

LAND USE  
BOARD OF APPEALS

JAN 31 1 01 PM '89

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

PAUL W. KRUEGER,  
Petitioner,

vs.

JOSEPHINE COUNTY,  
Respondent,

and

GERALD KIRSTEIN,

Intervenor-Respondent.)

LUBA No. 88-074

FINAL OPINION  
AND ORDER

Appeal from Josephine County.

Paul W. Krueger, Grants Pass, filed the petition for review and argued on his own behalf.

No appearance by Josephine County.

Duane Wm. Shultz, Grants Pass, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED

01/31/89

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals the county's decision to rezone 8.86  
4 acres from Rural Commercial (RC) to Tourist Commercial (TC).

5 MOTION TO INTERVENE

6 Gerald Kirstein moves to intervene in this matter on the  
7 side of respondent. There is no objection to the motion, and  
8 it is allowed.

9 FACTS

10 The property is located on the east side of Interstate 5 at  
11 the Hugo Interchange. Jump Off Joe Creek Road adjoins the  
12 property to the north, and Canyon Oak Drive adjoins the  
13 property to the east.

14 The applicant proposes to construct a recreational vehicle  
15 park, restaurant, gas station and food market on the property  
16 to serve travelers along Interstate 5. The RC zoning district  
17 previously applied to the property would permit all the  
18 proposed uses except the recreational vehicle park. The TC  
19 zone the county applied to the property allows all the proposed  
20 uses.

21 The county planning commission on May 9, 1988 recommended  
22 that the requested rezoning be denied without prejudice, to  
23 allow the applicant to present additional information in  
24 support of his application. On August 10, 1988, the board of  
25 county commissioners adopted its decision approving the  
26 rezoning and on August 25, 1988 the board of county

1 commissioners' decision became final when it denied  
2 petitioner's request for rehearing. This appeal followed.

3 FIRST ASSIGNMENT OF ERROR

4 In his first assignment of error, petitioner argues the  
5 county failed to require the applicant to satisfy his burden of  
6 proof as required by Section 7 of the Josephine County Land Use  
7 Hearing Rules (LUHR).

8 LUHR Section 7 provides as follows:

9 "The burden of proof shall be upon the Applicant. The  
10 degree of proof required shall vary depending upon the  
11 nature of the request and its impact upon the  
12 community. The greater the change or the greater the  
13 impact of the proposal on an area, or the greater the  
14 departure from the present land use patterns, the  
15 greater is the burden upon the Applicant. The  
applicant shall address the Criteria as listed in the  
Planning Director's Staff Report in order to meet his  
burden of proof. For purposes of an appeal, the  
burden of proof shall be upon the Applicant."  
(Emphasis added).

16 The planning director's staff report and the county's final  
17 decision identify the following applicable criteria:

18 "I. CRITERIA

19 "\* \* \* \* \*

20 "A. Josephine County Land Use Hearing Rules.

21 "B. Josephine County Comprehensive Plan.

22 "GOAL 4 - POLICIES 1 & 8 - To plan and develop  
23 facilities and services that are needed, and can  
be afforded, by the residents of the County.

24 "GOAL 5 - POLICIES 1, 2, & 5 - To diversify,  
25 expand and stabilize economic opportunities for  
the betterment of the County.

26 "GOAL 10 - Policy 1 - To depict a land use  
pattern to guide future uses, to implement the

1 desires of the County and to meet the  
2 requirements of the State of Oregon.

3 "GOAL 11 - Policy 6 - Demonstrate compliance with  
4 applicable Statewide planning goals and  
5 conformance with the texts of the Josephine  
6 County Comprehensive Plan, Zoning Ordinance and  
7 other implementing ordinances.

8 "C. Zoning Ordinance, Sections 9.010 (purpose of  
9 Rural Commercial District); 9.020 (uses -  
10 permitted) 10.010 (purpose of Tourist Commercial  
11 District); and 10.020 (uses - permitted).

12 "D. Site Plan Review - Any plan for development of  
13 the property will require a Site Plan Review  
14 under Section 15.218 of the Josephine County  
15 Zoning Ordinance.

16 "E. State Goals 5, 6, 8, 9, 10, 11 & 12."  
17 Record 28, 63-71.

18 Petitioner's first assignment of error attacks the accuracy  
19 of, and evidentiary support for, statements made by petitioner  
20 in his application for the zone change. The applicant's  
21 statements were in response to the following questions on the  
22 county's application form:

23 "HOW WILL THE PROPOSED DESIGNATION AFFECT THE GENERAL  
24 CHARACTER OF THE AREA?

25 \* \* \* \* \*

26 "HOW WILL THE REQUESTED CHANGE BENEFIT THE  
COMMUNITY?" Record 84-85.

Petitioner does not explain how either of these questions  
or the applicant's responses to the questions relate to  
compliance with the approval criteria identified supra.  
Petitioner apparently assumes that any statement made in a land  
use application or the local government's decision concerning  
that application must be correct and must be supported by

1 substantial evidence. However, unless a statement in the  
2 record or finding is necessary to support a local government's  
3 determination regarding an applicable approval criterion, the  
4 statement or finding provides no basis for reversal or remand,  
5 even if it is erroneous or unsupported by substantial evidence  
6 in the record. Pardee v. City of Astoria, \_\_\_ Or LUBA \_\_\_  
7 (LUBA No. 88-049/050/051, December 14, 1988), slip op 20;  
8 Bonner v. City of Portland. 11 Or LUBA 40, 52 (1984). Because  
9 petitioner does not explain why the challenged statements are  
10 necessary to support the county's decision concerning the  
11 relevant approval criteria, his first assignment of error is  
12 denied.

13 SECOND ASSIGNMENT OF ERROR

14 In his second assignment of error, petitioner argues the  
15 county failed to follow LUHR Section 8 which requires the  
16 county's decision to be based on substantial evidence and  
17 requires that applicable criteria be addressed by the county.

18 LUHR Section 8(1) provides in pertinent part:

19 "The decision of the Hearing Body shall be based upon  
20 substantial evidence presented by the Applicant and  
21 supported by the record. The applicant shall address  
22 the required criteria and present evidence as  
23 appropriate to his specific proposal. The greater the  
change requested, the more evidence may be required to  
sustain the burden of proof. The Hearing Body shall  
deem the following criteria relevant and material  
considerations in reaching their decision:

24 "a. Conformance with the Josephine County  
25 Comprehensive Plan to include its Goals and  
Policies.

26 "b. Conformance with \* \* \* the Statewide Planning

1 Goals.

2 "c. Conformance with the County Zoning Regulations,  
3 Subdivision Regulations, Building Code, Health  
4 Code and similar enactments as they relate to the  
5 specific proposal.

6 "d. Additional statements should be made by the  
7 Applicant with regard to the preservation of and  
8 current status of the character of the area  
9 involved, its peculiar suitability for particular  
10 uses, the conservation of property values, and  
11 the current direction of building development.  
12 The applicant may accept, reject, or amend the  
13 information in the Planning Director's report, as  
14 appropriate, to meet the requirements of  
15 Section 7.

16 "e. Whether or not a mistake has been made in the  
17 original designation.

18 "f. Whether or not a change of circumstances has  
19 occurred such that the existing condition within  
20 the vicinity of the proposal no longer conforms  
21 to the intent of the Comprehensive Plan, or  
22 applicable ordinances."

23 A. Josephine County Comprehensive Plan

24 As noted supra, paragraph (a) of LUHR Section 8(1) requires  
25 that a zone change conform "with the Josephine County  
26 Comprehensive Plan to include its goals and policies." On  
27 pages 7 through 11 of the petition for review, petitioner  
28 identifies numerous goal and policy requirements that  
29 petitioner argues are violated by the county's decision to  
30 rezone the property.

31 The goals and policies petitioner identifies and discusses  
32 in the petition for review are not from the Goals and Policies  
33 section of the Josephine County Comprehensive Plan (Plan).<sup>1</sup>  
34 Rather, the goals and policies petitioner identifies are from a

1 citizen involvement program attached as Appendix A to the Plan  
2 Data Base. Appendix A is a resolution dated April 29, 1976  
3 establishing the county's citizen involvement program.  
4 Incorporated into that citizen involvement program is a series  
5 of alternatives, findings, goals and policies that apparently  
6 were used in the process of developing the Plan. See Plan Data  
7 Base A-10 to A-20, A-30. Many of those alternatives, findings,  
8 goals and policies are labeled "DRAFT."

9 There is some overlap between the Plan Goals and Policies  
10 that were actually adopted as part of the county's  
11 comprehensive plan and the earlier draft alternatives,  
12 findings, goals and policies petitioner cites in his argument  
13 under this subassignment of error. However, we agree with  
14 intervenor that the goals and policies petitioner cites are not  
15 approval criteria applicable to zone changes. Rather, the  
16 goals and policies that apply to zone changes under LUHR  
17 Section 8(1)(a) are those included in the Goals and Policies  
18 section of the acknowledged Plan. In his argument that Plan  
19 policies are violated by the county's decision, petitioner does  
20 not identify any of these Goals or Policies.<sup>2</sup> Accordingly,  
21 the first subassignment of error is denied.

22 B. Statewide Planning Goals

23 Petitioner alleges the county's decision violates goals  
24 5-12 and 14.<sup>3</sup> Petitioner generally takes the approach under  
25 this subassignment of error of listing each goal separately and  
26 discussing evidence he believes shows the goal is violated.

1 Petition for Review 10-16. We also understand petitioner to  
2 allege that the county's findings are inadequate.

3 Intervenor's entire response is as follows:

4 "Respondent submits that much of petitioner's  
5 [argument] relates to issues more appropriately  
6 addressed at the site plan review level. These  
7 specific site plan review concerns will have to be  
8 thoroughly addressed before a development permit for a  
9 project is granted, pursuant to Section 15.218 of the  
10 Josephine County Zoning Ordinance."<sup>4</sup> This fact was  
11 specifically referenced in the findings of the board  
12 of commissioners \* \* \*."<sup>5</sup> (n 4 added). Intervenor's  
13 Brief 8.

14 We do not read the finding quoted in n 5 to be a finding  
15 that all of the goal related concerns expressed by petitioner  
16 are to be addressed in site plan review.

17 ORS 197.835(4) and the county's LUHR quoted supra require  
18 zone changes to comply with the statewide planning goals. It  
19 may well be that because the property is already zoned RC, the  
20 change to TC does not implicate all statewide planning goals  
21 and does not implicate all requirements under the goals that  
22 are implicated. It may even be that one or more goal  
23 requirements are inapplicable to the county's decision to grant  
24 the rezoning request because those goal concerns must be  
25 addressed during design review. However, it is for the county  
26 in the first instance to adopt findings explaining how the zone  
change complies with the statewide planning goals. See  
Sunnyside Neighborhood v. Clackamas Co. Comm, 280 Or 3, 22-23,  
569 P2d 1063 (1977); Lee v. City of Portland, 57 Or App 798,  
805, 646 P2d 662 (1982); McNulty v. City of Lake Oswego, 15 Or

1 LUBA 16, 24 (1986); Tides Unit Owners Assoc. v, City of  
2 Seaside, 11 Or LUBA 84, 93-94 (1984).

3 In this case, although the county's final decision clearly  
4 identified Goals 5, 6 and 8-12 as applying to the zone change,  
5 it only explicitly addressed Goal 11 in its findings.

6 "Based on the Concept Plan, commissioners Haugen and  
7 McGregor found that the applicant had adequately  
8 addressed State Goal #11 which requires that public  
9 facilities and services be planned and developed in a  
timely, orderly and efficient manner." Record 32,  
Finding III-G.

10 The above-quoted finding is simply a conclusion. It does  
11 not explain how the concept plan led the commissioners to their  
12 conclusion. McNulty v. City of Lake Oswego, supra.

13 The county adopted no findings at all concerning Goals 5,  
14 6, 7, 8, 9, 10, 12 or 14.<sup>6</sup> The county's order does not  
15 incorporate by reference findings from the planning  
16 commission's decision or planning staff report. Record 55-74;  
17 106-108. Even if the county had done so, neither document  
18 contains adequate findings of fact or explanation demonstrating  
19 why those facts demonstrate compliance with the cited goals.<sup>7</sup>

20 The county did not adopt findings explaining why the  
21 evidence submitted led it to conclude Goals 5-12 and 14 either  
22 are met or are inapplicable, in whole or in part. Our review  
23 of the evidence cited by petitioner would, therefore, serve no  
24 useful purpose. DLCD v. Columbia County, \_\_\_ Or LUBA \_\_\_ (LUBA  
25 No. 87-109, March 15, 1988); McNulty v. City of Lake Oswego, 14  
26 Or LUBA 366, 373 (1986).

1 The second subassignment of error is sustained.

2 C. Character of the Area, Property Values and  
3 Current Direction of Building.

4 Petitioner argues the county's decision violates LUHR  
5 Section 8(1)(d), (e) and (f).<sup>8</sup>

6 The county's order clearly identifies the LUHR as  
7 applicable criteria. Record 28. Intervenor cites us to no  
8 finding addressing LUHR Section 8(1)(d), (e) and (f) and we  
9 find none. Although we note paragraphs (d), (e) and (f) of  
10 LUHR Section 8(1) lack the mandatory language present in LUHR  
11 Section 8(1)(a) - (c), without any findings addressing these  
12 criteria, we must sustain petitioner's subassignment of error.

13 Intervenor contends that petitioner's concerns about impact  
14 on the character of the area are properly addressed later at  
15 design review. This contention was not adopted by the county  
16 in its order. Such a position is for the county to adopt and  
17 explain in the first instance, and we express no position on  
18 the merits of that position.

19 The third subassignment of error is sustained.

20 The second assignment of error is sustained in part.

21 THIRD ASSIGNMENT OF ERROR

22 In his third assignment of error, petitioner argues the  
23 county improperly applied LUHR Section 13 which establishes  
24 rules of evidence.

25 LUHR Section 13(1) and (5) state:

26 "1. All evidence offered and not properly objected to  
may be received unless otherwise excluded by the

1           Hearing Body. Evidence received at the hearing  
2           shall be of the quality that reasonable persons  
3           may rely upon in the conduct of their everyday  
4           affairs.

5           "5. No decision shall be rendered except upon  
6           consideration of the whole record, or such  
7           portions thereof as may be cited by any party,  
8           and as supported by and in accordance with  
9           reliable, probative, and substantial evidence."

10          Under this assignment of error, petitioner questions  
11          whether reports submitted by the applicant in support of its  
12          application constitute "evidence \* \* \* of the quality that  
13          reasonable persons may rely upon in the conduct of their  
14          everyday affairs," as required by LUHR Section 13(1).  
15          Petitioner argues the evidence is "prejudiced personal  
16          opinion," "preliminary" or based on erroneous assumptions.  
17          Petition for Review 18-20. Petitioner also questions whether  
18          the cited reports constitute substantial evidence, as required  
19          by LUHR Section 13(5).

20          As was the case under the first assignment of error,  
21          petitioner does not explain how the disputed evidence is  
22          relevant to the applicable criteria. Because petitioner does  
23          not establish that nexus, no purpose would be served by  
24          examining each piece of evidence petitioner attacks.

25          In addition, without findings by the county explaining the  
26          facts it based its decision on and the evidence it relied upon  
27          in arriving at those factual determinations, we cannot say the  
28          cited evidence is inadequate to comply with LUHR 13(1) and  
29          (5). Just because a report is preliminary, inaccurate in some

1 respects, or prepared by a hired consultant who may be less  
2 than totally objective does not mean such reports or their  
3 conclusions fall short of the type of evidence envisioned by  
4 LUHR 13(1) and (5). Until the county adopts findings to  
5 explain whether and how it relied on the information petitioner  
6 attacks, we are in no position to determine whether such  
7 evidence complies with LUHR Section 13(1) and (5). Once those  
8 findings are adopted by the county, we will be in a position to  
9 determine whether there is substantial evidence in the whole  
10 record to support the facts found. Younger v. City of  
11 Portland, 305 Or 346, 752 P2d 262 (1988).

12 The third assignment of error is denied.<sup>9</sup>

13 The county's decision is remanded.

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FOOTNOTES

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3 1  
4 The Plan Data Base explains: "The Comprehensive Plan is  
5 divided into basically three sections: (1) the data base --  
6 this document, (2) the goals and policies, and map and (3)  
7 implementation or use of the plan." Plan Database at iv.

8 The parties have provided the Board with the "Data Base"  
9 and the "Goals and Policies" portions of the Plan.

10 2  
11 Petitioner does note that Plan Goals 4 and 10 correlate with  
12 one of the goals and one of the policies from the citizen  
13 involvement program. Petition for Review 10-11. The  
14 correlation is not obvious and we find petitioner's notation  
15 insufficiently developed to provide a basis for reversal or  
16 remand.

17 3  
18 These statewide planning goals concern open space and  
19 natural and scenic resources (Goal 5), quality of air, water  
20 and land resources (Goal 6), natural hazards (Goal 7),  
21 recreational needs (Goal 8), economy of the state (Goal 9),  
22 housing (Goal 10), public facilities and services (11),  
23 transporation (Goal 12) and urbanization (Goal 14).

24 4  
25 Josephine County Zoning Ordinance Section 15.218 provides  
26 as follows:

27 "When in the judgment of the Planning Director a site  
28 plan review is necessary to adequately determine  
29 compliance with the standards of this Ordinance and  
30 Comprehensive Plan, the developer shall submit to the  
31 Director a site plan for total parcel development.  
32 The site plan shall be drawn to scale and shall  
33 indicate the following as appropriate, upon request of  
34 the Planning Director.

35 "\* \* \* \* \*"

36 5  
37 The finding intervenor cites states in its entirety:  
38 "Site Plan Review - Any plan for development of the

1 property will require a Site Plan Review under Section  
2 15.218 of the Josephine County Zoning Ordinance."  
Record 28, Finding I-D.

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We note that finding III-F, Record 31-32, states:

5 "Based on the Concept Plan, commissioners Haugen and  
6 McGregor found the applicant had adequately address  
[sic] the drainage problem in the area."

7 It may be that this statement was intended to be a finding  
8 of compliance with Goal 7. If so, like the county's finding of  
9 compliance with Goal 11, it is merely a conclusion and is  
inadequate to explain why the drainage problem was adequately  
addressed and why Goal 7 thereby is satisfied.

10  
11 7

The planning commission's decision addresses only Goals 7  
and 11 and finds they are not satisfied. Record 1'08. The  
planning staff report includes comments and references to  
statements by the applicant, but it does not include findings  
explaining why the requested rezoning complies with the  
applicable goals. Record 68-71.

14  
15 8

As noted earlier, LUHR Section 8(1) requires, in part, that  
in granting a zone change

17 " \* \* \* The hearings body shall deem the following  
18 criteria relevant and material considerations in  
reaching their decision:

19 " \* \* \* \* \*

20 "d. Additional statements should be made by the  
21 Applicant with regard to the preservation of  
22 and current status of the character of the  
23 area involved, its peculiar suitability for  
24 particular uses, the conservation of  
25 property values, and the current direction  
of building development. The applicant may  
accept, reject, or amend the information in  
the Planning Director's report, as  
appropriate, to meet the requirements of  
Section 7.

26 "e. Whether or not a mistake has been made in

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the original designation.

"f. Whether or not a change of circumstances has occurred such that the existing condition within the vicinity of the proposal no longer conforms to the intent of the Comprehensive Plan, or applicable ordinances."

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9  
Petitioner also argues LUHR Section 13(4) which controls judicial notice of facts is violated.

We do not understand the county to have taken judicial notice of any facts. Therefore, there was no violation of LUHR 13(4).