

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)
5 AND DEVELOPMENT,)

6)
7 Petitioner,)

LUBA No. 96-233

8)
9 vs.)

FINAL OPINION
AND ORDER

10)
11 DOUGLAS COUNTY,)

12)
13 Respondent.)

14
15
16 Appeal from Douglas County.

17
18 Melinda L. Bruce, Assistant Attorney General, Salem,
19 filed the petition for review and argued on behalf of
20 petitioner. With her on the brief was Hardy Myers, Attorney
21 General, David Schuman, Deputy Attorney General, and
22 Virginia L. Linder, Solicitor General.

23
24 Paul E. Meyer, Assistant County Counsel, Roseburg,
25 filed the response brief and argued on behalf of respondent.

26
27 GUSTAFSON, Referee; HANNA, Chief Referee, participated
28 in the decision.

29
30 REMANDED 05/19/97

31
32 You are entitled to judicial review of this Order.
33 Judicial review is governed by the provisions of ORS
34 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's amendment of the
4 population element of its comprehensive plan.

5 **FACTS**

6 During the 1995 legislative session, the legislative
7 assembly adopted HB 2709, now codified at ORS 195.036. That
8 statute provides, in relevant part:

9 "The coordinating body under ORS 195.025(1) shall
10 establish and maintain a population forecast for
11 the entire area within its boundary for use in
12 maintaining and updating comprehensive plans, and
13 shall coordinate the forecast with the local
14 governments within its boundary."¹

15 In response to that directive, Douglas County convened
16 a Population Forecast Committee, consisting of
17 representatives from the county, the twelve cities in the
18 county, and the Umpqua Regional Council of Governments
19 (URCOG). In April, 1996, that committee began updating the
20 county's existing population model and made projections for
21 population growth through 2016. In March, 1996, the state
22 economist also initiated a population forecast study for

¹ORS 195.025(1) states:

"In addition to the responsibilities stated in ORS 197.175, each county, through its governing body, shall be responsible for coordinating all planning activities affecting land uses within the county, including planning activities of the county, cities, special districts and state agencies, to assure an integrated comprehensive plan for the entire area of the county. * * *"

1 each county throughout the state. The state economist's
2 study had a scheduled completion date of October 15, 1996.

3 Based upon the results of the county's population
4 forecast study, the county initiated a legislative amendment
5 to the population element of its comprehensive plan. On
6 August 30, 1996, the county notified the Department of Land
7 Conservation and Development (DLCD) of the proposed
8 amendment, scheduled for consideration by the planning
9 commission on October 17, 1996. On September 20, 1996, the
10 county planning staff met with the state economist. The
11 economist requested that consideration of the plan amendment
12 be delayed until the state forecast was available and could
13 be considered in the county's evaluation. On October 2,
14 1996, DLCD submitted several comments to the proposed
15 amendments, questioning both the county's methodology and
16 its conclusions regarding its population forecasts. DLCD
17 expressed concern, in part, with the county's proposed
18 adoption of a wide forecast range of between 14 to 53
19 percent growth, and urged instead the county adopt a single
20 forecast.² DLCD also commented that "information in the

²With regard to the county's forecast of a wide percentage range of growth, DLCD's memorandum states:

"The county should eventually adopt a single forecast in addition to or in lieu of a forecast range. A single number, subject to revision if future growth differs significantly, would provide an adequate factual base for distributing county forecasts to the cities under SB 2709 and making decisions that must consider population and employment forecasts. Even for the few planning functions that a forecast range may be

1 proposed plan amendment is inadequate to fully evaluate the
2 county's methodology and information on which the county's
3 forecasts are based." Record 120. The memorandum cites
4 numerous inadequacies in the methodology and information
5 provided in the forecast.³ In addition to its specific
6 comments, DLCD requested that the County continue the matter
7 until the state economist's forecast could be considered,
8 stating, in part:

suitable, a forecast ranging from 14 to 53 percent growth provides little guidance for sound decision-making. Given the wide range in the county's proposed population projection, the county does not explain how these projections will be used or which projection (i.e., the high projection or the low projection) will be used in making key land use decisions such as the review of a proposed urban growth boundary amendment." Record 120.

³In discussing the inadequacies in the information and methodology, the memorandum states, in part:

"Also, information in the proposed plan amendment is inadequate to fully evaluate the county's methodology and information on which the county's forecasts are based. For example, the factual basis for relying upon: (1) the last 5-year migration rate; (2) a 1 percent reduction of the 5-year rate; (3) stopping the reduction at the 80 percent level; and (4) using the 1.5 and 2.5 percent growth rates are not presented or planned. These are questions that need to be addressed and should be discussed with the state economist before the forecast is adopted.

"* * * [N]o date or explanation is given for the average annual growth rates assumed for the cities. This information also needs to be provided before this forecast is adopted.

"Finally, no analysis is provided regarding economic factors and trends that are likely to stimulate or impede growth within the county. For these reasons, the [DLCD] requests that the Douglas County Planning Commission delay adoption of this proposed amendment and ask the respective County Planning Department and URCOG staff to work with the state economist to prepare a coordinated population forecast." Record 120.

1 "Since Douglas County submitted the update
2 population element, the state issued preliminary
3 statewide and county forecasts. Representatives
4 from the county have met with state officials to
5 discuss the two forecasts. The state is now
6 considering the county's information and will
7 communicate further with the county regarding the
8 final state forecast. The department requests
9 that Douglas County continue to work with * * *
10 the state economist, toward a coordinated forecast
11 of population and employment for Douglas County
12 and its cities. Therefore, we ask that the county
13 postpone adoption of this amendment and request
14 that the county and [URCOG] work with the state
15 economist to develop a single forecast to be used
16 by both the state and the county in future
17 planning activities." Record 119.

18 The county planning director responded in writing to
19 DLCD's memorandum, stating, in part:

20 "The update of our Population Element and
21 Projections has been in our work program for
22 almost two years. We have brought to conclusion
23 an update to an important part of our plan which
24 was carefully coordinated with our cities. Your
25 comments about supporting data and methodology
26 will be addressed in our adoption. The support
27 document for our plan amendments has already been
28 provided to the State Economist. As you know ORS
29 195.036 is very clear as to who is responsible for
30 area (County) population forecasts. I am
31 surprised that the State of Oregon (State
32 Economist's Office) has embarked upon a project
33 which duplicates what local government has been
34 empowered the responsibility to carry out. We
35 have asked the State Economist to coordinate our
36 work with their project. The State's work may
37 help other jurisdictions who are not prioritizing
38 population forecasts. We appreciate your
39 constructive comments on this amendment proposal."
40 Record 118.

41 Notwithstanding the planning director's response to
42 DLCD, the record does not reflect that the planning

1 commission was made aware of DLCD's request or its numerous
2 comments.⁴ At the October 17, 1996 planning commission
3 hearing, the planning director informed the commission of
4 the state economist's request that the county continue its
5 consideration of the amendment pending completion of the
6 state's study (Record 106), and reported on the meeting with
7 the state economist as follows:

8 "We did run into one area of difficulty and that
9 was that the state, although not empowered to do
10 so by the statutes, began initiating a population
11 forecast for counties that they were going to give
12 to counties and say you have to use this in the
13 implementation of House Bill 2709. We took
14 exception to that and the state economist who was
15 doing that forecast did come down a few weeks ago
16 with the original, initial hearing and at that
17 hearing we presented our material, showed them why
18 we felt their initial numbers were incorrect.
19 They took our material back and have indicated
20 that they will be adjusting their forecast for

⁴DLCD's October 2, 1996 memorandum discusses both the proposed amendments to the comprehensive plan population element and proposed amendments to the water resources element of that plan. The minutes of the October 17, 1996 planning commission meeting reflect that the planning director stated that DLCD had "made constructive comments" on the proposed amendments to the water resources element. Record 106. Those minutes do not indicate any statement by the planning director regarding DLCD's concerns and comments about the population element amendments. The minutes of a planning commission workshop held earlier in the day on October 17, 1996 reflect that the commission considered only the water resources element amendments. Those minutes state that the "Planning Department staff submitted to the Commission members copies of letters received from the Department of Land Conservation and Development (letter of support) * * *." Record 101. Given that DLCD's memorandum discussed both the water resources element amendments and the population element amendments, the planning commission may have received copies of DLCD's comments regarding the population element amendments. However, workshop minutes do not indicate that the population element amendments were discussed, and the minutes of the October 17, 1996 planning commission meeting do not indicate that DLCD's comments were mentioned at that meeting.

1 this part of the state." Respondents Brief, Ex.
2 1, Excerpts of Planning Commission Meeting of
3 10/17/96, p. 12.

4 The planning commission did not delay the proceedings
5 but instead, on October 17, 1996, recommended approval of
6 the proposed amendments. The Board of Commissioners
7 (commissioners) then adopted the amendments on October 30,
8 1996. Neither the minutes nor the transcript of the
9 commissioners' meeting reflect that the commissioners were
10 made aware of DLCD's comments and request for continuance.
11 A transcript of the commissioners' hearing, however,
12 reflects that the planning director informed the
13 commissioners generally regarding the state economist's
14 concerns but not its request for continuance, stating:

15 "This particular comprehensive plan amendment does
16 not contain any policies, it's the findings and
17 text for the comprehensive plan and we undertook
18 and reached unanimous consent on the enclosed
19 population projection. In the meantime, the State
20 of Oregon entered into this and decided that they
21 would establish projections for local governments
22 to work from. And the legislature did not empower
23 that, the legislature made very clear this was to
24 be a coordinated county effort, and so we met with
25 the state and communicated with them and fired off
26 a couple of letters making it clear that this was
27 a local projection and it would be appropriate for
28 them to incorporate the county's projection into
29 their work rather than the reverse to occur. This
30 is a policy projection which projects about 2
31 percent annual growth. The projection the state
32 has prepared for Douglas County actually show by
33 the year 2040 no increase in population. And
34 which we found a great deal of concern and
35 objection to that particular time. * * *"
36 Transcript of 10/30/96 Board of Commissioners
37 Meeting, Ex. 2, p. 15.

1 DLCD appeals the county's adoption of the population
2 element amendments.

3 **FIRST ASSIGNMENT OF ERROR**

4 DLCD contends the county violated Statewide Planning
5 Goal 2 when it failed to coordinate its population
6 projections with DLCD and the state economist.

7 Goal 2 requires, in part, that comprehensive plans be
8 "coordinated" with the plans of affected governmental
9 units.⁵ Comprehensive plans are "'coordinated' when the
10 needs of all levels of government have been considered and
11 accommodated as much as possible." ORS 197.015(5); Brown v.
12 Coos County, 31 Or LUBA 142, 145 (1996). Comprehensive plan
13 coordination is a two step process, which requires:

14 "1. The makers of the [comprehensive] plan
15 engaged in an exchange of information between
16 the planning jurisdiction and affected
17 governmental units, or at least invited such
18 an exchange.

19 "2. The jurisdiction used the information to
20 balance the needs of all governmental units *
21 * * in the plan formulation or revision."
22 Brown, 31 Or LUBA at 146, citing Rajneesh v.
23 Wasco County, 13 Or LUBA 202, 210 (1985).

24 A local government is not required to "accede to every
25 request that may be made by a state agency." Brown at 146.
26 It must, however, "adopt findings responding to legitimate
27 concerns." Id., citing Waugh v. Coos County, 26 Or LUBA 300,

⁵The parties agree that DLCD and the state's economist are affected governmental units as defined in ORS 197.835.

1 314 (1993).

2 The county acknowledges it did not adopt "technical
3 findings" to respond to the agency requests, but argues that
4 Goal 2 does not require such findings so long as there is an
5 adequate factual base in the record to support its decision.
6 The county relies on Redland/Viola/Fischer's Mill CPO v.
7 Clackamas County, 27 Or LUBA 560 (1994), in which we
8 explained that the requirement that legislative findings be
9 supported by an "adequate factual basis" can be met either
10 through findings in the decision, or through "argument and
11 citations to facts in the record adequate to demonstrate
12 that the challenged legislative decision complies with
13 applicable legal standards." Id. at 564.

14 The requirement that the county's findings must be
15 supported by an adequate factual basis is distinct from the
16 Goal 2 coordination requirement. While an adequate factual
17 basis for the decision can be established through argument
18 and citation to the record, in order to satisfy the Goal 2
19 coordination requirement, the county is required to adopt
20 findings that respond to agency concerns. ONRC v. City of
21 Seaside, 29 Or LUBA 39, 56 (1995). A statement in the
22 record that the staff rejected the agency concerns does not
23 satisfy the coordination requirement.

24 Moreover, even if the county's disposition of the
25 coordination requirement could be supported by reference to
26 the record, the record here shows that the county's

1 administrative rejection of the agencies' requests was based
2 upon a misunderstanding of those agency requests. The
3 county argues:

4 "Thus, even though the county did not adopt
5 technical findings concerning coordination with
6 DLCD and the state economist, the record in this
7 matter demonstrates that the county did engage in
8 dialogue with DLCD and the state economist and
9 that the county did respond to the state's desire
10 that the county use the state economist's model."
11 Respondent's Brief 7-8.

12 Neither DLCD nor the state economist requested that the
13 county use the state economist's model. Rather, both
14 agencies requested that the county temporarily postpone the
15 adoption of its plan amendments until the state's
16 projections were completed so that there could be an
17 "exchange of information" and an opportunity for
18 coordination between the state and county. It appears that
19 the county's sole response to DLCD's and the state
20 economist's concerns and requests was that the county, and
21 not the state, had jurisdiction to prepare population
22 projections. As even the county acknowledged at oral
23 argument, however, that jurisdiction does not supersede or
24 eliminate the Goal 2 coordination requirement.

25 The requirement in Goal 2 that the county engage "in an
26 exchange of information" between affected agencies would not
27 require that the county suspend its process indefinitely
28 pending other agencies' compilation of information.
29 However, given the imminence of the state's populations

1 projections and the close factual relationship between the
2 county's proposed amendments and the agencies' concerns, the
3 requested postponement in this case was reasonable and
4 necessary in order to enable the necessary coordination. By
5 dismissing both agencies' requests without even making the
6 decision makers aware of those requests, the county
7 eliminated the possibility for exchange of information
8 required by Goal 2. By eliminating any possible exchange of
9 information, the county consequently failed to balance the
10 needs of those agencies.⁶ Thus, the county has failed to
11 satisfy either step of the Goal 2 coordination requirement.

12 The first assignment of error is sustained.

13 **SECOND ASSIGNMENT OF ERROR**

14 Goal 2 requires that land use planning decisions have
15 an adequate factual base. We have previously concluded that
16 this requirement is identical to the substantial evidence
17 requirement for quasi-judicial decisions. 1000 Friends of
18 Oregon v. City of North Plains, 27 Or LUBA 372, 378 (1994),
19 citing Younger v. City of Portland, 305 Or 346, 752 P2d 262
20 (1988). Petitioner contends that the county plan amendment
21 violates Goal 2 because it lacks an adequate factual basis
22 for its in-migration and out-migration projections.

23 The county acknowledges that the findings themselves do

⁶Petitioner does not assign error to the county's failure to respond to DLCD's substantive concerns regarding the county's methodology or conclusions.

1 not identify the factual basis for the decision. The county
2 argues, however, that the record itself provides adequate
3 support, and that the record contains 75 pages of factual
4 support for its population projections. However, it has not
5 substantiated, in its brief or in oral argument, where in
6 those 75 pages there is a factual basis for its in-migration
7 and out-migration projections.⁷ The county relies on a
8 statement made by a staff member to the planning commission
9 at its October 17, 1996 meeting, to explain the factual
10 basis for the projections:

11 "I think the best way to give you this update is
12 to let you know that we didn't change the existing
13 model. Page number 8 [Record 26] shows the model
14 and what it is, is it takes the existing
15 population and looks at changes in the population.
16 Net natural increase, which is people that are
17 born minus people that have died. And then net
18 migration, which is people that come into the
19 county minus people who leave the county. Then
20 what we do is we take, that is oversimplified.
21 How the death rates are determined is based on
22 state figures. The state actually has death
23 rates. They also have birth rates. Migration we
24 use, we have the periods, so that's how we
25 adjusted the migration. What it does is it takes
26 the five-year period and says that, over time,
27 that factor will decrease by 80 percent. So,
28 there will be less people. Instead of it growing
29 each year, it's actually going to fall off. So,
30 that's what the model shows.

31 "What's interesting to point out is, that the

⁷The county contends that 23 factual findings and 14 conclusions in the record resolve questions about the population projection model, yet the county does not specify the evidence upon which it relies.

1 little table on the bottom of page 8 [Record 27]
2 shows that there was an anomaly. The expectation,
3 the original model expectation was that the range
4 of population was to be, in the year 2000, was to
5 be a low of 112,000 and a high of 135,000. What
6 the model is trying to show you is during the
7 period of 1980 to 1985 and to 1990, we had a great
8 out-migration. An unexpected event occurred. So
9 that's why we did an adjustment to the model. And
10 what we did is say that, because this unexpected
11 event occurred, that doesn't mean the model is
12 bad. What it means is we need to update the data
13 in the model and project it forward. And that's
14 what we did. We took the model apart, we updated
15 the figures, updated the base data, and then we
16 projected the data forward and that's what you
17 have on this table that goes from 1995 to 2016."
18 Respondent's Brief 10-11, Transcript of 10/17/96
19 Planning Commission Meeting, Ex. 1, p. 12.

20 This explanation, which the county contends provides
21 factual support for its projections, provides no evidence to
22 substantiate the county's figures for in-migration and out-
23 migration. It neither provides nor refers to factual
24 documentation of the "anomaly" or "unexpected event", yet
25 appears to base a total alteration of the data and model
26 upon this "event." The statement likewise provides no other
27 factual justification of how the county reached its in-
28 migration and out-migration projections.

29 We agree with petitioner that the county has not
30 demonstrated an adequate factual basis to support its in-
31 migration and out-migration projections, and therefore, has
32 not established an adequate factual base for the population
33 forecasts upon which the plan amendment is based.

34 The second assignment of error is sustained.

1 The county's decision is remanded.