

LAND USE
BOARD OF APPEALS

Nov 14 5 28 PM '80

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	WOODROW W. CAVE,)	
4)	
	Petitioner,)	LUBA NO. 80-084
5)	
	vs.)	FINAL OPINION
6)	AND ORDER
	KLAMATH COUNTY, BARBARA)	
7	JONES, LYLE YOUNG, and)	
	BEVERLY WALDREN,)	
8)	
	Respondents.)	

9 Appeal from Klamath County.

10 William P. Brandsness, Klamath Falls, filed a petition for
11 review and argued the cause for Petitioner.

12 Lyle Young and Beverly Waldren, Klamath Falls, filed a
brief and argued the cause on their own behalf.

13 Robert D. Boivin, Klamath Falls, filed a brief and argued
14 the cause for Respondent Klamath County. With him on the brief
were Boivin & Boivin.

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

17 Remanded. 11/14/80

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

1 BAGG, Referee.

2 NATURE OF DECISION

3 This is an appeal from a denial of a comprehensive plan and
4 zone change request. The request was to change a 40-acre
5 parcel from a designation of Agriculture-Forestry or "AF," to
6 Rural Residential or "SP-1." The change would allow a
7 residential subdivision on the property.

8 STANDING

9 Standing is not an issue in this case.

10 FACTS

11 In late 1979, Petitioner W. W. Cave requested a zone change
12 and a comprehensive land use map change for an undeveloped
13 40-acre parcel within Klamath County. The property is
14 composed of Class II and IV soils and is bordered on three
15 sides by property zoned for agriculture-forestry uses. The
16 property is agricultural land within the meaning of Goal 3. To
17 the west of the property is a residential subdivision on
18 property zoned for rural residential use. The property lies
19 along State Highway 39 within a 2.8 mile stretch of highway
20 that includes some 68 single-family residences in various
21 locations.

22 The Klamath County Planning Commission recognized the
23 applicability of Statewide Land Use Goal No. 3 and took an
24 exception to Goal 3 as part of its decision to allow the
25 requested changes. The commission's allowance of the plan and
26 zone change resulted in an appeal to the county commissioners.

1 The County Commissioner's hearings on the matter were held
2 on May 14 and on June 11. At the May 14 hearing, the County
3 Commissioners noted that they did not have a complete record of
4 the Planning Commission proceeding. They nonetheless elected
5 to go ahead and hear the case and announced that they would
6 review the tapes of the Planning Commission meeting prior to
7 making a final decision. No person present at the
8 Commissioner's meeting objected to this announced procedure.
9 Also at the May 14 hearing, the Commissioners accepted
10 testimony from interested persons. Testimony was allowed,
11 apparently, so that the hearing might proceed even in the
12 absence of a complete record from the Planning Commission. The
13 testimony was to be confined to the scope of the Planning
14 Commission record, and comments made that proved to be outside
15 of the scope of the Planning Commission record (when compared
16 with the tapes of the Planning Commission hearing) were to be
17 ignored. No objection was made to this procedure.

18 The County Commissioners overturned the Planning Commission
19 approval of the requested change, and this appeal followed.

20 ASSIGNMENTS OF ERROR

21 Petitioner makes seven numbered "Assessments of Errors."
22 Each of the numbered "Assessments" takes issue with a finding
23 of fact made by the county commissioners. Fairly read, all
24 seven "Assessments" add up to one assignment of error: the
25 findings are inadequate in that they are not supported by
26 substantial evidence in the record. The Board chooses to treat

1 all seven numbered assessments of error as one alleging that
2 the findings are inadequate and not supported by substantial
3 evidence in the record.

4 Included in the major topic heading entitled "Assessments
5 of Error," is an unnumbered paragraph alleging petitioners
6 interests were prejudiced by the Klamath County Board of
7 Commissioners in that the Board allowed testimony from parties
8 in opposition to the requested change while petitioner was not
9 able to testify. We treat this statement as a second
10 assignment of error alleging that the county made an error in a
11 procedural matter that prejudiced the substantial rights of the
12 petitioners.

13 ASSIGNMENT OF ERROR NO. 1

14 There are two sets of findings. One set of findings exists
15 in response to the requested comprehensive plan change and the
16 other set of findings exists in response to the requested zone
17 change. The two separate sets are essentially identical, and
18 we will treat them together.

19 The findings of the Board are as follows:

20 "1. The Board of County Commissioners found per
21 testimony from staff of Planning Department that
22 parcel for change in Comprehensive Land Use Plan and
23 zone was generally located approximately 230 feet
south of the Lost River Diversion Canal and west of
the Great Northern Railroad and west of the United
States Bureau of Reclamation Drain.

24 "2. The Board of County Commissioners found per
25 testimony from Staff the site to be approximately 40
acres in size and basically rectangular in shape.

26 "3. The Board of County Commissioners found per

1 Applicant's Exhibit No. 2, a proposed preliminary
2 plat, that the 40 acres would be eventually subdivided
into 21 lots with lot average being 1.9 acres.

3 "4. The Board of County Commissioners found per
4 testimony from the record that there was testimony
5 from the applicant, the Henley Area Committee, and
also people in opposition, and letters from agencies,
therefore addressing L.C.D.C. Goal No. 1.

6 "5. The Board of County Commissioners found per
7 testimony that 40 acre site to be subdivided, with the
8 exception of Henley Acres Subdivision to the west, was
not the general trend of the area, as larger lots are
in the area, therefore addressing L.C.D.C. Goal No. 2.

9 "6. The Board of County Commissioners found per
10 information which was made part of the record that by
11 approving the 40 acres for a change in Comprehensive
12 Land Use Plan and zone, that the increase of density
would create an access problem onto State Highway No.
39, therefore addressing L.C.D.C. Goal No. 12.

13 "7. The Board of County Commissioners found that
14 site for change in Comprehensive Land Use Plan and
15 zone is not inside any established urban growth
boundary line.

16 "CONCLUSIONS OF LAW FOR ZONE CHANGE

17 "1. The property affected by the change in zone
18 is not adequate in size to facilitate those uses
19 normally allowed in conjunction with such change.

20 "2. The property affected by the change in zone
21 is not properly related to streets and highways to
22 adequately serve the type of traffic generated by
proposed use.

23 "3. The proposed change in zone is not in
24 keeping with land uses and trends and land
25 development, density of land development in the
26 affected area.

"4. The proposed change in zone is not in keeping
with land use plans and in effect does not represent the
best and most appropriate use of the land."

The first portion of the findings, the findings of fact,
describe the site in very general terms. Also included in that

1 section is a statement that subdivision of the 40-acre site was
2 somehow not in keeping with "the general trend of the area," as
3 larger lots are in the areas [sic] * * *." Also, the
4 commissioners noted that the increase in density (presumably
5 from the subdivision of the parcel into 21 residential lots)
6 "would create an access problem on state highway 39 * * *."
7 These statements are as specific and as close to findings of
8 "fact" as any in the order. It is this lack of specificity
9 that we find most objectionable in the order.

10 The record in the case does show that the area is generally
11 sparsely settled. There is substantial evidence in the record
12 for which the Board can make a finding that residential
13 subdivisions were not the prevalent land use in the immediate
14 area. There is no detailed inventory as to land uses and lot
15 sizes, however. There is also no particular evidence as to how
16 this 21 lot subdivision would create an access problem on the
17 state highway 39. What does appear in the record is much
18 discussion with respect to access onto a roadway known as
19 Roberta Way. Roberta Way itself accesses highway 39, but the
20 record does not reveal that access to the project will be
21 directly via highway 39. We are forced to conclude that either
22 the commissioners misstated their concern regarding access, or
23 there is simply not sufficient evidence in the record to
24 support that particular finding of fact.

25 The second section of the order includes the conclusions
26 from the facts drawn by the county. A review of the conclusion

1 shows them to be adequate as conclusions, but not particularly
2 tied or supported by the facts recited earlier in the order.
3 For example, the first conclusion announces that the property
4 is not large enough "to facilitate those uses normally allowed
5 in conjunction with such change." The findings of fact do not
6 indicate what sizes the county would consider to be adequate to
7 allow the uses requested. Similarly, the second conclusion
8 announces that the property is somehow not "properly related"
9 to streets and highways to adequately serve the type of traffic
10 generated by proposed uses." That conclusion suffers from a
11 lack of a finding of fact as to exactly how the property is
12 "related" to streets and highways. Also, there is no standard
13 as to what the county believes is proper placement or relation
14 of such development to streets and highways. In short, there
15 is no statement as to what traffic requirements exist for a
16 21-lot subdivision, and there is no statement as to how much
17 traffic will be generated by this development and why the
18 existing streets and highways are not adequate to serve it.

19 The third conclusion that the proposal is not in keeping
20 with "land uses and trends" suffers from a similar lack of
21 detail in the findings about what land uses and trends exist in
22 the area and why it is that this development will not be in
23 keeping with those land uses and trends. The last conclusion,
24 that the change is not in keeping with "land use plans and in
25 effect does not represent the best and most appropriate use of
26 the land," is a conclusion that is tied to no statement of what

1 land use plan exists and what is the best and most appropriate
2 use of the land.

3 The effect of this lack of specificity is that the
4 applicant does not know against what standard his development
5 is tested and how his development fails to meet that
6 standard. Persons are entitled to know the standards to which
7 they will be held and whether they have met those standards.
8 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569
9 P2d 1063 (1977); Petersen v. Klamath Falls, 279 Or 249, 566 P2d
10 1193 (1977).

11 It is, therefore, our conclusion that the first assignment
12 of error is sustained insofar as it alleges a failure to make
13 adequate findings of fact supported by substantial evidence in
14 the record.¹

15 ASSIGNMENT OF ERROR NO. 2

16 The second assertion made by petitioners is that the
17 procedure was unfair and prejudicial in that it allowed
18 testimony apparently outside the scope of the record.

19 Our review of the record convinces us that the testimony
20 was received in order to illuminate an incomplete record from
21 the Planning Commission. The county commissioners used the
22 testimony as a convenience to provide them with a record so
23 that they might proceed with a hearing. They were advised by
24 county counsel that any testimony taken should be limited to
25 the proceedings before the Planning Commission, and they were
26 also advised that testimony outside the scope of the Planning

1 Commission hearing was to be disregarded. The county
2 commissioners would know the scope of testimony when they
3 reviewed the tapes of the Planning Commission meeting. The
4 record shows the commissioners accepted this advice. A search
5 of the record reveals no clear objection to this procedure.

6 Even if we were to disregard the apparent lack of a clear
7 objection to this expedited process, we could not say as a
8 matter of law that the procedure was so tainted as to require
9 us to reverse the county's decision. There is no evidence to
10 suggest to us what, if any, improper evidence was received at
11 the hearing, and there is nothing to show that the
12 commissioners disregarded the advice of their counsel and
13 considered any improper evidence in their final decision
14 making. Without that showing, we cannot say petitioner's
15 rights have suffered substantial prejudice. The second
16 assignment of error is, therefore, denied.

17 This matter is remanded to Klamath County for action
18 consistent with this opinion.
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FOOTNOTE

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1 We note that the findings are vaguely written. There may be sufficient evidence in the record from which the county could draw a new set of findings adequate to support a denial of this proposed plan change and zone change. We do not, however, speculate on that possibility.