

1 REYNOLDS, Chief Referee

2 NATURE OF THE PROCEEDINGS

3 Petitioners appeal the granting of a zone change by Malheur
4 County from F-2 to R-1 (rural residential, one acre minimum lot
5 size) for approximately 32 acres of class 2 and 4 soil located
6 outside of the urban growth boundary for the City of Ontario.

7 SUMMARY OF ARGUMENT

8 Petitioners assignments of error are summarized in the
9 following from their Petition for Review:

10 "In summary, the final order in this case, dated
11 April 23, 1980, should be reversed upon the grounds
12 that: (1) The court below failed to give adequate,
13 timely and meaningful notice as required by the county
14 code, Oregon Statute and the LCDC Goals and
15 Guidelines; (2) The court below improperly applied
16 the LCDC goals and failed to properly apply the
17 exceptions process for agricultural lands as required
18 by LCDC Goals 2 and 3 and the guidelines thereto; (3)
19 The court's findings are non compelling with respect
20 to the exceptions process, inconsistent and
21 constitutes mere recital of evidence as opposed to
22 findings of fact to support its conclusions of law;
23 (4) The court failed to consider the whole record;
24 (5) The court has participated in a consistent pattern
25 of ex-parte contact which has denied petitioners
26 fundamental fairness."

19 FACTS

20 Lem Wilson and Jim Abbe petitioned for a zone change from
21 F-2 to R-1 to allow development of 32 acres of class 2 and 4
22 soil into approximately 23 rural residential home sites. The
23 property is located approximately 4 miles from the City of
24 Ontario and is outside of the city's urban growth boundary.

25 Malheur County recognized that Goal 3 was applicable to the
26 zone change request and attempted to take an exception to

1 it.¹ With respect to the question of need for the zone
2 change, the first factor which must be addressed in the
3 exceptions process, the opinion and order of the county
4 provides as follows:

5 "The petitioners have addressed the question of
6 whether there is a need for the zone change. Lem
7 Wilson has submitted statements of findings of fact by
8 the County Planning Department relating to the urban
9 growth boundary for the City of Ontario. Among those
10 findings, the Planning Department concludes,

11 "The urban growth boundary for the City
12 of Ontario is adequate in size if the low
13 development estimates are not exceeded.
14 However, if the high development estimates
15 are met, the urban growth boundary is not
16 large enough. With the possibility that the
17 urban growth boundary will not be large
18 enough, the County must take on the
19 responsibility of allowing room for the
20 needed growth. This could be in the form of
21 rural residential zones.

22 "According to exhibit No. 3, Roy Probasco,
23 Executive Vice President of the Ontario Chamber of
24 Commerce, testified that based upon present growth
25 trends, Ontario will exceed the urban growth
26 boundaries in the next two (2) years.

"According to an Ontario Chamber of Commerce
Study contained in Exhibit No. 3, the Ontario urban
area, which includes the population close to the
Ontario city limits, has grown from 10,000 people in
1975, to 15,000 people in 1979, an increase of fifty
percent (50%) in five years.

"Exhibit No. 11 is a construction report for the
City of Ontario, showing the number of building
permits issued annually in the City of Ontario. In
1970, forty-one (41) such permits were issued for
dwellings. In 1977, one hundred (100) such permits
were issued. In 1978, the number was one hundred
eleven (111). From 1970 through 1978, building
permits for a total of six hundred and twenty-three
(623) dwellings were issued. Based upon the foregoing
evidence, the Court finds that there is a strong
growth trend in the Ontario area, requiring the

1 development of additional housing sites.

2 "The realtors in the area confirm that there is a
3 strong market demand for the kind of lots provided in
4 an R-1 zone, and that such lots are in scarce supply
5 in the Ontario area. In a letter contained in Exhibit
6 No. 3 and in testimony to the County Court, Dean
7 Bertalotto, an Ontario realtor, stated that he always
8 has clients looking for a country parcel to build a
9 home or to buy an existing home in the country, and it
10 is almost impossible to find these parcels. Letters
11 from Ontario realtors Gary Goodfellow and Jim Weber,
12 contained in Exhibit No. 3, share the view of Mr.
13 Bertalotto.

8 "In testimony to the Court, a realtor from
9 Village Realty in Ontario testified that there is a
10 special need for rural residential parcels of less
11 than five (5) acres. He testified that many people
12 who are seeking rural housing simply want enough room
13 for a house, a garden and perhaps some animals, and
14 that lots of five (5) acres or more are too large to
15 maintain except as part of an extensive farming or
16 ranching operation. Lem Wilson offered similar
17 testimony.

14 "As set forth in Exhibit No. 3, in a letter from
15 William Buxton, City Engineer for the City of Ontario,
16 to County Planning Director Jon Beal, the Ontario
17 Planning Commission voted on April 9, 1979, to
18 recommend approval of the zone change from F-2 to R-1
19 to allow one acre sites.

17 "In considering the testimony and exhibits, the
18 County Court finds that, not only is there a need for
19 additional housing in the Ontario area, but there is a
20 need for rural non-farm housing available in an R-1
21 zone but in an F-2 zone."

20 OPINION

21 Petitioner's first assignment of error is that the county
22 erred in failing to give notice that an exception to Goal 3 was
23 proposed in its notices of public hearing in violation of Goal
24 2, Part II, Exceptions. The pertinent portion of Goal 2
25 provides as follows:
26

1 "When, during the application of the statewide
2 goals to plans, it appears that it is not possible to
3 apply the appropriate goal to specific property or
4 situations, then each proposed exception to a goal
5 shall be set forth during the plan preparation phases
6 and also specifically noted in the notices of public
7 hearing. The notices of hearing shall summarize the
8 issues in an understandable and meaningful manner."

9 In its policy paper on the exceptions process,² LCDC has
10 described the type of notice required:

11 "5.A. Goal number 2 requires that the intent to
12 take an exception should be communicated widely, and
13 should begin as soon as it becomes apparent that a
14 Goal cannot be applied to a particular area. Adequate
15 notice and time to review and comment on the proposed
16 Exception should be provided. The LCDC Field
17 Representative must also be notified promptly of the
18 intent to take an exception.

19 "B. When the comprehensive plan, plan element or
20 amendment reaches the public hearings stage, Goal 2
21 requires that the public notices must describe each
22 proposed Exception. At a minimum the notice should
23 indicate that an Exception to a specific Goal is being
24 discussed, and should summarize the location of the
25 Exception and the issues involved. Specific
26 opportunities for comment on the proposed Exception
27 shall be provided at the public hearing (s)."

28 In the present case, the need to take an exception to Goal
29 3 for the proposed zone change first became apparent to Malheur
30 County when the planning director in a memo dated April 24,
31 1979, to the Malheur County planning commission, stated the
32 following:

33 "Should this area be rezoned from farm use to
34 rural residential an exception to LCDC Goal 3
35 (Agricultural Lands) would have to be taken under the
36 procedure set forth in Part II, LCDC Goal 2 (Land Use
37 Planning). I have attached the current LCDC policy
38 paper regarding the "Exceptions Process" for your
39 information.***"

40 The notices of public hearing in the present case, both

1 those published in the newspapers and those mailed to property
2 owners in the area, do not mention that an exception is
3 proposed to be taken let alone describe any of the issues
4 involved in the exceptions process.³ Petitioner's first
5 assignment of error is sustained.

6 Petitioner's second assignment of error is that the county
7 failed to properly take an exception to Goal 3 in rezoning the
8 parcel from F-2 to R-1. In Wright v. Marion County, ___ Or
9 LUBA ___, (LUBA No. 80-010, 1980), we concluded that in order
10 for an exception to be valid under Goal 2, the exception must
11 be taken as part of the comprehensive planning process. In
12 other words, the exception and its justification must be
13 included in the county's comprehensive plan either by way of an
14 amendment to an existing comprehensive plan or in the process
15 of adopting a new comprehensive plan. Referring to the LCDC
16 policy paper on the exceptions process we said:

17 "The policy paper states that the only time an
18 exception is not required for Goals 3 and 4 is when
19 findings can be made that the land is: (a) Physically
20 developed or built upon or, (b) irrevocably committed
21 to non-farm or non-forest uses in urban or rural
22 areas. Section 14. The policy paper makes it quite
23 clear, however, that an exception is required when
24 "agricultural and forest lands are available for
25 agricultural and forest uses, [i.e. not committed or
26 built upon] but are needed for use not allowed by Goal
27 3 and 4." Section 14. Wright v. Marion County at
28 page 9.

29 In the present case, Malheur County attempted to base the
30 exception upon need rather than precommitment to urban uses.
31 There is nothing, however, in the opinion and order of the

1 county which amends the comprehensive plan for Malheur County
2 by incorporating therein the findings contained in the opinion
3 and order. The opinion and order simply grants the zone change
4 without also amending the comprehensive plan. Because it
5 failed to take the exception to the comprehensive plan, we must
6 reverse.⁴

7 In addition to the procedural failure discussed above,
8 Malheur County's exception is not adequate on substantive
9 grounds. In Still v. Marion County, 42 Or App 115, ___P2d___
10 (1979), the Court of Appeals addressed the validity of an
11 exception taken by Marion County to allow the subdivision of a
12 99 acre parcel of rural land into 30 lots of various sizes. As
13 in the present case, the property at issue in Still was located
14 outside city limits and outside any urban growth boundary.
15 Concerning the county's finding of need, the Court stated:

16 "The Board's conclusion that there is a need for
17 the proposed development in Marion County is based on
18 its finding that there is a scarcity of similar lots,
19 as indicated by the price and small number of similar
20 lots on the market. This correctly summarizes the
21 evidence, which shows that there is a market for
22 residential lots of the kind in the proposed
23 subdivision. A market demand for rural residential
24 development, however, does not constitute a "need" for
25 it, as that word is used in Goal 2. Goal 3 was
26 enacted to preserve agricultural land from
encroachment by urban and suburban sprawl by
subordinating the free play of the market place to
broader public policy objectives. Land is not
excepted from the agricultural goal merely because
somebody wants to buy it for a house.

25 "A determination of whether this land is needed
26 for residences should be made in accordance with Goal
10, Housing, which mandates that local government
should designate sufficient suitable land within the

1 urban growth boundary to meet residential needs. There
2 is no showing in the record that no suitable land is
3 available inside the urban growth boundary for
4 residential use. The Board's finding regarding need
5 misconstrues the applicable legal standard and is not
6 supported by substantial evidence." Still v. Board of
7 County Commissioners, 42 Or App 115 at 122-123, __
8 P2d ___ (1979).

9 In the present case, Malheur County based its "need"
10 determination upon market demand for one acre rural residential
11 lots and its conclusion that population growth within the
12 Ontario urban growth boundary would soon exhaust the supply of
13 land available for residential home sites. As the court in
14 Still correctly points out, the fact that there is a market
15 demand for one acre rural homesites does not satisfy the "need"
16 requirement in Goal 2, Part II, Exceptions. Nor does the fact
17 that Ontario may in the near future exhaust the supply of
18 available land within its urban growth boundary give rise to a
19 "need" to use agricultural land located outside the urban
20 growth boundary for Ontario's housing needs. If the Ontario
21 urban growth boundary is too small to accommodate Ontario's
22 population, then it must be amended to include more land for
23 residential housing needs. A county may not use agricultural
24 land located outside urban growth boundaries to satisfy housing
25 needs because those needs must be satisfied under Goal 10 by
26 using land within urban growth boundaries. Cf Still v. Board
of County Commissioners, supra.

For the foregoing reasons, the opinion and order of Malheur
County must be reversed.⁵

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

1 In a memo from the planning director to the Malheur County Planning Commission, the planning director pointed out that an exception would be needed for the zone change request and that:

"If an exception was taken, the exception, including the findings of fact would then have to be adopted as an element of the new comprehensive plan."

2 See LCDC policy paper "Common Questions About The Exceptions Process Relating To The Preparation of Comprehensive Plans" and the subsequent policy paper "Common Questions Concerning The Exceptions Process As It Relates To Land Use Decisions Prior To An Acknowledged Comprehensive Plan." This policy paper was attached to the planning director's memo to the planning commission mentioned in footnote 1, supra.

3 The published and mailed notices were virtually the same in content. For example, the published notice for the hearing on November 26, 1979 stated as follows:

"The Malheur County court advises that a public hearing will be held regarding the petition for zone change from F-2 General Farm Use Zone to R-1 Rural Residential Zone for the following described property:

Tax Lot #5400 of Section 15, T17 S, R47 E located on Map #1747 B.

Petitioners are Lem Wilson and Jim Abbe of Ontario, Oregon. The hearing will be held in the conference room of the Malheur County Library, Ontario, Oregon, November 26, at 7:30 p.m."

4 Respondents-Applicants Wilson and Abbe have contended that inasmuch as Malheur County has not adopted a comprehensive plan it is impossible for the county to take an exception to its plan at this time. While Malheur County does have a proposed draft comprehensive plan, referred to in the County's Opinion and Order as the "Malheur County Comprehensive Plan," the existence of an adopted plan is irrelevant for purposes of complying with Goal 2, Part II, Exceptions. As petitioners

1 have succinctly stated,

2 "Under respondent's interpretation of LCDC's
3 policy in this area, a governing body would be able to
4 avoid the exceptions process by simply failing to
5 adopt a comprehensive plan prior to rezoning exclusive
6 farm use areas for residential occupancy."
7 Petitioner's letter to the Board dated August 8, 1980.

8 From a mechanical standpoint, we fail to understand why the
9 non-existence of an adopted comprehensive plan is an impediment
10 to taking a proper exception. The county could very well in
11 advance of adoption of its complete plan adopt a portion (which
12 may involve only the area subject to the exception) or element
13 of its plan which includes the area for which the exception is
14 taken. Even if this were impractical, the short answer to
15 respondents-applicants contention would be that the taking of
16 the exception, if one is to be taken, must await the time when
17 it can be done as part of the comprehensive planning process.

18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

5 In view of the foregoing, it is not necessary for the Board
to address petitioners remaining assignments of error.