

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUN 23 1 36 PM '80

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3	HELEN J. WRIGHT,)	
4)	LUBA No. 80-010
5	Petitioner,)	
6)	
7	vs.)	OPINION AND ORDER
8)	
9	MARION COUNTY BOARD OF)	
10	COMMISSIONERS,)	
11)	
12	Respondent.)	

Appeal from Marion County.

Robert E. Stacey, Jr., Portland, argued the cause and filed a petition for review on behalf of Petitioner Helen J. Wright.

Marion County did not participate orally or by submission of a brief.

William B. Wyllie, Salem, argued the cause and filed a brief for Respondent Carpenters

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

Reversed and Remanded. June 23, 1980

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

1 REYNOLDS, Chief Referee.

2 NATURE OF THE DECISION

3 This appeal involves the validity of Marion County's order
4 granting tentative plat approval to the subdivision into ten
5 lots of a 13.09 acre parcel of agricultural land located within
6 an industrial zone but outside any adopted urban growth
7 boundary. Petitioners challenge the decision on the basis that
8 it violates Goal 3 inasmuch as no valid exception was taken by
9 the county. Petitioners contend the exception was not valid
10 because:

- 11 A. Proper notice was not given that the exception was to
12 be taken;
13 B. The exception was not taken to the comprehensive plan;
14 C. The exception findings were not adequate to support an
15 exception; and
16 D. The findings, if adequate, were not supported by
17 substantial evidence.

17 STATEMENT OF FACT

18 Respondents Carpenters applied to Marion County for
19 permission to subdivide a 13.09 acre parcel into ten lots. The
20 parcel is located east of Salem and outside Salem's urban
21 growth boundary. The parcel consists of class 2 and 4 silt
22 loam soils and has been used in the past for agriculture. The
23 lands adjoining the parcel on both the east and west are in
24 active farm use. Petitioner owns 44 acres immediately adjacent
25 to the parcel on the east side, which she farms.

26 At the time the subdivision application was made, the

1 property was zoned IP by Marion County. As part of a
2 comprehensive revision of its zoning ordinances, Marion County
3 subsequently zoned the property IR (Rural Industrial). Under
4 this zoning ordinance, the application of which was struck down
5 in 1000 Friends vs. Marion County, _____ Or LUBA _____
6 (1980),¹ various "low intensity" industrial uses are
7 permitted when they "do not require urban services for their
8 operations." The IR zone also permits, as a conditional use,
9 any industrial use not requiring urban services, subject to
10 criteria stated in the text. Marion County Ordinance No. 516,
11 ch 163 (as amended by Ordinance No. 562, October 17, 1979).

12 The staff report considered by the planning commission at
13 its first and only public hearing, at which testimony was
14 received from "parties" to the proceeding, did not analyze the
15 approval of the subdivision in light of the statewide planning
16 goals. 1000 Friends of Oregon appeared at this hearing and
17 testified that the county had to consider goal 3 and take an
18 exception to goal 3 if it were to approve the subdivision. The
19 planning commission closed the public hearing and directed its
20 staff to prepare a report which analyzed the subdivision in
21 light of the statewide goals (principally goal 3 and goal 2)
22 for submittal to the planning commission's November 9, 1979
23 meeting.

24 At its November 9 meeting, the planning commission
25 considered the staff report which purported to analyze the
26 subdivision under the exceptions procedure in goal 2. The

1 public hearing was not reopened for purposes of discussion of
2 the staff report or receipt of new testimony or evidence. The
3 minutes of the planning commission's hearing do not indicate
4 whether anyone requested that the public hearing be reopened.
5 After a brief discussion of the planning staff report, the
6 planning commission voted unanimously to approve the
7 subdivision based upon the staff report.

8 Petitioner appealed the planning commission's approval of
9 the subdivision to the Board of Commissioners on December 5,
10 1979. On December 12, 1979, the Board of Commissioners voted
11 to deny the appeal. In doing so, the Board of Commissioners
12 adopted the findings and conclusions of the planning
13 commission.

14 The Board of Commissioners' final order incorporating the
15 planning staff report finds that the "property is agricultural
16 land under the requirements of state land use goal number 3 and
17 a goal exception must be justified before the land can be
18 committed to non-agricultural uses." The report then states:

19 "The exceptions procedure requires that the need
20 for the proposed use, its possible alternative
21 locations, the long term effects of the proposal and
22 the compatibility with adjacent uses be addressed in
the exceptions process. The following discussion will
address each of these categories." (Emphasis
added).²

23 With respect to the need for the proposed use, the report
24 states that Marion County has a need for locating low intensity
25 industrial uses not requiring urban services outside the urban
26 growth boundary so as to reserve adequate space within the

1 urban growth boundary for those types of industries that
2 require an urban level of services. The report also states
3 that "industrial land outside of urban areas is also needed to
4 accommodate those industrial uses that must locate close to
5 resources or market areas as a function of their specific
6 operating characteristics." The report notes that it is
7 appropriate to locate certain agricultural industries near
8 agricultural operations in order to "minimize transportation
9 costs or take maximum advantage of the value added through a
10 processing activity." The report stated that at the
11 comprehensive plan hearings there was "considerable evidence .
12 . . . indicating a lack of such industrial areas and supporting
13 the designation of the State Street industrial area for rural
14 industrial use."³

15 Concerning "possible alternative locations" the staff
16 report finds that the location of the parcel in question is
17 appropriate because of its close proximity to the City of Salem
18 and the availability of access from the site to a major
19 thoroughfare. The report then states:

20 "This land has been zoned for industrial use of
21 various kinds for more than fourteen years. Several
22 industrial operations covering approximately 52 acres
23 have located in this area since it was zoned and many
24 of the remaining vacant parcels have been purchased
25 and planned for industrial uses. In the evaluation of
26 rural industrial land needs, other potential areas
were evaluated. It was determined that the
combination of existing uses, heavy expectation and
commitment by individuals and locational factors make
the State Street industrial area the best location for
the type of development proposed. The option of
designating numerous other small rural industrial

1 areas was rejected in favor of a concentrated larger
2 area because of the potential benefits from clustering
3 rural industrial uses and the fact that one larger
4 area is easier to buffer from surrounding land uses
5 than numerous scattered rural and industrial areas.
6 The area originally zoned industrial was reduced
7 significantly in the Comprehensive Plan when it was
8 determined that the easterly portion was more
9 industrial area than could be justified up to the year
10 2000 and was suitable for continued agricultural use.
11 The proposed industrial subdivision is in the portion
12 of the industrial area nearest the Urban Growth
13 Boundary and is the most advantageous area for early
14 development. Most of the industrial land to the west
15 of the proposal is part of a large power generating
16 facility."⁴

17 Concerning the long term effects of the proposed use on the
18 property, the report states that the most significant adverse
19 effect would be the loss of agricultural land. However, the
20 report notes that with residential development on lands to the
21 north the agricultural capabilities of a "potentially
22 productive parcel" could be jeopardized. The report then
23 states that "an industrial development containing the low
24 intensity uses allowed in the IR zone would, in the long run,
25 be more compatible with nearby residences than an intensive
26 agricultural operation." No reasons for these conclusions,
27 however, are contained in the report.

28 Although the proposed development of the property "will
29 alter the nature of the general area from one of open
30 agricultural tracts and residential properties to include
31 developed, small industrial parcels," the report states that
32 this alteration will be compatible with and will not produce
33 any significant adverse impacts on surrounding lands because

1 "this alteration will be contained within the relatively narrow
2 strip designated for industrial use." The report found that
3 the wide railroad right of way on the north and State Street on
4 the south would serve as buffers to isolate the industrial area
5 from surrounding agricultural and residential lands.

6 OPINION ON THE MERITS

7 1. First Assignment of Error.

8 Petitioner's first assignment of error is that Marion
9 County failed to properly comply with goal 3 which requires
10 that either a division of agricultural land must be supported
11 by findings demonstrating that the lots to be created are
12 appropriate for continuing the existing commercial agricultural
13 enterprise or that each proposed lot meets the criteria for
14 non-farm uses set forth in ORS 215.213. Petitioner contends
15 that the county made neither finding in this case and because
16 its exception to goal 3 was inadequate, goal 3 has been
17 violated. Respondent states that Goal 3 was not violated
18 because the county properly took an exception to goal 3.
19 Whether, therefore, goal 3 has been violated depends upon
20 whether the exception to goal 3 was valid.

21 2. Second Assignment of Error.

22 Petitioner's second assignment of error challenges on
23 procedural grounds the exception which was purportedly taken
24 by the County. First, petitioner argues that the county's
25 notice of hearing failed to specifically note the proposed
26 exception or to summarize the issues in a meaningful way as

1 required by goal 2. Second, the county failed to include the
2 exception and its justification in the county comprehensive
3 plan, also as required by goal 2. We deal with the second
4 aspect of this assignment of error first.

5 Respondent's argument in response to the alleged failure to
6 take an exception to the comprehensive plan is, essentially,
7 the Board cannot know whether the exception was or was not
8 amended into the comprehensive plan since petitioner has not
9 alleged that she or her counsel have seen the comprehensive
10 plan. Moreover, respondent asserts that "it could be argued
11 that this very act of the planning commission adopting an
12 exception is tantamount (sic) to adopting that exception as part
13 of its plan." In addition, respondent argues that since Marion
14 County's comprehensive plan has for many years zoned this
15 parcel and adjacent parcels for industrial purposes "an
16 exception to agricultural purposes is hardly required."

17 Petitioner's argument that goal 2 has been violated because
18 the exception was not taken to the comprehensive plan is well
19 taken. There is nothing in the record in this particular case
20 to suggest that the action of the planning commission could be
21 construed as an amendment of the comprehensive plan for Marion
22 County.

23 Goal 2, Part II - Exceptions, provides, in pertinent part,
24 as follows:

25 "When, during the application of the statewide
26 goals to plans, it appears that it is not possible to
apply the appropriate goal to specific properties or

1 situations, then each proposed exception to a goal
2 shall be set forth during the plan preparation phases
3 and also specifically noted in the notices of public
hearing. The notices of hearing shall summarize the
issues in an understandable and meaningful manner.

4 "If the exception to the goal is adopted, then
5 the compelling reasons and facts for that conclusion
shall be completely set forth in the plan"

6 An LCDC policy paper concerning the exceptions process,
7 "common questions about the exceptions process relating to the
8 preparation of comprehensive plans" and the subsequent policy
9 paper, "common questions concerning the exceptions process as
10 it relates to land use decisions prior to an acknowledged
11 comprehensive plan" indicate that where an exception is
12 required, it must be done as part of the comprehensive plan
13 adoption or amendment process. Section 5(C) of the policy
14 paper states:

15 "If a city or county determines that an exception
16 is justified, compelling reasons and facts justifying
the exception must be documented (referenced and
17 appended) in the plan."

18 Section 19 of the policy paper, which section relates to
19 the exceptions process prior to acknowledgment, states, in
20 pertinent part, as follows:

21 "* * * The findings and reasons for the exception
22 must be adopted as part of the newly revised
comprehensive plan or amended into the existing plan.

23 "The rationale for requiring exceptions to be an
24 amendment to the plan is as follows:

25 "Recent court cases have determined that the
26 statewide planning goals apply to interim land use
actions. The practical result of these court
decisions has been, in effect, to include in existing
comprehensive plans those goal provisions which

1 contain site specific requirements. Therefore, a
2 local jurisdiction cannot take an action that is
3 inconsistent with those goals without amending its
4 current plan or adopting an element of its new plan."

5 The policy paper states that the only time an exception is
6 not required for goals 3 and 4 is when findings can be made that
7 the land is: (a) physically developed or built upon or, (b)
8 irrevocably committed to non-farm or non-forest uses in urban or
9 rural areas. Section 14. The policy paper makes it quite clear,
10 however, that an exception is required when "agricultural and
11 forest lands are available for agricultural and forest uses,
12 [i.e. not committed or built upon] but are needed for a use not
13 allowed by goals 3 and 4." Section 14.

14 Because goal 2 has been violated as a result of the county's
15 failure to take an exception as part of the comprehensive plan
16 adoption or amendment process, we must reverse. Oregon Laws
17 1979, ch 772, § 4(b). In light of our conclusion as to the
18 second half of petitioner's second assignment of error, it is not
19 necessary to decide whether the notice received by petitioner was
20 adequate under goal 2. Only if the county had taken an exception
21 to its comprehensive plan would we need to review other aspects
22 of the taking of that exception, including whether the notice was
23 proper.

24 3. Third Assignment of Error.⁵

25 Petitioner's third assignment of error asserts that Marion
26 County failed to demonstrate, with compelling reasons and facts
that it is not possible to apply goal 3 to the subject parcel

1 because the county failed to demonstrate a need for the land for
2 industrial uses and failed to demonstrate that there was a lack
3 of alternative sites for industrial use.

4 The "need" finding of Marion County is set out in the
5 statement of facts. To summarize this statement, Marion County
6 found that there was a need to allow industrial uses of property
7 not requiring urban services to locate outside an urban growth
8 boundary so as to preserve within the urban growth boundary lands
9 for industrial uses which do need urban services.

10 The applicants contend that the county's finding of need
11 summarized above and the finding that industrial land outside of
12 urban areas is needed to "accommodate" those industrial uses that
13 must locate close to resources and market areas as a function of
14 their operating characteristics" are reasonable and are
15 substantiated by facts in the record.

16 The "need" finding is a policy statement of Marion County
17 that it does not want to locate industrial uses not requiring
18 urban services within the urban growth boundary so as to preserve
19 those lands for industrial uses which require urban services.
20 Yet, there is nothing in any of the statewide goals which
21 remotely suggests that just because an industry does not require
22 public sewers, public water or an urban level of police or fire
23 protection that it may or needs to be located outside an urban
24 growth boundary. Rather, the definition of "Rural Lands"
25 contained in the goals⁶ and the concept of urban growth

26 / /

1 boundaries to contain urban sprawl and preserve agricultural land
2 militate against any interpretation of the goals that industrial
3 uses (other than those permitted in farm or forest zones, see ORS
4 215.203, 215.213(2), Goal 4) may or, in fact, need to be located
5 outside urban growth boundaries.

6 If non-farm or non-forest related industries may or, as
7 Marion County found, need to be located outside an urban growth
8 boundary on prime agricultural soil because they do not require
9 an urban level of services, then certainly the same must hold
10 true for non-farm or non-forest related housing not requiring an
11 urban level of services. Just as Still v. Board of County
12 Comm'rs., 42 Or App 115, 600 P2d 433 (1979) stands for the
13 proposition that the need for housing must be satisfied by land
14 located within an urban growth boundary, so must also the need
15 for industrial uses be satisfied by land located within an urban
16 growth boundary. If sufficient land does not exist, then it is
17 the responsibility of the county and the city to amend the
18 boundary. The county may not simply take agricultural land
19 outside the boundary and designate it for non-farm or non-forest
20 related industrial uses.

21 In the present case, the county erred, first, because it
22 failed to determine that there was not an adequate supply of land
23 within the urban growth boundary to satisfy the industrial needs
24 of the area. The county erred, second, because instead of

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26 / /

1 amending the urban growth boundary to add lands which would be
2 suitable and available, it simply allowed the subdivision of
3 agricultural land for industrial purposes outside the urban
4 growth boundary.

5 Marion County's elimination of all lands within the urban
6 growth boundary as possible alternative sites for industrial uses
7 permitted in the IR zone is not permissible under Goal 2 just
8 because Marion County thinks it makes good policy. It is not,
9 within the meaning of the goal 2 exceptions process, impossible
10 for Marion County to locate these kinds of industrial uses within
11 the urban growth boundary. It is only that Marion County chooses
12 not to do so. This is insufficient under the goal 2 standard
13 which requires a showing that "it is not possible to apply the
14 appropriate goal to specific properties or situations."

15 4. Fourth Assignment of Error.

16 Petitioner's fourth assignment of error is that even if the
17 conclusions of Marion County with respect to need and alternative
18 sites were adequate under the goal 2 exceptions process, these
19 findings are not supported by substantial evidence. In view of
20 the conclusions in the preceding section under petitioner's third
21 assignment of error that these findings are not sufficient under
22 goal 2, it is not necessary to examine the fourth assignment of
23 error in great detail.

24 1. Evidence supporting finding that there is a need for low
25 intensity industrial uses outside of urban areas.

26 Petitioner states there is no evidence supporting this

1 conclusion. The applicant cites us to no specific evidence
2 supporting this conclusion except to say "the report adopted by
3 respondent contains substantial evidence supporting the
4 conclusion[s]." The applicant notes that respondent's report
5 states that "considerable evidence has been presented at the
6 comprehensive plan hearings establishing a need for such rural
7 and industrial land," and that "the evidence in support of the
8 respondent's other conclusions is even more extensive." Again,
9 however, the applicant cites us to no specific evidence.

10 It appears that the only support for the finding of "need" in
11 this case is Marion County's policy determination that "lands
12 within urban growth boundaries should be reserved for those types
13 of industries that require such services." However, since Marion
14 County was not permitted to make this kind of a policy decision
15 under the goals, this policy decision is not evidence supporting
16 Marion County's finding that there is a need to allow industries
17 not requiring urban services to locate outside urban growth
18 boundaries.

19 2. Evidence that certain industries must locate close to
20 resources or market areas as a function of their specific
21 operating characteristics.

22 Petitioner contends that there is no evidence supporting this
23 conclusion. Applicants cite no specific evidence supporting this
24 conclusion either, except to generally note that the report
25 contains ample evidence. In any event, we have reviewed the
26 record and have found no evidence as to what industries must

1 locate close to what resources or market areas, nor what specific
2 operating characteristics are involved. The evidence was
3 apparently gathered by Marion County during its plan and zoning
4 hearings, but was not made part of the record in the subdivision
5 proceeding.

6 3. Evidence that there is a lack of industrial areas outside
7 of urban growth boundaries and this site is supported for such
8 use.

9 Petitioner contends that there is no evidence in this record
10 supporting the conclusion that there is a lack of industrial
11 areas outside urban growth boundaries. The report notes that
12 "considerable evidence was presented at the recent comprehensive
13 plan hearings indicating a lack of such industrial areas and
14 supporting the designation of the State Street industrial area
15 for rural industrial use." That evidence, however, was not made
16 a part of this record. There is, therefore, no evidence in the
17 record before us of a lack of industrial areas outside urban
18 growth boundaries.

19 4. Evidence that "the combination of existing uses, heavy
20 expectation and commitment by individuals and locational factors"
21 make this site the "best location" for rural industrial uses.

22 Petitioners contend there is no evidence supporting this
23 conclusion. The report notes that

24 "This land has been zoned for industrial use of
25 various kinds for more than 14 years. Several
26 industrial operations covering approximately 52 acres
of the remaining vacant parcels have been purchased

1 and planned for industrial uses. In the evaluation
2 of rural industrial land needs other potential areas
were evaluated."

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4 The specific conclusion cited by petitioner is preceded by
5 the phrase "it was determined that the combination of existing
6 uses" (Emphasis added). Presumably, the determination
7 to which petitioners refer was made in the comprehensive
8 planning process. Again, however, no evidence from the
9 comprehensive planning process was introduced into the record
10 of this land use decision.

11 5. Evidence that the site is part of "the most
12 advantageous area for early development."

13 Petitioner contends that this conclusion is not supported
14 by evidence in the record. The report states

15 "The proposed industrial subdivision is in the
16 portion of the industrial area nearest the Urban
17 Growth Boundary and is the most advantageous area for
early development. Most of the industrial land to the
west of the proposal is part of a large power
generating facility."

18 Perhaps Marion County's "evidence" in support of the conclusion
19 that this is "the most advantageous area for early development"
20 is based upon the fact that the property is "nearest the urban
21 growth boundary of any other portion of the industrial
22 subdivision. However, Marion County made no finding as to why
23 this parcel was "the most advantageous." Why proximity to the
24 urban growth boundary is important, unless the area is to
25 receive urban services, is not stated. It appears that we
26 cannot say that the finding that the property is "the most

1 advantageous area for early development" is supported by
2 evidence in the record.

3 CONCLUSION

4 Marion County has violated goal 2 because the exception
5 which it purported to take to allow this subdivision was not
6 made part of its comprehensive plan as required by goal 2. It
7 also violated goal 2 because its findings of need and lack of
8 alternative available sites do not meet the goal 2 requirements
9 for need and lack of alternative available sites, and its
10 findings, even if adequate, are not supported by substantial
11 evidence in the record.

12 For the foregoing reasons, the decision of Marion County in
13 this matter is reversed and is remanded to the county for
14 further proceedings and consideration consistent with this
15 opinion.

16 Reversed and Remanded.
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1 FOOTNOTES

2 1
3 The Board's order in 1000 Friends vs. Marion County, supra,
4 invalidated the rezoning of lands IR pursuant to Ordinance 562
5 on the basis that no valid exception to Goal 3 was taken in the
6 adoption of Ordinance 562.

7 2
8 We note that Goal 2 requires more than simply addressing
9 the factors mentioned in the staff report. Goal 2 states:

10 "If the exception to the goal is adopted, then
11 the compelling reasons and facts for that conclusion
12 shall be completely set forth in the plan and shall
13 include:

14 "(a) Why these other uses should be provided for;

15 "(b) What alternative locations within the area
16 could be used for the proposed uses;

17 "(c) What are the long term environmental,
18 economic, social and energy consequences to the
19 locality, the region or the state from not applying
20 the goal or permitting the alternative use;

21 "(d) A finding that the proposed uses will be
22 compatible with other adjacent uses."

23 Findings with respect to the above factors must be made for
24 the purpose of showing why "it appears it is not possible to
25 apply the appropriate goal to specific properties or situations
26 . . ." (Goal 2, Part II). Thus, by addressing the factors one
does not satisfy the exceptions process, unless findings are
made and those findings contain "compelling reasons and facts"
(Goal 2, Part II) which justify the conclusion that it is not
possible to apply the goal involved.

27 3
28 The evidence referred to by the report was not made part of
29 the record in this subdivision proceeding.

30 4
31 The evidence, if any, which might support the conclusions
32 analyzed by this portion of the staff report was not made part
33 of the record of this subdivision proceeding.

1 (FOOTNOTES, Cont.)

2 5

3 The Proposed Opinion and Order in the above captioned
4 matter was submitted to LCDC in accordance with Oregon Laws
5 1979 ch 772, sec 6. LCDC's Determination states as follows:

6 The Board has elected to include in its Final
7 Opinion and Order its discussion of Assignments of
8 Error #3 and #4 with the caveat to the reader that it
9 has not been specifically approved or rejected by LCDC.

10 6

11 "Rural Lands" is defined in the Goals as:

12 ". . . those which are outside the urban growth
13 boundary and are:

14 "(a) Non-urban agricultural, forest or open
15 space lands or;

16 "(b) Other lands suitable for sparse
17 settlement, small farms or acreage homesites with no
18 or hardly any public services, and which are not
19 suitable, necessary or intended for urban uses."