining habitat, setbacks and
35 restoration of damage and avoiding damage would be
36 appropriate."

37 We understand the mitigation standard requires developers

1 to take actions as may be necessary to minimize conflicts to a
2 level which does not seriously interfere with the preservation
3 of fish and wildlife areas. CDC Section 106-129 provides,
4 therefore, a standard to be used when evaluating a request
5 which conflicts with a Goal 5 resource. This standard provides
6 a method to reach goal compliance. The goal requires no more
7 of the county plan.

8 We deny this assignment of error.

9 "TWENTY FIFTH ASSIGNMENT OF ERROR

10 "CDC section 430-109.6, relating to public antennas
11 and towers, exempts such developments from most
12 development requirements under section 430-109,
13 thereby violating Goals 2, 11 and 12, and plan policy
14 12(b) (p. 3.2.18 of the Urban Plan)."

15 Petitioners advise that county Urban Plan Policy 12
16 protects scenic views, routes and features. Petitioners
17 complain that the ordinance amendments exempt antennas and
18 towers from these controls. They say the amendments allow
19 construction of publicly owned towers in violation of county
20 plan provisions protecting nearby uses. In addition,
21 petitioners complain that the amendments affect compliance with
22 Statewide Planning Goals 2, 11 and 12. Petitioners make no
23 specific complaint as to how the violations occur. We will not
24 speculate as to the nature of vaguely-alleged statewide goal
25 violations.

26 Plan Policy 12 states that the individual community plans
will direct how scenic resources are to be protected. Also,
the plan provides for regulation of "activities" (which we

1 understand to mean development activities) through the
2 developoment code. Petitioners do not cite to a plan provision
3 which would restrict the county's decision to limit
4 restrictions on transmission towers. We will not speculate on
5 what legal reason exists to prohibit the county's method on
6 controlling transmission towers.

7 "TWENTY SIXTH ASSIGNMENT OF ERROR

8 "CDC section 202-3.4 provides vague and insufficient
9 standards for denial of a Type III permit, thereby
10 violating ORS 215.416(7), Goal 10, and OAR 660-07-105."

11 Petitioners complain that the standards for denial of a
12 Type III development are too vague. The standards are as
13 follows:

- 14 "A. The proposed development will have significant
15 adverse impacts on property values in the area.
- 16 "B. The proposed development will unduly conflict
17 with the character of an area not otherwise in
18 transition; or
- 19 "C. The public interest is not served by permitting
20 the proposed development to occur on the proposed
21 site at the proposed time. Development proposed
22 to serve significant portions of the County may
23 be evaluated for its impacts on the entire area
24 to be served."

25 In acting on permit under such standards, the county must
26 explain its decision. ORS 215.416(7). These standards are as
specific as those upheld in Lee v. City of Portland, 57 Or App
798, 646 P2d 662 (1982). Petitioners' attack is at least as
vague as the standards in question. No further discussion is
warranted.

1 TWENTY EIGHTH ASSIGNMENT OF ERROR

2 "CDC section 440-2.4(c), relating to nonconforming
3 dwelling "additions" in EFU, EFC and AF-20 zones,
4 violates ORS 215.130(5)-(9)."

5 CDC Section 440-2.4(c) allows additions to nonconforming
6 dwellings through a nondiscretionary review procedure if: (1)
7 setback and height standards are maintained; (2) the
8 development will not occur in a hazard area, and (3) access
9 requirements have been met. These standards are not
10 sufficient, according to petitioners.

11 ORS 215.130(9)(a)(B) permits alterations of a nonconforming
12 use if the alteration is "of no greater adverse impact to the
13 neighborhood." Setback and height standards may be relevant to
14 the statutory test, but we do not find them to be the
15 equivalent of that test. For example, a large lot owner could
16 create a quite substantial change in a dwelling and still be
17 within height and setback requirements.¹⁰

18 We conclude the county provision allows changes without
19 consideration of adverse impact as required in the statute. We
20 therefore sustain this assignment of error.

21 THIRTIETH ASSIGNMENT OF ERROR

22 "CDC section 209-7.1 relating to decisions by the
23 Review Authority on appeal before the Board, fails to
24 provide for adequate notice, a public hearing, or the
25 provision of written submissions, thereby violating
26 ORS 215.416(8), ORS 215.416(9), and ORS 192.630."

27 This provision controls the procedure on appeals of land
28 use decisions to the county board of commissioners.¹¹

29 Respondent agrees we should remand CDC Section 209-7.1. We

1 uphold the challenge.

2 THIRTY FIRST ASSIGNMENT OF ERROR

3 "CDC section 106-115 relating to rural lots of record
4 now includes lands in the EFU and EFC zones, thereby
5 violating Goals 3, 4 and nonexcepted lands under Goals
6 2, as well as ORS 197.175 and Washington County
7 Rural/Natural Resource Plan Policy 18 and implementing
8 strategies."

9 Petitioners argue that the new ordinance permits nonfarm
10 and nonforest uses on forest land based only on the size or
11 pre-existing status of lots. This rationale is impermissible
12 under either Goal 3 or Goal 4, according to petitioners. The
13 appropriate alternative, according to challengers, is for the
14 county to take exception to Goals 3 and 4. See ORS 197.732.

15 CDC Section 106-115 establishes a "lot of record" exception
16 for several zones including exclusive farm use and exclusive
17 forest use zones. Application of Lot of Record provisions in
18 exclusive farm use zones is contrary to Ch 884, Or Laws 1981,
19 1983, as amended by Ch 826, Or Laws 1983. The law specifically
20 bars granting lot of record relief to lands in exclusive farm
21 use zones. The effect of the county action is to permit
22 nonfarm uses in exclusive farm use zones without compliance
23 with applicable criteria.

24 CDC Section 106-115 also violates Goal 4. The county lot
25 of record exception does not follow the limitation on lot of
26 record on forest land found in Section 11, Ch 884, Or Laws 1981.

We therefore uphold the assignment of error and remand this
portion of Ordinance 293 for compliance with applicable

1 criteria.

2 Petitioners' challenges under ORS 197.175 and the
3 Washington County Rural/Natural Resource Policy 18 is
4 unexplained. We will not speculate as to how the provisions
5 violate the statute and plan policies.

6 This assignment of error is sustained, in part.

7 The remaining assignments of error sustained by this Board
8 require remand. OAR 661-10-070(1)(b)(C).

9 Our review of statewide goal issues raised in Assignments
10 of Error 9 and 11 is deferred until after LCDC action on the
11 pending Metro UGB acknowledgement.

12 The errors cited in Assignments of Error 7, 23, 29 and 31
13 require reversal of Ordinance 293.

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FOOTNOTES

1

In Washington County, the comprehensive framework plan is the overall comprehensive plan. There are additional community plans which set policies for particular areas. Implementation of the plans is achieved through the Washington County Development Ordinance (CDO).

2

The "may elect" to adopt not more than three annual land use ordinances language appearing in Section 103(a) can be read to give the Board the discretion to elect to adopt a greater number of land use ordinances. However, the provision must be read with Section 102. Under Charter Section 102, all land use ordinances are subject to notice procedures requiring individual notice to each property owner "directly affected" by an ordinance. Section 102(d). However, under Section 103, the county has an election to only give a general taxpayer notice provided it adopts only three annual land use ordinances embracing a single topic each.

The amendment of the map by Ordinance 294 is one type of ordinance permitted by the charter. We find no error.

3

Section 104(b) requires mailed notice to any city within one mile of land to be rezoned by the county.

4

McQuillin defines a resolution as

"a resolution, generally speaking, is simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. Thus, it may be stated broadly that all acts that are done by municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters upon which the municipal corporation desires to legislate must be put in the form of ordinances." Id.

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This case found deficiencies in the LCDC acknowledgement of the Metropolitan Service District (Metro) Urban Growth Boundary (UGB). Under ORS 268.390(3), Metro is to adopt a UGB for the jurisdiction within the district.

6

The effect of the court's order is to invalidate the acknowledgement of the Washington County Plan and Implementing Ordinances. We are mindful that the court's order only goes to matters of compliance with Goal 5, but once a portion of an acknowledgement is overturned, the county is obliged to show compliance with each and every goal. See Panner v. Deschutes County, 76 Or App 59, ___ P2d ___ (1985). Also, the comprehensive plan for the Metropolitan Service District which establishes the Urban Growth Boundary for Washington County is now before the LCDC on a continuance order. A portion of the plan was found not to be in compliance with statewide planning goals (Goal 14). Because the commission is still reviewing the plan, or a portion of it, Washington County's reliance on the Metro Plan as justification for its Urban Growth Boundary is misplaced.

7

Statewide Planning Goal 10 requires that local plans provide adequate numbers of housing units at rents and prices commensurate with the financial ability of Oregon households.

8

Petitioners also claim that the county notice requirement conflicts with Goals 1 and 2. It is not clear what portions of Goals 1 and 2 petitioners claim are violated, and we will not speculate on this complaint.

9

For example, certain uses subject to quasi-judicial approval procedures may be expanded if they meet certain dimensional standards. See CDC Section 302-2.5. The dimensional standards provide objective criteria for the planning director. We find no error in this scheme.

10

ORS 215.130(5) permits alteration of nonconforming uses. However, alteration of a nonconforming use is allowed "when necessary to comply with any lawful requirement for alteration in the use." ORS 215.130(6) allows restoration or replacement of a nonconforming use under certain circumstances.

1 "Alteration" is defined in ORS 215.130 as a change in the use
2 or a change in the physical structure. Additions to dwellings
3 are, therefore, alterations and fall within the statutory
4 scheme.

5 Alternation of a nonconforming use is subject to review by
6 the county under the contested case provision of ORS 215.402.

7 11

8 Respondent argues that we are unable to reach the merits of
9 this section because the issue was not raised below. We
10 disagree. Petitioners are not required to articulate each
11 future assignment of error in proceedings before the county.
12 Twin Rocks v. Rockaway, 2 Or LUBA 36 (1980).