

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 PHILIP TURRELL, BARBARA TURRELL, )  
5 RODNEY SCOTT FRANKLIN, ELLEN )  
6 FRANKLIN, DIANE C. MOLT, SAM KAZER )  
7 LOUIS MOLT, MELODI MOLT, LARRY )  
8 IMBACH, ROBERT EUGENE SCRIVNER, )  
9 RONALD E. WHITING, LINDA R. WHITING, )  
10 DELMER CLEMMENS, JOHN E. )  
11 CLEMMENS, FRANK WHITE, DORIS )  
12 WHITE and MARILEE WHITE, )

13 )  
14 Petitioners, )

15 )  
16 vs. )

17 ) LUBA No. 98-212  
18 HARNEY COUNTY, )

19 ) FINAL OPINION  
20 Respondent, ) AND ORDER  
21 )

22 and )  
23 )

24 CLYDE AMBURN, )  
25 )

26 Intervenor-Respondent. )  
27 )  
28 )

29 Appeal from Harney County.  
30

31 Robert S. Lovlien, Bend, filed the petition for review and argued on behalf of  
32 petitioners. With him on the brief was Bryant, Lovlien & Jarvis.  
33

34 No appearance by Harney County.  
35

36 Myer Avedovech, Bend, filed the response brief and argued on behalf of intervenor-  
37 respondent.  
38

39 BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
40 participated in the decision.  
41

42 AFFIRMED

05/27/99

43  
44 You are entitled to judicial review of this Order. Judicial review is governed by the  
45 provisions of ORS 197.850.

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county’s preliminary plat approval of a subdivision in the  
4 county’s Rural Residential (R-1) zone.

5 **MOTION TO INTERVENE**

6 Clyde Amburn moves to intervene on the side of respondent. There is no opposition  
7 to the motion, and it is allowed.

8 **FACTS**

9 This matter is before us for the second time. We remanded the county’s initial  
10 approval in Turrell v. Harney County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 97-103, May 1, 1998)  
11 (Turrell I). For ease of reference, we shall recite the facts as provided in that case:

12 “Intervenor proposes to subdivide approximately 60 acres in an area known as  
13 the Hebener Tracts into 11 five-acre parcels. In 1980, the county took an  
14 exception to Statewide Planning Goal 3 [Agricultural Lands] to allow it to  
15 zone the Hebener Tracts for residential uses. In 1984, the Land Conservation  
16 and Development Commission (LCDC) acknowledged that exception. The  
17 subject property has since been used for alfalfa production, and the  
18 surrounding properties are developed with a mix of agricultural and  
19 residential uses.” Turrell I, slip op at 2.

20 After the County Court approved the preliminary plat, petitioners appealed to LUBA.  
21 We found that the county findings were inadequate to show (1) that there was need for the  
22 residential development proposed;(2) that the subject property is better suited to meet the  
23 public need than other potential properties; and (3) that the cul-de-sac design either complied  
24 with county standards, or that special circumstances warranted the extended cul-de-sac  
25 design. Turrell I, slip op at 5-9. Finally, we found that the decision failed to adopt findings  
26 to show that the application complied with applicable infrastructure standards. We therefore  
27 remanded the decision to the county. Turrell I, slip op at 11.

28 Upon remand, the county held a hearing that was limited to the issues identified in  
29 our decision in Turrell I. The County Court received additional evidence from the parties,

1 closed the hearing, and after deliberations, again decided to approve the application. This  
2 appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioners argue that the county failed to identify what “public need” exists that the  
5 applicant is attempting to address in this application.

6 The county identified “a public need for rural residential lots of five acres in Harney  
7 County.” Record 7. Petitioners do not explain why this finding is an inadequate  
8 specification of public need. It is the petitioner’s responsibility to identify the inadequacies  
9 of the county’s decision. McCoy v. Linn County, 16 Or LUBA 295, 315 (1987), aff’d 90 Or  
10 App 271, 752 P2d 323 (1988).

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 Harney County Comprehensive Plan (HCCP) 5.B requires the county to adopt  
14 findings of fact supporting a conclusion “[t]hat there is a demonstrated public need for the  
15 proposed use.” Petitioners argue that the County failed to adopt findings to support its  
16 conclusion that there is a demonstrated public need for the disputed rural residential  
17 development.

18 **A. The County’s Interpretation of “Public Need”**

19 “Public need” is no longer a generally applicable criterion in quasi-judicial land use  
20 proceedings. Neuberger v. City of Portland, 288 Or 155, 170, 603 P2d 771 (1979). While  
21 the county has adopted “public need” as an approval criterion for the decision challenged in  
22 this appeal, the question is not whether the county’s interpretation of “public need” under  
23 HCCP 5.B is consistent with the interpretation that those words have been given in other

1 contexts.<sup>1</sup> Because HCCP 5.B does not implement any statutory or rule-based provisions,  
2 our standard of review is whether the county’s interpretation of its “public need” criterion is  
3 so wrong as to be reversible under ORS 197.829 and Clark v. Jackson County, 313 Or 508,  
4 836 P2d 710 (1992). Huntzicker v. Washington County, 141 Or App 257, 261, 917 P2d  
5 1051, rev den, 324 Or 322 (1996); Goose Hollow Foothills League v. City of Portland, 117  
6 Or App 211, 843 P2d 992 (1992).

7 Here, the county interpreted the “public need” criterion as being met where (1) there  
8 is little land available to meet the identified need; and (2) there is a strong market demand for  
9 the identified need. The county’s interpretation of HCCP 5.B, although not plainly stated, is  
10 implicit in its findings and is adequate for our review. Alliance for Responsible Land Use v.  
11 Deschutes County, 149 Or App 259, 265-66, 972 P2d 836 (1987), dismissed 327 Or 555  
12 (1998). The county’s interpretation of HCCP 5.B might not be consistent with the way the  
13 concept of “need” has been interpreted in other contexts, but we cannot say that, in the case  
14 before us, it is clearly wrong. Therefore, we defer to it.

15 **B. The County’s Findings of Public Need**

16 Petitioners challenge the county’s findings concluding that there are no vacant 5-acre  
17 lots designated for rural residential development available for that purpose.<sup>2</sup> The findings  
18 explain that some of the property currently zoned for rural residential use is not developable  
19 because of seasonal flooding. Most of the other property zoned R1 is developed with  
20 dwellings. The findings also explain that the county relied upon letters from local real estate

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<sup>1</sup>See, e.g., Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973) (establishing a public need criterion for quasi-judicial zone changes) and Still v. Marion County, 42 Or App 115, 122, 600 P2d 433 (1979) (discussing compelling public need under Statewide Planning Goal 2).

<sup>2</sup>Intervenor argues that, by adopting the exception to Goal 3 in 1980, the county adequately determined that there was need for rural residential housing in Harney County, and that the Land Conservation and Development Commission (LCDC) concurred with the county’s need determination by acknowledging the comprehensive plan in 1984. Therefore, intervenor concludes, it is redundant to revisit the question of need at this juncture. The intervenor submitted the same argument to us in Turrell I, and we rejected it there. We will not revisit it now.

1 companies to show that realtors regularly receive requests for vacant rural acreages near the  
2 cities of Burns and Hines, and there is little or no inventory available for sale.

3 Contrary to petitioners' argument, the county relied on more than market demand to  
4 determine that there is a public need for the proposed subdivision. The county determined  
5 that the applicant established a public need for the proposed use by showing (1) that the  
6 comprehensive plan has established that rural residential land is a housing option that should  
7 be provided; (2) that little or no property designated for rural residential use is presently  
8 available; and (3) that there is a market demand for rural residential lots.<sup>3</sup>

9 Petitioners do not challenge the findings the county made regarding the limited  
10 amount of rural residential land, nor do they challenge the county's findings regarding the

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<sup>3</sup>The County's findings of compliance provide:

"The \* \* \* records \* \* \* indicate that the Hebener Tracts and North Burns are the only areas zoned R1, Rural Residential, with 5 acre minimums. Nearly all of the buildable land other than property subject to the Amburn proposal have buildings. The only exception are those lots in the North Burns area that are still vacant because they are subject to annual periodic flooding from the Silvies River which runs through this area.

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"Nearly all of R1, Rural Residential, property that is not subject to periodic flooding, have homes on them which clearly demonstrate a public need for this type of zoned property.

"The approval of the Amburn subdivision is consistent with LCDC Goal 10 which is to 'provide for the housing needs for the citizens of the state.' It also meets the need for rural non-farm housing that the Harney County Comprehensive Plan recognizes that the County should provide.

"The subdivision proposal meets that need by providing rural residential for rural non-farm housing that would otherwise be unavailable since the record clearly indicates that all available buildable R1, Rural Residential, with 5 acre minimums has been constructed.

\*\*\* \*\*

"The record contains several letters from real estate agencies located in Harney County that there were no five (5) acre parcels listed or available through those offices. The record further demonstrates that there are weekly inquiries made of local realtors for such parcels and there are no available parcels of this size within Harney County."

Record 7.

1 limited developability of the land presently designated R1. Rather, petitioners argue that the  
2 County failed to consider residential development within the urban growth boundaries and  
3 city limits of the cities of Hines and Burns. The county defines the public need here as 5-  
4 acre rural residential lots. The availability of land within an urban growth boundary is not  
5 relevant to the assessment of public need for rural five-acre lots. By definition, property  
6 within urban growth boundaries is non-rural land.

7 The county's findings adequately explain the county's conclusion that there is a  
8 public need for rural residential lots and those findings are supported by substantial evidence.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioners argue that the county failed to adopt findings of fact supported by  
12 substantial evidence to show that this particular property is better suited than other properties  
13 to meet the public need for rural residential dwellings. The only premise to this argument is  
14 that the county failed to take land within urban growth boundaries into account when  
15 determining that this site is best suited to meet the public need for rural residential dwellings.  
16 We have already found that the county's limitation of its needs analysis to R1 designated  
17 land is a permissible limitation on the scope of alternatives. Petitioners' argument under this  
18 assignment of error does not provide a basis for reversal or remand.

19 The third assignment of error is denied.

20 The county's decision is affirmed.