

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS ~~JUNE 4~~ 2 36 PM '80
OF THE STATE OF OREGON

3	RUBEN DUPONT,)	
4)	LUBA No. 79-013
4	Petitioner,)	
5	vs.)	FINAL OPINION AND ORDER
6	JEFFERSON COUNTY,)	
7)	
7	Respondent.)	
8	and)	
9	WILLIAM B. HOFFMAN,)	
10)	
10	Respondent.)	

11 Appeal from Jefferson County.

12 Paul J. Speck, Bend, argued the cause and filed a
13 petition for review on behalf of Petitioner Ruben
Dupont.

14 Paul Sumner, Madras, argued the cause and filed a
15 brief on behalf of Respondent William B. Hoffman.

16 No appearance for Respondent Jefferson County.

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

19 Reversed and Remanded June 4, 1980

20
21 You are entitled to judicial review of this Order.
22 Judicial Review is governed by the provisions of
Oregon Laws 1979, ch 772, § 6(a).

1 BAGG, Referee

2 STATEMENT OF THE CASE

3 This case is about a subdivision approved by the Jefferson
4 County Court. Petitioner seeks to have the decision declared
5 invalid as a violation of the Jefferson County plan and zoning
6 ordinance and several statewide land use goals.

7 FACTS

8 Between April 12, 1979 and April 25, 1979, the Jefferson
9 County Planning Commission approved a subdivision application
10 submitted by William B. Hoffman. Record 52-55. The exact date
11 of the approval is not clear from the record as no findings or
12 written order appear in the record. On April 25, 1979, Mr.
13 Hoffman appealed the decision of the planning commission on two
14 grounds. Record, 52-53. Mr. Hoffman's first complaint was
15 that the planning commission apparently required him to
16 purchase property owned by Ruben Dupont and dedicate that
17 property to the county for road purposes; and the second issue
18 was the planning commission's failure to grant Mr. Hoffman a
19 variance to a county cul-de-sac length requirement.

20 The Jefferson County Court met on September 11 and also on
21 October 1 to consider the matter. A notice was published
22 calling for a September 11 hearing

23 "on the preliminary plat of Mt. Jefferson
24 Subdivision. The proposal consists of 37 acres of 29
25 lots of approximately one acre each. The property is
east of Bean Drive south of Loucks Road." Record 29.

26 The notice calling for the October 1 hearing provided

1 "[I]n accordance with the Jefferson County zoning
2 ordinance, the Jefferson County Court will continue
3 its public hearing on the preliminary plat of Mt.
4 Jefferson subdivision. This hearing will be continued
5 on Monday Octomber [sic] 1, 1979, at 7:30 p.m. in the
6 County Courthouse Conference Room." Record 19.

7
8 The parties agree that the County Court hearings were open to
9 testimony on the subdivision. There was no objection to the
10 kind or scope of testimony.

11 There is no written "order" in the record. But, a letter
12 dated October 12, 1979 was addressed to Mr. Paul Sumner from
13 Roger C. Martin, the planning director for Jefferson County
14 announcing approval of the Mt. Jefferson Subdivision and
15 listing conditions regarding road right of way and pavement.
16 Record 15. There are no written findings supporting the
17 decision, but there is a county court journal entry dated
18 October 3, 1979 reading as follows:

19 "Court discussed Mt. Jefferson Subdivision, and
20 approved it based on findings adopted by planning
21 commission dated March 21, 1979."

22 The above reference to findings of March 21, 1979, is
23 confusing as there are no "findings" at least in a form this
24 Board recognizes. There is, however, a letter to the Jefferson
25 County Planning Commission from the planning staff bearing that
26 date and concerning the application for the subdivision.
Record 71-72. In the body of that letter there is a reference
to a requirement that the Planning Commission make findings,
and there are also several proposed findings of fact. The

1 findings of fact appear at page 71 of the record and are
2 conclusory in that they recite that the proposal is in
3 compliance with the comprehensive plan and various county
4 policies. Additionally, conclusions regarding the need for
5 housing and a requirement that services be upgraded appear.
6 The property lies in the A-3 zone. Record 70. The A-3 zone
7 lists subdivisions as a conditional use. Jefferson County
8 Zoning Ordinance, Section 3.050(2)(u). There is no evidence in
9 the record showing a conditional use grant by the planning
10 commission or the county court.

11 ASSIGNMENT OF ERROR NO. 1

12 Petitioner asserts that "no adequate findings of fact or
13 conclusions of law were made to support the decision approving
14 the subdivision." It is correct that the closest thing that
15 the Board has found to a set of findings is the letter of
16 October 12 to Mr. Paul Sumner appearing at page 15 of the
17 record. An applicant is entitled to written findings and an
18 order. Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 590
19 (1979). The journal entry of October 3 referencing findings
20 that do not appear in the record is not sufficient as an order
21 of the Board of Commissioners. ORS 215.416(6) and Heilman,
22 supra. There is nothing in the record to show the planning
23 commission itself considered or adopted the suggested staff
24 findings.

25 Without findings of fact and conclusions, this Board is
26 unable to sustain the county's action. The absence of findings

1 alone is sufficient to require remand of the decision of the
2 county court.

3 However, respondent urges that the only matter before the
4 Board "is the decision of the county court to affirm denial of
5 the variance and modify the condition regarding dedication of
6 Ruben Dupont's property." Respondent's Brief at 4. Assuming
7 that there are not enough findings, respondent asks that the
8 Board simply remand the case with an order that the county
9 prepare findings on the matter of the roadway dedication and
10 the variance only. If respondent's view is accepted, no
11 findings relative to statewide land use goals need appear in
12 the order of the Jefferson County Court.

13 Appeal from a tentative subdivision approval (as here) is
14 governed by Section 308 of the Jefferson County Subdivision
15 Ordinance. The Ordinance at Section 308(D) provides that the
16 planning commission action is to be transmitted to the county
17 court, and the county court may review the planning commission
18 action. The court may "affirm, reverse or modify" the planning
19 commission decision. If not "notified" (and we assume the
20 notification is from the county court to the planning director
21 or planning commission) within 21 days, "the decision of the
22 planning commission shall be affirmed." In effect, the
23 decision on the subdivision is not final until county court
24 review or until 21 days pass.

25 Section 308 (E) allows a subdivider to appeal "any action"
26 of the planning commission, and he must be specific as to the

1 "error or abuse of discretion by the planning commission." If
2 he appeals,

3 "[A]t its next regular meeting, the county court
4 shall review the action of the planning commission and
5 the written appeal of the subdivider and shall report
6 its action to the subdivider and to the planning
7 commission in writing. When an appeal is filed and
8 heard by the county court, such hearing shall
9 constitute meeting the requirements of review and
10 action by the county court as prescribed in Paragraph
11 D of this section." (Emphasis added).

12 We interpret this language to require a complete review of
13 the subdivision. The filing of an appeal under 308(E) stays
14 the review of the court until the "hearing." The court
15 "shall," at the time of the "hearing" on the specific issues
16 raised by the subdivider, conduct its own "review" of the
17 planning commission action. The procedure has the effect of
18 suspending a final decision on the subdivision until after the
19 county court determination. The petition for review to us,
20 then, is based on that final decision by the county court.

21 As noted above, respondent urges us to consider on review
22 only those issues raised by the subdivider in his appeal to the
23 county court. To accept that position is to foreclose a
24 complete review of the subdivision. We decline to do so
25 because of our analysis of the procedure used in the ordinance
26 to arrive at a final determination on the subdivision
27 application.

28 Oregon Laws 1979, ch 772 grants this Board power to review
29 a "final decision or determination" of a planning body. The
30 final decision subject to review in this case was made by the

1 county court, and any ambiguity that may exist with respect to
2 the scope of review should be interpreted to favor a complete
3 review.

4 "Statutes giving the right of appeal are liberally
5 construed, and an interpretation which will work a
6 forfeiture of that right is not favored." 3 Sands
Southerland Statutory Construction. 67.08 (3d ed 1974).

7 We conclude the county court conducted a de novo review of
8 the subdivision approval.¹ As a review of the whole
9 approval was made, findings must reflect all required
10 considerations including statewide land use goals.

11 ASSIGNMENT OF ERROR NO. 2

12 Petitioner alleges that the county court failed to consider
13 LCDC's Goals 3, 10, 11, 12 and 14. Again, as there are no
14 findings showing a conscious consideration of the goals
15 mentioned or, for that matter, any goals, the Board must
16 conclude in petitioner's favor with respect to assignment of
17 error no. 2. All the above mentioned goals may be relevant to
18 any subdivision application, and the Board believes that it is
19 the respondent's duty to determine which goals are applicable
20 and to address those goals. Sunnyside Neighborhood League vs.
21 Clackamas County Commission, 280 Or 3, 569 P2d 1063 (1977).

22 There is nothing in the record to show that responsibility was
23 fulfilled. We note that there was at least mention of the need
24 for housing (Goal 10), public facilities (Goal 11), and
25 transportation (Goal 12) in the staff report of March 21. The
26 discussion is, however, conclusory in nature and is not

1 supported by any evidence in the record. Record at 70-71. The
2 mention of matters relevant to the goals is not sufficient for
3 us to conclude that the goals were addressed and applied to the
4 land use decision.

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6 ASSIGNMENT OF ERROR NO. 3

7 Petitioner asserts that the "applicant did not prove the
8 land proposed for development was other than agricultural
9 land." This assignment of error suggests that when a
10 subdivision occurs it must be proven that the land is other
11 than agricultural land. This Board does not believe that this
12 case furnishes facts or circumstances sufficient for us to make
13 such a broad statement. There are circumstances under which
14 land defined as "agricultural land" by Goal 3 may be subject to
15 development. Whether the circumstances exist in this case is
16 unknown as the record is incomplete. We do agree, however,
17 that the applicant must show that the

18 "[P]rominent soil classes on the property are other
19 than agricultural land within the Goal 3 definition,
20 see Meyer v. Lord, 37 Or App 59, 586 P2d 367 (1978),
21 rev den 286 Or 303 (1979); or (2) the lot sizes
22 created by the partition will be sufficient for the
23 continuation of the existing agricultural enterprise
24 in the area; or (3) the factors set out in ORS
25 215.213, and incorporated by reference into Goal 3,
26 relevant to permitting non-farm uses -- usually
meaning residential use -- on agricultural land are
met. See Rutherford v. Armstrong, 31 Or App 1319, 572
P2d 1331 (1977), rev den 281 Or 431 (1978)."
Jurgenson v. Union County Court, 42 Or App 505, 511
(1979).

Therefore, we sustain Assignment of Error No. 3 as it

1 alleges affirmative duty on the part of the county to address
2 soil types; and if the land is found to be "agricultural land,
3 then the division of the land must be consistent with the
4 commercial agricultural enterprise in the area or be in accord
5 with the factors set out in ORS 215.213.

6 ASSIGNMENT OF ERROR NO. 4

7 Petitioner alleges that the applicant failed to address
8 Goals 10, 11, 12 and 14 and asserts that no findings were made
9 with regard to those goals. This assignment of error appears
10 simply to restate Assignment of Error No. 2. Under this
11 assignment of error there is a discussion regarding the county
12 comprehensive plan, however. Petitioner asserts that the
13 property "was outside the area designated for urban expansion
14 and was recognized as agricultural land" in the Jefferson
15 County Comprehensive Plan, but the body of the discussion seems
16 to concern the failure of the county to make findings
17 concerning the conversion of this land from rural to
18 urbanizable land.

19 We are unable to tell, from the map showing the area of the
20 subdivision included in the notice of the hearing and the maps
21 appearing in the comprehensive plan, precisely where this
22 property is located. For the purposes of our review, we
23 believe it only necessary to say that the county must address
24 the statewide planning goals and the relevant portions of its
25 comprehensive plan. A review of the record shows an apparent
26 failure to do so as there are no findings in the record even

1 discussing the statewide goals and the comprehensive plan.
2 Insofar as Assignment of Error No. 4 is a restatement of
3 Assignment of Error No. 2, it is unnecessary for us to sustain
4 this assignment of error. Insofar as this assignment of error
5 alleges a failure to consider the comprehensive plan, the
6 assignment of error is sustained.

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8 ASSIGNMENT OF ERROR NO. 5

9 Assignment of Error No. 5 asserts that "the Jefferson
10 County A-3 zone of the Comprehensive Plan as it relates to
11 limited agricultural use is inconsistent with Goal 3." The
12 Jefferson County Comprehensive Plan and the Jefferson County
13 Zoning Ordinance are not on appeal to this Board. The
14 Jefferson County Comprehensive Plan and Zoning Ordinances were
15 adopted long before this Board came into existence and we have
16 no power in this case to review them. If petitioner is
17 attacking the zone and the plan through their application, we
18 still must deny the assignment of error. The plan and zone
19 designations of this land were not shown to have occurred
20 within the time limits in Oregon Laws 1979, ch 772.

21 ASSIGNMENT OF ERROR NO. 6

22 Petitioner asserts that "[T]here is no evidence in the
23 record indicating where, if ever, a conditional use was
24 granted." Petitioner notes that a conditional use is necessary
25 for a subdivision approval in Jefferson County. The property
26 in question was zoned A-3, and a review of the Jefferson County

1 Zoning Ordinance at Section 3.050, does list "subdivision" as a
2 conditional use requiring planning commission approval.
3 Petitioner is correct that there is no evidence in the record
4 showing that a conditional use was granted or even considered.
5 This assignment of error is sustained.

6 CONCLUSION AND ORDER

7 As mentioned earlier, respondent asks that the Board remand
8 rather than reverse the decision of the county court. Our
9 review of the record does not show sufficient basic evidence in
10 the record concerning the consideration and application of the
11 statewide goals and guidelines to make a remand worth the
12 county's time. However, there are tapes of the planning
13 commission and county court proceedings which may include
14 testimony sufficient for the county court to arrive at findings
15 and conclusions necessary to support this subdivision and the
16 necessary conditional use that goes along with any subdivision
17 approval in the A-3 zone. The Board will accept respondent's
18 request that the matter be remanded with the understanding that
19 the subdivision approval is nonetheless ineffective until the
20 county court makes the required findings and complies with its
21 own plan and ordinances. If the record does not enable the
22 county court to so act, then, of course, the subdivision
23 approval will remain ineffective.

24 The approval of the Mt. Jefferson Subdivision by the
25 Jefferson County Court is reversed and remanded for action by
26 the county consistent with this opinion.

FOOTNOTE

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We note in support of our conclusion that the record shows no attempt to limit the scope of review whether in the notices of the pending county court hearings or in the conduct of the hearings. In addition, the county court journal entry recites that the approval of the subdivision was based on the "findings adopted by planning commission." There is no note in the journal entry to suggest that the planning commission action was simply modified by the removal of conditions based on a review only of the conditions.