

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS 9 28 AM '80
OF THE STATE OF OREGON

1
2
3 KEN CALE, DOROTHY CALE,)
4 DOLO CUTTER, JAMES SAUL,)
5 DON PETERMAN, ROBERT)
6 BOEKENOOGEN, LOUISE)
7 BOEKENOOGEN, and MARY)
8 WATERMAN,)
9
10 Petitioners,)
11
12 vs.)
13
14 DESCHUTES COUNTY and)
15 THE CITY OF BEND,)
16
17 Respondents.)

LUBA NOS. 80-016 and 80-030

FINAL OPINION
AND ORDER

11 Appeal from Deschutes County.

12 Daniel E. Van Vactor, Bend, filed the petition for review
13 and argued the cause on behalf of Petitioners. With him on the
14 brief were Van Vactor & Francis.

15 Jill Thompson, Bend, filed a brief and argued the cause for
16 Respondent Deschutes County.

17 Ronald Marceau, Bend, with special permission from the
18 Board argued the cause for Respondent City of Bend but did not
19 file a brief.

20 Reversed and Remanded.

10/02/80

21 You are entitled to judicial review of this order.
22 Judicial review is governed by the provisions of Oregon Laws
23 1979, ch 772, sec 6(a).
24
25
26

1 COX, Referee.

2 Petitioners are appealing a series of three land use
3 decisions made by Respondent Deschutes County which relate to
4 the Bend Municipal Airport. Case No. 80-016 contests
5 Respondent Deschutes County's amendment of its Comprehensive
6 Plan which is known as Ordinance No. PL-20. In this contested
7 action Deschutes County on February 7, 1980, adopted as a part
8 of its Comprehensive Plan the document which has become known
9 as the Land Use Element of the Bend Airport Master Plan.

10 In LUBA Case No. 80-030, petitioners contest two Deschutes
11 County decisions made on March 12, 1980. In the first
12 Deschutes County amended Ordinance PL-20 to provide for an
13 exception to the Agricultural Lands Goal (Statewide Goal No.
14 3). In the second contested decision Deschutes County Zoning
15 Ordinance PL-15 was amended to include an Airport Development
16 (AD) zone. Due to the interrelated nature of these two cases
17 and the necessity to deal with them together to understand the
18 status of Deschutes County's actions regarding the Bend
19 Municipal Airport, this Board has consolidated them.

20 STANDING

21 Respondent Deschutes County contests petitioners' standing
22 by alleging petitioners have failed to show how their interests
23 are adversely affected. Petitioners are neighboring landowners
24 who appeared in the proceedings below. They allege sight and
25 sound impact which will adversely affect the enjoyment and use
26 of their land. The record reveals sufficient facts to support

1 petitioners' standing regardless of whether we characterize the
2 contested actions as quasi-judicial or legislative.

3 JURISDICTION

4 Deschutes County alleges this Board is without jurisdiction
5 to hear this matter because petitioners failed to file their
6 notice of intent to appeal within 30 days of the land use
7 decisions being contested. Deschutes County claims the land
8 use decisions occurred on November 1, 1979 when the County's
9 Comprehensive Plan and a Temporary Airport Development zone
10 were adopted. Based on the facts as set forth below, we find
11 the contested decisions occurred on February 7, 1980 and March
12 12, 1980 respectively. Petitioners notices of intent to appeal
13 were received within 30 days of those dates and, therefore,
14 respondents' allegation is dismissed.

15 ALLEGATIONS OF ERROR

16 Petitioners offer several allegations of error falling
17 within the following four general categories:

18 1. Respondent Deschutes County's decisions failed to
19 comply with local and statewide procedural law governing land
20 use decisions.

21 2. Respondent Deschutes County's decisions violate both
22 local and statewide law regarding agricultural land uses.

23 3. Respondent Deschutes County's decisions violate both
24 local and statewide law regarding the provision of public
25 facilities and services, including transportation, to the
26 subject site.

1 4. Respondent Deschutes County's decisions are not
2 supported by substantial evidence in the record.

3 FACTS

4 On November 1, 1979, Respondent Deschutes County adopted
5 its Year 2000 Comprehensive Plan. At that time the County had
6 not finished its planning work regarding the airports which
7 serve the County. In order to move ahead with its overall
8 planning tasks, the County set aside a portion of the
9 Comprehensive Plan to be filled in at a future date when the
10 master plans for the airports were completed. On page 104 of
11 its Comprehensive Plan, the County states:

12 "The land use elements of both the Roberts Field
13 and the Bend Area Master Plan shall become part of
14 this plan and guide land use decision making in the
vicinity of these facilities after public hearing
review and acceptance by the County governing body."

15 In addition, on November 1, 1979, the County enacted Zoning
16 Ordinance PL-15 containing a section establishing a temporary
17 Airport Development Zone (AD). Section 4.160(1) Zoning
18 Ordinance PL-15 states:

19 "This zone is intended to operate as an interim
20 control until such time as the Board of County
21 Commissioners duly adopt a Bend Airport Master or
Comprehensive Plan."

22 According to a zoning map and other evidence in the record,
23 an area comprising approximately 354 acres was set aside,
24 entitled the Bend Airport and given the temporary AD zone. The
25 soil contained in the 354 plus or minus acres designated AD
26 consists of Class III, IV and VI soils. Based on the record

1 before us the statewide goals do not appear to have been
2 applied to that zoning decision.

3 The November 1, 1979 Comprehensive Plan defines
4 agricultural lands as those lands which are identified as
5 possessing Soil Conservation Service, agricultural capability
6 Class I-VI soils. The Comprehensive Plan further states that:

7 "All lands meeting the definition of agricultural
8 lands shall be zoned exclusive farm use unless an
9 exception to state goal 3 is obtained so that the
zoning may be Multiple Use Agriculture." (Comp plan,
p. 145.)

10 In addition, the Comprehensive Plan states:

11 "Any agricultural lands not zoned EFU agriculture
12 shall be identified in the County exceptions
statement."

13 The County's exceptions statement, however, does not
14 contain any reference to the property encompassing or
15 surrounding the Bend Municipal Airport.¹

16 On February 7, 1980, Respondent Deschutes County considered
17 and adopted the Land Use Element of the Bend Airport Master
18 Plan (hereafter referred to as LUE-BAMP) and ordained that the
19 plan with all its accompanying maps be added to the Deschutes
20 County Year 2000 Comprehensive Plan (Ordinance PL-20).

21 On March 12, 1980, Deschutes County, recognizing that the
22 temporary AD zone adopted under County Zoning Ordinance PL-15
23 had expired on February 7, 1980, amended Ordinance PL-15 and
24 adopted as permanent an Airport Development Zone (AD). In
25 addition, on March 12, 1980, the County took an exception to
26 Statewide Goal No. 3. The County did not, after taking the

1 exception adopt (re-adopt) those portions of LUE-BAMP which
2 restricted agricultural use or permitted non-agricultural use
3 of agricultural land.

4 The exception statement indicates that the Bend Municipal
5 Airport lies approximately two miles east of the Bend Urban
6 Growth Boundary and has been in operation since 1942. The
7 exceptions statement also states that the area of 354 acres
8 (The AD Zone property) shall be excepted from compliance with
9 the State Land Use Planning Goal 3.

10 The record does not reveal what portion of the 354 acres
11 contained in the area designated AD, is presently developed for
12 airport use. It appears from maps in the record, however, that
13 the actual land mass developed for airport use at this time is
14 considerably less than the entire 354 acres.

15 The Bend Municipal Airport is the second major air
16 transportation facility in Deschutes County. LUE-BAMP
17 authorizes the airport to expand from its 120 present airplane
18 berths to 245 berths, expand its runway, add a runway, provide
19 additional auto parking, aprons, hangers, buildings, terminal
20 facilities, and to provide 70 acres for future development of
21 commercial lease space. It incorporates by reference
22 development plans calling for the acquisition of an additional
23 20 acres not then owned by the City of Bend. LUE-BAMP calls
24 for adoption of, in addition to the AD zone established on
25 3/12/80, on "Airport Overlay Zone," made up of an obstruction
26 zone, clear zone, approach safety zone, and noise corridor

1 zone. The stated purpose of the "Airport Overlay Zone" is "to
2 place additional land use conditions on lands impacted by the
3 airport regardless of the underlying zone." The AD zone is
4 entirely surrounded by agricultural property zoned either
5 Exclusive Farm Use or Multiple Use Agriculture.

6 Presently the airport's location is not served by any
7 public sewer or water service. Fire protection is provided by
8 a rural fire protection district. Electric and telephone
9 service presently exist in the area and the roads to and from
10 the area are maintained at public expense.

11 DECISION

12 Petitioners' numerous assignments of error relate primarily
13 to the treatment by Respondent Deschutes County of agricultural
14 land. They allege that the property comprising and surrounding
15 the Airport Development Zone was not given appropriate
16 treatment as required by Statewide Goal 3. Their concerns also
17 relate to Statewide Goal 11 (Public Facilities and Services)
18 and Statewide Goal 12 (Transportation). Petitioners cite
19 standards set forth in Deschutes County's Comprehensive Plan
20 regarding facilities and service and transportation as
21 additional support for their allegations that the respondent's
22 decisions herein contested are in error.

23 For the sake of this opinion, we find that LUE-BAMP is
24 divisible into two general categories: (1) general matters not
25 relating to specific land in the airport area and (2) those
26 matters whose effect is either to restrict use of agriculture

1 class land or to permit non-agriculture uses on agriculture
2 class land. It is the latter category with which this decision
3 is concerned.²

4 LUE-BAMP contains a section entitled Zoning Recommendations
5 which directly impacts not only the AD zone land owned by the
6 City of Bend but also land surrounding the 354 acre zone. In
7 pertinent part the Zoning Recommendations state:

8 "In order to insure future use compatibility and
9 minimize the potential of use conflict, it is
10 necessary to establish the following zones to be
11 applied to the airport area:

12 "1. Airport Development Zone

13 "2. Airport Area Overlay Zone.

14 "The Airport Development Zone shall consist of
15 the airport property owned by the City of Bend. The
16 components of the Airport Area Overlay Zone shall
17 include:

18 "1. An obstruction zone.

19 "2. An approach safety zone.

20 "3. A clear zone.

21 "4. A noise corridor zone.

22 "No use shall be approved in these zones unless
23 found to be in compliance with the Land Use Section of
24 the Bend Airport Master Plan ***

25 *****

26 "Airport Overlay Zone

27 "This zone is intended to place additional land
28 use conditions on lands impacted by the airport
29 regardless of the underlying zone.*****" (Emphasis
30 added).

31 The text under the heading of "Clear Zone" and "Approach

1 Safety Zone" indicate that certain types of agriculture use
2 would be restricted. Specific reference is made to
3 agricultural activities which might attract birds or require
4 burning which would create smoke.

5 On February 7, 1980, no effort was made to take a Goal 2
6 exception to Goal 3 or make findings in support thereof.
7 Consequently, it is the decision of this Board that the zoning
8 recommendations section of LUE-BAMP was in violation of
9 Statewide Planning Goals 2 and 3 and thus its incorporation
10 into Deschutes County's Year 2000 Comprehensive Plan is invalid.

11 Respondents claim that the failure to take an exception on
12 February 7, 1980 was a mere technical error rectified on March
13 12, 1980 when it adopted the Airport Development Zone and took
14 an exception to Goal 3 regarding the 354 acres making up the AD
15 zone. We disagree with respondents for two reasons.

16 First, respondents March 12, 1980 exception (which is not
17 supported by substantial evidence, infra) only relates to the
18 354 acres comprising the Airport Development Zone. No mention
19 is made of the agricultural land which will fall within the
20 Airport Overlay Zone.

21 Second, there is no statement in the March 12, 1980 actions
22 which, based on the findings in support of the exception,
23 adopts (re-adopts) those portions of LUE-BAMP that restrict
24 agricultural use or permit non-agricultural use of agricultural
25 land. Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 390
26 (1979).³

1 On remand, Deschutes County will need to readopt the above
2 referred to portions of LUE-BAMP after taking an exception to
3 the Comprehensive Plan for lands contained in the AD zone which
4 are not physically developed or committed to physical
5 development: (see discussion infra). In addition a similar
6 exception will have to be taken for lands impacted by the
7 Airport Overlay Zone.

8 PROPRIETY OF MARCH 12, 1980 EXCEPTION

9 Land containing Class I-IV soils in Western Oregon and
10 Class I-VI in Eastern Oregon is by definition under Statewide
11 Goal No. 3 presumed to be agricultural land. Meyer v. Lord, 37
12 Or App 59, 586 P2d 367 (1978). It is uncontested that the soil
13 contained in the 354 acres zoned for airport use is
14 agricultural land. Statewide Planning Goal No. 3 states in
15 pertinent part:

16 "A governing body proposing to convert rural
17 agricultural land to urbanizable land shall follow the
18 procedures and requirements set forth in the Land Use
19 Planning goal (Goal 2 for goal exceptions."

19 An airport serving a major urban area is an urban use. As
20 such, the respondent was correct when on March 12, 1980, it
21 proceeded to take an exception to Goal 3 for the 354 acres it
22 wished to set aside for airport use. Statewide Goal No. 2,
23 Part II, entitled Exceptions states:

24
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
4 hearing. The notices of hearing shall summarize the
5 issues in an understandable and meaningful manner.

6 "If the exception to the goal is adopted, then
7 the compelling reasons and facts for that conclusion
8 shall be completely set forth in the plan and shall
9 include:

10 "(a) why these other uses should be provided for;

11 "(b) what alternative locations within the area
12 could be used for the proposed uses;

13 "(c) what are the long term environmental,
14 economic, social and energy consequences to the
15 locality, the region or the state from not applying
16 the goal or permitting the alternative use;

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

19 As regards the above set forth four areas of inquiry
20 required for an exception, we have reviewed the findings of
21 respondent contained in its March 12, 1980 amendment to
22 Ordinance PL-20 regarding the exception. While the items are
23 not directly addressed by the findings, we made our review
24 pursuant to the dictates of the Suoreme Court of Oregon in
25 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569
26 P2d 1063 (1977) wherein it was stated no particular form is
27 necessary for findings in a land use decision.

28 We find that all four of the elements above cited were
29 directly or indirectly referred to in the respondent's
30 findings. A review of the record also indicates legally
31 substantial evidence in the record upon which the respondent
32 could base its findings regarding parts (a), (b) and (c) of the

1 exceptions test. The record, however, does not support a
2 finding that "the proposed uses will be compatible with other
3 adjacent uses." Most of the evidence, whether used to support
4 Comprehensive Plan incorporation of LUE-BAMP or the March 12,
5 1980 exception to Goal 3, refers to the surrounding property as
6 being compatible with the use of the subject property as
7 airport. There is little or no reference, however, to the
8 compatibility of the expanded airport with the surrounding
9 property. There are general comments in LUE-BAMP regarding
10 noise generated by all airport facilities. Noise is dealt with
11 as a problem not yet existing at the Bend Airport but one which
12 should be considered in future development, especially as
13 regards a housing development to the east of the airport.
14 Little or no concern is shown for the surrounding agriculture
15 land. There was sufficient testimony by neighboring property
16 owners that their continued operation of commercial
17 agricultural enterprises will be harmed by the expansion of the
18 present airport to have put the County on notice that a problem
19 existed. The neighboring landowners concerns were not
20 addressed by Deschutes County in its findings. The neighboring
21 farmers and ranchers are concerned about the effect of
22 increased air traffic on their farm animals, on the continued
23 commercial viability of the agricultural land, and the
24 restrictions which might be forthcoming upon alternative
25 agricultural uses allowed on their property. Their concerns
26 seem to have merit especially when viewed in context of the

1 Airport Overlay Zone (see discussion supra).

2 Respondent argues that even though it took an exception, it
3 was not required to since the land was "physically developed or
4 built upon," citing LCDC Policy Paper, Exceptions Process, as
5 amended May 3, 1979. Respondent bases its argument that no
6 exception was necessary on the fact that the airport has been
7 in operation on its current site since 1942. The County in its
8 brief and at oral argument and the city at oral argument took
9 the position it was not the amount of property physically
10 developed or built upon which controlled under the policy
11 papers exception process statements. Respondent argued that
12 since the City of Bend had owned the property since 1942, all
13 354 acres were, in fact, "the airport." This Board does not
14 accept respondents' argument. Ownership of land does not
15 equate to use. The mere fact that the entire 354 acres was
16 owned by the City of Bend and contained a portion developed as
17 airport does not mean the entire acreage was "physically
18 developed or built upon." Nowhere in the record is it
19 indicated exactly what portion of the 354 acres involved has
20 actually been built upon for airport use. The record, by
21 interpretation of maps, seems to indicate that only a portion
22 of the 354 acres has actually been physically developed or
23 built upon. The remaining property is still open, agricultural
24 land. Therefore, respondent's argument that an exception was
25 not necessary is not convincing.

26 For the above stated reasons, we find that the exception

1 was improperly taken. The record does not show substantial
2 evidence to support a finding that the proposed expanded use of
3 the airport as contemplated in the Land Use Element of the Bend
4 Airport Master Plan will be compatible with other adjacent
5 uses. The County must give additional attention to the impact
6 of an enlarged airport on the surrounding agricultural uses.

7 FACILITIES AND SERVICES

8 Petitioner alleges that the Land Use Element of the Bend
9 Airport Master Plan violates Statewide Goal No. 11 (Public
10 Facilities and Services).

11 Goal 11 states:

12 "GOAL: To plan and develop a timely orderly and
13 efficient arrangement of public facilities and
14 services to serve as a framework for urban and rural
development.

15 "Urban and rural development shall be guided and
16 supported by types and levels of urban and rural
17 public facilities and services appropriate for, but
18 limited to, the needs and requirements of the urban,
19 urbanizable and rural areas to be served. A provision
for key facilities shall be included in each plan. To
meet current and long-range needs, a provision for
solid waste disposal sites, including sites for inert
waste, shall be included in each plan."

20 Respondent should have applied Goal 11 at the time it
21 adopted the LUE-BAMP. It did not.

22 The record is completely devoid of any attempt to apply
23 Goal 11 to the property impacted by LUE-BAMP. There needs to
24 be a showing of how the increase in public use of the subject
25 property will be provided for by services such as sewer, water,
26 police, fire, etc.

1 Transportation.

2 Petitioners claim that respondents failed to comply with
3 Goal 12 (Transportation) when adopting LUE-BAMP. The record
4 does not show that respondents addressed Goal 12 in any
5 manner. In light of the fact that this is a transportation
6 magnet facility being developed in a rural setting, surrounded
7 by agricultural land, respondent should have addressed such
8 things as the impact on transportation systems between the
9 airport and urban settings. There is no indication in the
10 record that such concern was addressed. As Goal 12 states in
11 subsection (5), a transportation plan shall "minimize adverse
12 social, economic and environmental impacts and costs." The
13 record does not reveal respondents' consideration of that
14 concern. For the same reasons addressed under the Public
15 Facilities section of this decision, we request the County
16 apply Goal 12 on remand.

17 PROCEDURAL ERRORS

18 Petitioners allege that Statewide Goal No. 1 (Citizen
19 Involvement) was violated by respondents during their hearings
20 on the Bend Airport Master Plan. In addition, petitioners
21 allege that Statewide Goal No. 2 (Land Use Planning) was
22 violated during the exceptions process taken by respondent on
23 March 12, 1980 because there was a failure to give adequate
24 notice regarding the fact that an exception was going to be
25 taken. In light of the decision of this Board regarding other
26 allegations of error by petitioner, it is unnecessary that we

1 address these concerns since we are recommending that this
2 matter be sent back to the County for further consideration.
3 Upon reconsideration, the County should pay close attention to
4 the notice and public involvement directives of Statewide Goals
5 1 and 2.

6 Petitioners also allege respondents violated ORS 203.045
7 which requires "every ordinance of a County governing body
8 shall, before being put upon its final adoption, be read fully
9 and distinctly in open meeting of that body on two days at
10 least 13 days apart."

11 Petitioners allege that the ordinances which are the
12 subjects of this appeal did not exist prior to the hearings. A
13 review of the record indicates petitioners are correct. The
14 language that ultimately became part of the ordinance did not
15 exist at the time the public hearings were held. The proposed
16 ordinances should have been in existence at the time of the
17 public hearings. Without a draft ordinance, the public does
18 not have knowledge of the ordinances terminology and thus are
19 unable to ensure the ordinance achieves its stated purpose.
20 Therefore, we agree with petitioner on this subject. This
21 Board, however, cannot reverse actions of the respondent which
22 are purely procedural in nature and do not prejudice the
23 substantial rights of the petitioner. Oregon Laws 1979, ch
24 772, sec 5(4)(a)(B). Petitioners do not indicate to this Board
25 how they have had a substantial right prejudiced as a result of
26 the County's actions.

1 In summary, we hold that those portions of the Land Use
2 Elements of the Bend Airport Master Plan which restrict
3 agriculture use or permit non-agriculture use on agricultural
4 land are invalid. A goal 2 exception regarding those lands
5 must be taken and incorporated into the Comprehensive Plan.
6 The portions of LUE-BAMP regarding those lands must then be
7 adopted (re-adopted).

8 In addition, we hold that the exception taken on March 12,
9 1980 regarding the 354 acre AD zone is not supported by
10 substantial evidence. The issue of compatibility with adjacent
11 uses needs further consideration.⁴ Therefore, the AD zone is
12 also invalid at this time.

13 As regards petitioners' allegations regarding Statewide
14 Goal 1 and 2 we request that Deschutes County, upon remand, pay
15 close attention to the notice and public involvement directives
16 of those goals.

17 Finally, this opinion does not directly address some of
18 petitioners non-goal related allegations of error. We are of
19 the opinion that the items addressed in this decision cover
20 major contentions. The Board is desirous of providing guidance
21 to governing bodies and to assist them in avoiding repeating
22 errors made when a land use decision which is reversed by the
23 Board will likely again be before the governing body. The
24 Board cannot, however, comply with the time limit imposed upon
25 it by the Legislature and adequately review the other appeals
26 / /

1 before the Board if it addresses all issues raised that are not
2 necessary to the outcome of the appeal under review. Kerns, et
3 al v. Pendleton, _____ Or LUBA _____, (1980) (LUBA No. 79-001).
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FOOTNOTE

1
2
3
1

4 However, on page 146 of the Comprehensive Plan, it is
5 stated:

6 "Public lands meeting the criteria for EFU zoning
7 shall be so zoned unless some other resource, (i.e.
8 forest) or public use exists on the land."

9 Respondents point to the above quoted section regarding
10 public lands and argue that since the airport is a public use
11 owned by the City of Bend the property is exempt from the EFU
12 zone otherwise placed on the land by the Comprehensive Plan
13 provisions. The record does not reveal any reference to the
14 land contained in the Airport Zone Development Zone as being
15 public use. Respondents contend an airport is a public use as
16 a matter of common knowledge.

12
13
14
15
2

16 This opinion should not be construed as approving matters
17 in LUE-BAMP not specifically discussed.

15
16
17
18
19
3

20 LUE-BAMP and the act of incorporating it into Deschutes
21 County's Year 2000 Comprehensive Plan contains elements of both
22 legislative and quasi-judicial actions. We are aware that
23 Heilman, supra, relates only to quasi-judicial actions. The
24 due process protections set forth in Heilman should be provided
25 as well in situations where mixed legislative-quasi judicial
26 activities take place.

21
22
23
24
25
26
4

27 The following is added pursuant to the September 26, 1980
28 LCDC Determination:

29 "The findings as a whole must constitute
30 compelling reasons and facts for not applying goal 3."