

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

LAND USE
BOARD OF APPEALS
Nov 24 8 46 AM '82

WEYERHAEUSER REAL ESTATE)
COMPANY, a Washington)
corporation,)
)
Petitioner,)
)
v.)
)
LANE COUNTY, et al,)
)
Respondents,)
)
and)
)
LOWER McKENZIE COMMUNITY)
COUNCIL, GORDAN VANCE and)
GORDON CARLSON,)
)
Respondents.)

LUBA No. 82-014

FINAL OPINION
AND ORDER

Appeal from Lane County.

Michael E. Farthing, Eugene, filed the Petition for Review and argued the cause on behalf of Petitioner. With him on the brief were Husk, Gleaves, Swearingen, Larsen & Potter.

William A. Van Vactor, Eugene, filed the brief and argued the cause on behalf of Respondent Lane County.

Robert E. Stacey, Jr., Portland, filed the brief and argued the cause on behalf of Respondents Lower McKenzie Community Council, et al.

REYNOLDS, Chief Referee; BAGG, Referee; participated in the decision; COX, Referee; dissents.

AFFIRMED 11/24/82

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

In an earlier proposed opinion in this case (8/02/82, unpublished) a majority of the Board, Referee Cox dissenting, proposed that denial of a Goal 2, Part II exception was to be evaluated against the arbitrary and capricious standard. LCDC, in its determination, decided that a denial, like an approval of an exception, must be accompanied by findings. This opinion reflects that determination.

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner Weyerhauser Real Estate Company (WRECO) applied
4 to Lane County for a comprehensive plan amendment and zone
5 change as step 2 in the process of obtaining approval for its
6 "new development center" (NDC) proposal pursuant to Lane County
7 Comprehensive Plan goals and policies. - Petitioner received
8 approval for step 1 of its proposal in July of 1978. This
9 approval enabled petitioner to proceed to step 2.

10 Step 2 of WRECO's proposal, the request for a comprehensive
11 plan amendment and zone change, involved 1,070 acres bordering
12 the McKenzie River, 17 miles east of Springfield. Petitioner's
13 NDC proposal would permit, if approved, the construction of 800
14 dwelling units, a restaurant, a 30-room lodge, a general store,
15 a 6-office commercial complex and a recreational center and
16 facilities. Two hundred of the dwelling units were proposed to
17 be vacation homes, 360 units family primary homes and 240 units
18 primary retirement homes. These units would be clustered on
19 260 acres with the remainder of the property left in its
20 natural state. The planning commission for Lane County,
21 following public hearings, voted to recommend approval of the
22 application. The Board of Commissioners, however, voted to
23 deny WRECO's application for the plan amendment and adopted a
24 13 page order setting forth its reasons for denial. The Board
25 of Commissioners concluded that WRECO had failed to meet its
26 burden of proof justifying an exception to Goal 4 pursuant to

1 Goal 2. The Board of Commissioners also concluded that
2 petitioner had not demonstrated that Goal 12 would be met if
3 the plan amendment and zone change were allowed.

4 Petitioner challenges the Board of Commissioners' denial as
5 follows:

- 6 1. "The findings adopted by Lane County are
7 inadequate because they are conclusory [sic],
8 lack specificity, are internally inconsistent,
9 irrelevant, and not supported by substantial
10 evidence in the record."
- 11 2. "Lane County erred by improperly construing the
12 Goal 2, Part II exceptions criteria and finding
13 petitioner failed to show a need for the uses
14 proposed. Lane County further erred because such
15 finding was not supported by substantial evidence
16 in the record."
- 17 3. "Lane County erred by improperly construing Goal
18 12 and finding that petitioner failed to prove
19 that present street and bridge systems are
20 sufficient to serve the development and are
21 affordable by affected governments. Lane County
22 further erred because such finding was not
23 supported by substantial evidence in the record."
- 24 4. "Lane County erred by failing to follow its own
25 procedures, which failure prejudiced the
26 substantial rights of the petitioner."

19 OPINION

20 A. Standard of Review

21 Our review of a local governments' land use decision is
22 governed by 1979 Or Laws, ch 772, sec 5(4)(a), as amended by
23 1981 Or Laws, ch 748. That statute provides:

24 "The board shall reverse or remand the land use
25 decision under review only if:

26 "(a) The board finds that the local government
or special district governing body:

1 "(A) Exceeded its jurisdiction;

2 "(B) Failed to follow the procedure
3 applicable to the matter before it in a
4 manner that prejudiced the substantial
rights of the petitioner;

5 "(C) Made a decision that was not supported
6 by substantial evidence in the whole record;

7 "(D) Improperly construed the applicable
8 law; or

9 "(E) Made a decision that was
10 unconstitutional;..."

11 "(b) After review in the manner provided in
12 section 6, chapter 772, Oregon Laws 1979,
the commission has determined that the local
government or special district governing
body or state agency violated the goals."

13 Judicial precedent in the area of administrative law
14 generally and land use law specifically has further enlarged
15 upon our scope of review. We are also required to review the
16 adequacy of findings in support of quasi-judicial decisions and
17 may remand a decision if the findings do not set forth the
18 facts, reasons and conclusions which form the basis for the
19 decision. See Hoffman v DuPont, 49 Or App 699, 621 P2d 63
20 (1980).

21 Review of a land use decision granting a requested land use
22 change is typically more involved than review of a denial of a
23 land use change, at least where the local government's decision
24 is sustained. In order for a reviewing body to affirm an
25 approval of a land use change, it must be determined that each
26 of the applicable standards was properly applied. This means

1 there must be findings of fact sufficient to support
2 conclusions that each of the applicable standards has been met,
3 and substantial evidence in the record for each of the findings
4 of fact. See generally: Green v Hayward, 274 Or 693, 552 P2d
5 815 (1976); Sunnyside Neighborhood v Clackamas County
6 Commissioners, 280 Or 1, 569 P2d 1063 (1977).

7 In order for a denial of a requested land use change to be
8 affirmed, however, the findings of fact need only support the
9 conclusion that one of the applicable criteria has not been
10 met, so long as the findings of fact are supported by
11 substantial evidence. See generally: Heilman v City of
12 Roseburg, 39 Or App 71, 591 P2d 390 (1979); Marracci v City of
13 Scappoose, 26 Or App 131, 552 P2d 552 (1976), rev den.

14 Because our review in this case is of a denial of a
15 requested land use change, we must decide whether any of the
16 county's findings of fact and conclusions are adequate to show
17 at least one of the applicable criterion has not been met, and,
18 if so, whether the findings of fact and conclusions are
19 supported by substantial evidence in the record.

20 B. Burden of Proof

21 The proponent of a land use change has a heavy burden to
22 prove the findings of fact and conclusions in support of denial
23 of the change were not supported by substantial evidence. In a
24 typical denial case, the proponent must prove the denial was
25 erroneous as a matter of law. Jurgenson v Union County Court,
26 42 Or App 505, 600 P2d 1241 (1979). In other words, the

1 proponent's evidence must be so strong and so convincing that
2 the county's findings of fact, reasons and conclusions for
3 denying the requested change cannot be upheld. There need not
4 be evidence in the record supporting the county's findings so
5 long as there is some reasonable basis by which the county
6 could find the proponent's evidence was not convincing.
7 Jurgenson, supra. It is not enough for the proponent to
8 introduce evidence supporting affirmative findings of fact and
9 conclusions on all applicable legal criteria. The evidence
10 must be such that a reasonable trier of fact could only say the
11 evidence should be believed.

12 The burden on the proponent of a land use change to prove
13 his entitlement to a requested land use change increases as the
14 applicable criteria become more subjective. For example, it
15 would be less burdensome for a proponent who had to prove the
16 land was not agricultural land within the meaning of Goal 3 to
17 prove as a matter of law the land was not soil class I-IV than
18 to prove, as a matter of law, the land was not suitable for the
19 production of farm crops and livestock. The former is capable
20 of objective proof - what is the soil classification of the
21 property. Testing soil is a fairly standard, scientific
22 procedure. However, whether soil is suitable for the
23 production of farm crops and livestock involves more subjective
24 analysis and opinion both on the part of those testifying and
25 those who comprise the trier of fact.

26 In the present case, the criteria which must be addressed

1 by the proponent and with which he must prove conformance as a
2 matter of law are those set forth in Goal II, Part II
3 Exceptions.¹ These criteria are not objective criteria but
4 involve the exercise of judgment on the part of the trier of
5 fact. Thus, it is difficult, to say the least, for one to
6 prove as a matter of law that a particular use "should be
7 provided for," or that the use "will be compatible with other
8 adjacent land uses."

9 C. Adequacy of Findings

10 Findings sufficient to support denial of a land use request
11 as a general rule need not be lengthy or detailed. Marracci v
12 City of Scappoose, supra; Heilman v City of Roseburg, supra.

13 If the local government's denial is because it was not
14 persuaded or, in the case of an exception under Goal II, not
15 compelled to grant the request, its duty is to explain why. If
16 there is conflicting evidence in the record and the local
17 government believes the opponent's witnesses instead of the
18 applicant's witnesses, it should explain in its findings why.
19 See, e.g., Advance Health Systems v Washington County, 4 Or
20 LUBA 20 (1981). In other words, in the denial of a land use
21 request, the reason for denial is the key. Findings of fact
22 qua facts may well take on lesser importance, except as they
23 are necessary to set the stage for the reasons. If, for
24 example, a particular standard may be applicable only if
25 certain property characteristics exist, and the governing body
26 does not believe the applicant's evidence is persuasive to show

1 the standard has been met, the local government must set forth
2 the facts which establish the applicability of the standard
3 before it can deny the request on the basis the standard was
4 not met.

5 D. Analysis of Findings

6 With the foregoing as background we can begin to review the
7 county's denial of petitioner's request for a comprehensive
8 plan amendment and zone change. As previously stated, the
9 county denied petitioner's request for the reason that
10 petitioner had failed to show the request satisfied Goal 12 and
11 the exceptions criteria of Goal 2. There is no dispute that
12 the petitioner had to satisfy the Goal 2 exceptions criteria
13 because the subject property is forest land and the proposed
14 use is not one allowed on forest land under Goal 4. We are
15 precluded by time and space from responding to petitioner's
16 arguments contained in its first two assignments of error point
17 by point. The thrust of petitioner's arguments is that the
18 county's findings addressing the "need" and "alternative lands"
19 criteria for an exception to Goal 2 were impermissibly
20 conclusional and lacking in substantial evidentiary support.
21 After reviewing the county's order in this case, we conclude
22 the order contains an adequate explanation of why the county
23 denied petitioner's request for a plan amendment and zone
24 change, and that the order is supported by substantial evidence
25 in the record.

26 A primary reason for denial expressed by the county is that

1 petitioner failed to present compelling reasons and facts
2 showing why this use should be provided for, as required by
3 Goal 2, Part II Exceptions (1). The petitioner sought to
4 satisfy this requirement in different ways. The petitioner
5 tried to show this use should be provided:

- 6 1. To satisfy the psychological needs of some people
7 for rurally located housing;
- 8 2. To satisfy the housing needs of the McKenzie
9 Valley to the year 2000;
- 10 3. To satisfy the need for increased employment and
11 an increased tax base; and
- 12 4. To satisfy the need for a diversified economy
13 which would be assisted by a rurally located
14 destination resort.

15 After listing the foregoing "need" justifications advanced
16 by the petitioner, the county said:

17 "Before dissecting these justifications, it is
18 important to determine the overall character of the
19 proposal. The applicant proposes a combination of a
20 200 unit recreational destination resort with a 600
21 unit housing development. It may very well be that a
22 site-specific recreational resort of this type is
23 justifiable under the need criterion. However, that
24 is not the entire proposal. Where, as here, a
25 recreational development is tied to a planned housing
26 project, and such linkage is not necessary to the
economic viability of the resort, the applicant must
separately justify the resort and the housing
development under Goal 2; Part II."

The county does not appear to have based its denial on a
lack of justification for the 200 unit recreational destination
resort, but only upon lack of justification for the 600 units
of primary residential housing. We will review the county's

1 order only to determine whether the county properly found a
2 lack of justification for the 600 units of primary residential
3 housing.

4 1. Psychological need

5 The county believed that WRECO's psychological need
6 justification for why the plan amendment and zone change should
7 be allowed raised more questions than it answered. The county
8 questioned, first, whether people who might have a
9 psychological need for freedom of choice, territoriality,
10 freedom from health threatening urban living, housing
11 satisfaction, and lack of "stimulus overload" would choose to
12 live, let alone demand to live, in what is essentially an urban
13 density planned community. Second, the county questioned
14 whether psychological need such as had been shown by petitioner
15 really existed for residents of cities in the area of the
16 development. Third, the county questioned how many people who
17 lived within the market area for WRECO's proposed development
18 had the psychological need to live in a such a development.
19 That is, the county wondered whether the demand which may exist
20 was for 10, 50 or 500 persons in the market area. The county
21 stated:

22 "It may be that existing rural housing sites not only
23 in this subarea but in other areas of the county, may
be sufficient to fulfill this need."

24 Finally, the county was not persuaded that for people who
25 may live within the market area and may have the psychological
26

1 needs which petitioner described, that need could not be
2 satisfied by living many other places in the county. Thus the
3 county stated:

4 "Much housing in our county has access to recreational
5 areas within a reasonable travel time. It is not
6 necessary to locate housing adjacent to recreational
7 areas solely to save travel time, particularly for
8 upper income persons who can readily afford whatever
9 minimal travel expense that is occasioned by any more
10 distant starting point."

11 What the above findings indicate is that the county was not
12 persuaded petitioner had established a psychological need for
13 rurally located housing, that this housing type met the need
14 which may exist or that the need which may exist was for 600
15 units. We have reviewed the evidence and cannot say the
16 county's lack of conviction is unreasonable. Petitioner says
17 there is a "total dearth of factual evidence contradicting the
18 documentation of psychological need." The documentation of
19 psychological need to which petitioner refers consists largely
20 of a market analysis performed by Richard L. Ragatz Associates,
21 Inc. of Eugene.² The Ragatz Market Analysis, as petitioner
22 points out, indicates higher income households, more highly
23 educated households and the occupational category of
24 professionals are expected to increase over the next 20 years
25 in Lane County, and these people would be the primary
26 consumers, along with retired persons, "for a high amenity,
high quality project and for home ownership." Petition for
Review at 36. Petitioner argues that the best indicator of

1 psychological need for rurally located primary housing is the
2 market demand for that housing:

3 "***Market demand is a far better and more efficient
4 measure of need since it builds in a balancing of
5 needs based on the unique requirements and resources
6 of each individual. The fact that demand continues to
7 be strong in the McKenzie Valley in the face of
8 current economic conditions is ample evidence of need,
9 and demographic trends support this preference for
10 rural living." Record, Attachment 5, Document 9, p.
11 19.

12 Thus, the applicant attempted to prove the existence of
13 psychological need by proving there is a market demand for
14 rurally located housing. That there would be some market
15 demand for WRECO's 360 primary family housing units is probably
16 not in dispute in this case, although the quantity of that
17 demand is. But the Court of Appeals in Still v Marion County,
18 42 Or App 115, 600 P2d 433 (1979) said the existence of market
19 demand for rural housing is not an adequate reason under Goal 2
20 for locating housing on rural resource land. Therefore, even
21 without any evidence refuting petitioner's evidence, the county
22 was clearly entitled and in fact required under Still to say no
23 psychological need had been shown for 360 primary family
24 housing units.³

25 Petitioner addresses the needs of retired persons for
26 rurally located housing in close proximity to recreational
opportunities. Petitioner's evidence indicated the retirement
age population in Lane County is increasing and that

***Leisure is a way of life for these 22,364 people
[by the year 1990]...For those whose recreational

1 preferences require proximity to a high quality
2 natural environment, locating within a UGB decreases
3 recreational opportunities, deprives the elderly of
4 privacy and safety needs and requires long commutes to
5 preferred recreational environments." Record,
6 Attachment 5, Document 9, p. 18.

7 The county was not persuaded by this and other evidence of
8 similar ilk that WRECO's development should be allowed so that
9 retired persons' psychological needs would be fulfilled. The
10 county did not dispute that petitioner's evidence may be true,
11 at least as a general proposition. But the county was not
12 convinced that retired people in Lane County would feel the
13 same urgency for a rural living environment as might retired
14 people in the nation's more populous cities. The county was
15 not convinced that this development, a planned development of
16 some 800 units clustered on 260 acres, would provide the
17 environment that people desiring space and having feelings of
18 territoriality would want, let alone require.

19 Moreover, with both primary family and retirement housing,
20 the county was not persuaded that even if urgent desires may
21 exist for rurally located housing, and even if this development
22 might be just what these people were looking for, the demand
23 was equal to the supply offered by WRECO. We have been
24 directed to no evidence, save evidence of population generally
25 to be discussed next, which would provide a basis, let alone a
26 compelling demonstration, for saying 600 units of primary
family and retirement housing should be provided to meet the
psychological needs of families and retired people.

1 2. Housing needs of the subarea in general

2 The county address WRECO's contention that the plan
3 amendment and zone change would fulfill the need for housing
4 generally within the subarea (McKenzie Valley). The county
5 recognized this argument as perhaps WRECO's strongest, because
6 the plan amendment and zone change would avoid "random, lineal
7 strip development as has occurred in the past." The county
8 also recognized for this justification to be persuasive there
9 would have to be some demonstration of a market demand for the
10 housing. Market demand, in turn, depended upon population
11 projections for the subarea. The county made the following
12 finding about population:

13 "In this case, there are several different projections
14 by the Lane Council of Governments for the housing
15 demand for the subarea, ranging from a projected
16 decrease of 578 units to a projected increase of 1,615
17 units with a middle projection of 465 units. We find
18 the latter figure to be more representative of
19 assumable need in view of the uncertain ability of the
20 county, given its fiscal problems, to service any
21 particular level of population increase and the
22 uncertainty of both short range and long term
23 population increase extrapulation given recent
24 evidence in the record of possible population
25 stagnation or even decrease due to declining
26 employment base.

21 "Whether one chooses the 1,615 or 465 unit figure,
22 there is a further problem in the applicant's
23 satisfaction of its burden of proof on need. Even if
24 one assumes a need for 1,615 units, if 600 of those
25 units are at a high price range in one location, at
26 one density and of only two types, such allowance may
violate the dictates of Goal 10 mentioned above. That
is to say that it was the applicant's burden to show
not a need for 600 unspecified units but a need for
600 high priced units at an urban type density and of
the type contemplated here. This the applicant has
not done. Nor do we see any indication in this record

1 based on a survey of the income distribution in the
2 subarea that approximately 37% (600 units of a 1,615
3 unit need) of future housing needs for the subarea
4 will be those of upper middle to high income
5 residents."

6 The basis of petitioner's attack on the finding that
7 WRECO's development is not needed to meet the McKenzie Valley's
8 housing needs to the year 2000 lies with the population
9 projection relied upon by the county. In order for petitioner
10 to successfully argue here that its development should be
11 provided to meet the subarea's housing needs,⁴ the record
12 would need to conclusively show, at a bare minimum, that the
13 population of the subarea to the year 2000 would be such as to
14 require at least the 600 housing units proposed by WRECO plus
15 the 376 units which petitioner itself concedes can already be
16 developed through infill on existing lots in the subarea. The
17 evidence, however, in the record shows wide variations in terms
18 of the future population for the McKenzie River Valley. The
19 Lane Council of Governments (L-COG) conducted its population
20 projections for Lane County as a whole and concluded, with a
21 zero percent tolerance level, that there would be a net
22 migration into urban growth boundaries from rural areas of
23 approximately 18,000 people. That is, by the year 2000, the
24 rural population of Lane County would decrease from its present
25 58,000 to approximately 39,000 people. This decrease would
26 result in a negative housing need in the subarea to the year
2000. L-COG recognized a net decrease in rural population was

1 probably unrealistic so it developed population projections
2 based upon 5% and 10% tolerance levels. Applying these
3 tolerance levels to the McKenzie Valley subarea, L-COG
4 concluded that there would be a total population of 6,262 at a
5 5% tolerance level and 8,819 at a 10% level. The present
6 population of the McKenzie River Valley, according to L-COG, is
7 5,381. Using L-COG's low 5% tolerance figure, there would be a
8 total of new housing units in the subarea (assuming, as does
9 L-COG, a 2.42 persons per unit occupancy) of 491 units.
10 Petitioner estimates that 376 units can be provided through
11 infilling on existing lots. Thus, given the 600 additional
12 units which petitioner's proposal would provide, there would be
13 an over supply of 475 units if L-COG's population estimate with
14 a 5% tolerance level were valid. Using L-COG's high, or 10%,
15 tolerance level, an additional 1,547 housing units would be
16 required in the McKenzie River Valley. Subtracting from that
17 figure the units to be provided by petitioner's proposal as
18 well as units which could be provided through infilling, would
19 leave a need for an additional 577 units. Thus, at a 5%
20 tolerance level, WRECO's proposal would provide an oversupply
21 of 475 units; at a 10% tolerance level, there would remain a
22 need for 577 units.

23 Petitioner concluded the average between the 5% and 10%
24 tolerance figures was most representative of the projected
25 population in the McKenzie River Valley. It said this was
26 "reasonable" because L-COG had implied that the population for

1 the subarea would fall somewhere between the 5% and 10%
2 tolerance levels. Based upon this assumption, petitioner
3 concluded that there would be a need for 1,019 additional
4 housing units in the valley. Subtracting from this figure the
5 600 units to be furnished by petitioner's proposal, and the 376
6 units which could be accommodated through infilling, petitioner
7 concluded there would be an additional need for 43 units in the
8 McKenzie River Valley until the year 2000.

9 The county did not accept petitioner's population
10 estimate. The county, instead, found that the several
11 different L-COG population projections resulted in a range of
12 housing needed within the subarea from a low of a minus 578
13 units to a projected increase of 1,615 units. The county
14 believed a middle projection (465 units) was

15 "more representative of assumable need in view of the
16 uncertain ability of the county, given its fiscal
17 problems, to service any particular level of
18 population increase and the uncertainty of both short
19 range and long-term population increase extrapolation
20 given recent evidence in the record of possible
21 population stagnation or even decrease due to a
22 declining employment base."

23 The county's selection of the midpoint in the range of
24 population projections cannot be said to be lacking in
25 substantial evidentiary support. Petitioner attacks the 465
26 unit figure as wrong mathematically. Our arithmetic causes us
to agree with petitioner that the midpoint between a minus 578
and a plus 1,615 is not 465 but is 518. We believe this does
not change, however, the validity of the county's findings.

1 The intent of the county's findings was to select the midpoint
2 in the range. That its arithmetic was off by some 53 units
3 does not change matters. The figure of 518 units, which is the
4 figure we believe the county intended, is supported by
5 substantial evidence because it falls within the 5% to 10%
6 tolerance level which L-COG estimated would be the more likely
7 range for Lane County's rural population. While it is very
8 close to the 5% tolerance level which L-COG said represented
9 the likely low end of the range, the 5% projection was
10 supported by the Lane County League of Women Voters as the more
11 probable estimate. Petitioner cannot say that it conclusively
12 proved its population projection was the only reasonable
13 projection. It is not our job to judge whether petitioner's
14 projection is more reasonable or the county's is more
15 reasonable. That job is the county's. The county's population
16 figure is supported by substantial evidence in the record and
17 an explanation of why it was chosen.

18 Given petitioner's figure that there are 376 units which
19 can be provided through infilling, there is only a need, given
20 the county's finding of a need for 518 units, for an additional
21 142 dwelling units in the McKenzie River Valley to the year
22 2000. Petitioner's proposal for 600 units would, therefore,
23 provide 458 unneeded housing units.

24 Even if the county had erred in its estimate of housing
25 need based on projected population, the county still was not
26 persuaded this development would satisfy whatever housing need

1 might exist within the subarea. If we assume that petitioner's
2 estimate of needed housing units were the only reasonable
3 estimate (1,016 units), petitioner's proposal would provide
4 almost 60% of that housing. The county was concerned, however,
5 that allowing anywhere near such a percentage of housing by
6 this development would not satisfy the county's responsibility
7 under Goal 10 to encourage "housing units at price
8 ranges...which are commensurate with the financial capabilities
9 of Oregon households and allow for flexibility of housing
10 location, type and density." The county believed that even if
11 1,615 housing units were needed in the subarea by the year 2000
12 (i.e., 10% tolerance level), to have 600 (37%) of those units
13 be high priced, of two types and of uniform density, would do
14 violence to Goal 10. The county saw no indication from the
15 record that 37%, let alone 60%, of the housing need within the
16 subarea would be "those of upper middle to high income
17 residents."

18 Petitioner says there is no evidence to support the
19 county's finding that these units are "high income units" and
20 that, in any event, the county did not define "high income."
21 Petitioner argues it "repeatedly has stated that it will be for
22 middle to upper middle income buyers." Petition for Review at
23 36.

24 The Ragatz Market Analysis submitted by petitioner supports
25 the county's findings these units could be considered "high
26 income units." The Ragatz analysis examined the projected

1 population increase in the county as a whole in terms of
2 income, occupation, and education. The report found that the
3 category of upper middle income (persons with incomes 30% above
4 the median income) and high income persons are expected to
5 increase from 78,840 in 1975 to 113,850 by 2000. The report
6 found similar increases in the category of "professional"
7 workers and persons with college educations. Based upon these
8 findings the report stated:

9 "In summary, the proceeding projections appear very
10 positive for the proposed McKenzie River project. As
11 will be discussed in the concluding chapter, the
12 project will be oriented toward the upper moderate to
13 high cost range due to the inherent quality of the
14 site and the expense required to develop it." Ragatz
15 Market Analysis, p. 12.

13 The Ragatz report also notes at page 9 that persons over 65
14 are an important age group to consider in terms of their
15 ability to purchase units in WRECO's development:

16 "While most people in this sector have limited
17 incomes, a sizable proportion have sufficient wealth
18 to retire in relatively expensive housing and
19 environments due to the availability of an existing
20 house which has probably been paid off but has also
21 escalated in value in recent years.***"

20 The foregoing from the Ragatz Market Analysis provides a
21 sufficient basis for the county to characterize the units in
22 this development as "high income." While not necessarily an
23 exact term and while not defined by the county, the meaning of
24 "high income" is relatively clear - these units are intended
25 for persons with upper middle to high incomes and retired
26

1 persons who can afford "relatively expensive housing."

2 Petitioner takes issue with the county's statement that a
3 survey must be done to determine if there is a need for 600
4 "high income" units. Petitioner says a survey of residents
5 would have little bearing on the housing needs 17 years from
6 now. Petitioner states:

7 "What is essential, given population projections which
8 indicate that the population in the area is going to
9 increase...is to identify the likely nature of that
10 increase by identifying the demographic
11 characteristics of the projected population increase
12 in the identified market area." Petition for Review
13 at 35-36.

14 The Ragatz Market Analysis, while discussing demographic
15 characteristics of the Lane County population as a whole, both
16 now and in the future, is too general for us to be able to say
17 the demographic characteristics identified in the Ragatz report
18 would be possessed by the future population in the McKenzie
19 subarea. That is, the report does not say whether the high
20 income and professional people who are expected to comprise a
21 significant part of the increase in Lane County's population as
22 a whole will want to live in rural Lane County, will need to
23 live in rural Lane County for their work, or, more
24 specifically, would want to live or need to live in a planned
25 development of some 800 housing units such as WRECO proposes.
26 The report does not compel the conclusion 60% of the McKenzie
Valley subarea's population increase will consist of high
income persons, professional workers and retired people.⁵

1 3. Economic and employment benefits

2 The county found that WRECO's proposed development was not
3 needed to satisfy the county's economic and employment problems:

4 "The economic needs of the county, severe as they may
5 be, do not justify in themselves, this site for a
6 housing development. Such economic return to the
7 county in enhanced tax revenues would occur no matter
8 where the development is located. Standing
9 alone, such factors do not show a compelling need to
10 use this site as opposed to other locations for this
11 type of housing development."

12 The county's analysis of petitioner's economic
13 justification, in effect, concedes there is a need to improve
14 the county's economy, but disagrees that a justification has
15 been made to do it at this location. This analysis, therefore,
16 is really under the second criterion of Goal 2, Part II, which
17 requires an analysis of alternative locations within the area.
18 The county's findings addressed this issue in greater detail
19 later in the order:

20 "***In its discussion of alternative sites, the
21 applicant details that no other large tract exists to
22 allow development of this type in the county. To the
23 extent that the housing needs to justify this
24 development can be subcatagorized into retirement
25 housing versus primary family housing or subarea
26 housing needs versus metropolitan housing needs, the
27 alternative lands evaluation can be more particular.
28 Absent a showing that it is necessary to package
29 retirement and primary family housing together, or to
30 serve metropolitan and rural needs at one location, an
31 examination of alternatives includes the alternative
32 of meeting the housing need at different locations in
33 combination. On this perusal, the applicant has also
34 failed to meet its burden of proof.

35 "This combination alternative is, in fact, called for
36 by the existing subarea comprehensive plan which
37 mandates a 'community growth concept.' In other

1 words, growth is to be channeled into a variety of
2 existing communities rather than one location. The
3 growth pattern that is an alternative here, is not
4 lineal and random but nodal and planned, under the
subarea plan. This is not only to avoid duplication
of public services provision but also to foster
community spirit in growing in active towns."

5 Before discussing petitioner's economic need argument, it
6 is important first to point out a distinction made by the
7 findings. The county's findings that economic and employment
8 benefits to the county from WRECO's proposal were not an
9 adequate basis to say the use should be provided only related
10 to the 600 units of primary family/retirement housing, not to
11 the 200 unit destination resort portion of the development
12 proposal. This is significant because much of petitioner's
13 argument about economic and employment benefits to the county
14 relate only to the destination resort portion of the proposal.
15 Those arguments will not be addressed here.

16 Petitioner contends the county "ignored the substantial
17 evidence submitted by petitioner concerning the economic
18 benefits" of its proposal in terms of tax base expansion,
19 employment opportunities and new income to the county.
20 Petitioner states the facts show the economic and employment
21 benefits resulting from conversion of 260 of the 1,070 acres to
22 residential use are more positive than if the 260 acres were
23 retained for commercial timber production.

24 Petitioner seems to be arguing that one may justify
25 designating resource land for a use determined to be needed to
26

1 provide additional economic benefits to the county, by showing
2 development of the property has better economic and employment
3 benefits than retaining the property for its resource use,
4 particularly in the short run. If this argument were to hold,
5 there would be little protection for resource lands. This is
6 particularly true for forest land at a time when the state's
7 wood products industry is experiencing hard times. It takes
8 more to justify directly removing 260 acres from resource
9 production and indirectly impacting an additional 800 acres of
10 prime timberland: what is required is proof that non-resource
11 land is not available for the use to be provided. 1000 Friends
12 of Oregon v Douglas County, 4 Or LUBA 148 (1981). The county
13 found that development of residential housing elsewhere in the
14 subarea and in the county as a whole would provide to the
15 county the same economic and employment benefits, without
16 taking significant commercial timberland out of production.
17 Petitioner attacks this finding by stating:

18 "The NDC (New Development Center) has numerous
19 self-contained services such as sewage treatment, fire
20 protection, water and security. If these units were
21 built in an urban area the cost of providing these
22 services would be born by all citizens. In this case,
23 the costs are born only by the residents of NDC. That
24 is why the revenue impacts are more positive with the
25 NDC as proposed. The ability to provide these on-site
26 services is due to the scale economies of combining a
number of uses into an NDC. The capital costs of
providing these services are prohibitive for a small
number of units. Hence, the economic benefits from
one part cannot be realistically separated from the
whole.

"It is seldom that a developer is willing to put up
\$55 million to develop a quality project. It is

1 extremely unlikely that petitioner, if denied here,
2 would try again in Lane County at another location, so
3 the substantial revenue and employment benefits from
4 this project would not accrue to the county."
5 Petition for Review at 52-53.

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Petitioner's first reason assumes that new development within urban areas will entail significant increased service costs and that these costs would reduce the economic benefit to the county. This may or may not be true and may or may not have been believed by the county. Although the petitioner expressed this view before the county (see Record, Attachment 1 at p. 47), the findings do not tell us what the county thought about the argument. But even if true, petitioner's argument does not provide a compelling basis for saying this use should be allowed to help solve the county's economic problems. If the county can partially provide for a need on non-resource land, the fact that it may fulfill the need to a slightly greater extent by allowing the use on resource land is not compelling justification for using the resource land and foregoing the present or future economic benefit to be derived by preserving the resource land for resource uses.

Petitioner's second reason appears to assume there are no other housing developers in Lane County. It is true that if WRECO is not allowed to develop the project, there will be no economic and employment benefits to the county from this project. But it does not follow, based on this record, that economic and employment benefits would not result from other

1 development or that other development projects would not be
2 undertaken.

3 Thus, while the county agreed the construction of new
4 housing units in Lane County would assist the county's economic
5 and employment difficulties, the county did not believe it had
6 been shown to be necessary to use this site compared to other
7 sites, at least for the 600 permanent housing units. We
8 conclude the county's finding was adequate to explain why
9 petitioner failed to satisfy its burden with respect to the
10 alternative lands criteria in Goal 2, Part II, Exceptions.

11 CONCLUSION

12 In order to be entitled to its plan amendment and zone
13 change, petitioner was required to persuade the county by
14 compelling reasons and facts that an exception to Goal 4 should
15 be granted. Petitioner failed to do this. The county's order
16 sets forth reasons why the county was not persuaded an
17 exception should be granted. These reasons are rational and
18 supported by substantial evidence in the record. The county's
19 denial of petitioner's request for a plan amendment and zone
20 change is affirmed.

1 COX, Dissenting.

2 I respectfully dissent.

3 The majority opinion takes pains to explain how it is the
4 applicants' burden to convince the local government of the
5 reasonableness of its proposal. The Court of Appeals in
6 Jurgenson v. Union County Court, supra, interpreted the burden
7 on an applicant to be analogous to the burden on a plaintiff in
8 a personal injury case. The majority opinion, however, takes
9 the Jurgenson holding into new territory, by applying it to the
10 extremely subjective Goal 2 exceptions process. The Jurgenson
11 case dealt with application of the definition of agricultural
12 land, a standard infinitely more specific and subject to
13 objective measurement than the Goal 2, Part II standard in this
14 case. To say the least, the use of the four questions posed by
15 Goal 2, Part II as objective standards is an exercise in mental
16 stimulation. The extent the appellate process has gone to make
17 some sense out of the exceptions process is evidenced not only
18 by the trouble this Board has had with the test but by the
19 court in Still v. Marion County, 42 Or App 115, 600 P2d 433
20 (1979), dubbing Goal 2's instruction to local governments to
21 answer the subjective question "why these other uses should be
22 provided for" as the hopefully more objective standard of
23 "need." Of course, the court did not mention what "need" meant
24 except that it wasn't to be measured by "demand." See DLCD v.
25 Tillamook, 3 Or LUBA 138 (1981) concurring opinion.

26 The majority opinion attempts to make allowances for the

1 lack of objectiveness of the Goal 2 exceptions standard by
2 stating that as the standard to be met becomes more subjective
3 the reasons for denial must become more specific. All the
4 majority creates, however, is more confusion when it doesn't
5 even apply its "rule" to the findings in this case.

6 The order and findings in this case are insufficient by any
7 standard heretofore recognized by the appellate courts in this
8 state. The court in Sunnyside v. Clackamas County, 280 Or 3,
9 569 P2d 1063 (1977), stated what findings must accomplish to be
10 acceptable. As the court stated:

11 "[w]hat is needed for adequate judicial review is a
12 clear statement of what, specifically, the decision-
13 making body believes, after hearing and considering
14 all the evidence, to be the relevant and important
15 facts upon which its decision is based. Conclusions
16 are not sufficient." 280 Or at 21.

17 The court in Commonwealth Properties v. Washington County, 35
18 Or App 387, 582 P2d 1384 (1978), stated the test in another
19 manner; one which is appropriately applied to this case
20 considering the initial green light given to the applicant and
21 the interpretation the county gave to the exceptions
22 procedure. The court stated:

23 "While it is true that we have held that statutory law
24 allows an agency to utilize a broadly worded general
25 standard in making decisions, we have also stressed
26 that:

27 "'[a]n applicant * * * should be able to know the
28 standards by which his application will be judged
29 before going to the expense in time, investment and
30 legal fees necessary to make application * * * Sun Ray
31 Dairy v. OlCC, 16 Or App 63, 71, 517 P2d 289 (1973)'"

32 The court summarized its feeling in the Commonwealth case by

1 stating:

2 "An applicant, be he seeking a liquor license or a
3 subdivision, should not be put in a position of having
4 his success or failure determined by guessing under
5 which shell lies the pea." 35 Or App at 387.

6 In my reading of the findings in this case, they are
7 exactly what the Sunnyside and Commonwealth courts cautioned
8 against. They are vague, misapply the language of Goal 2, Part
9 II, are unresponsive to the application and conclusional. They
10 are, for the most part, merely rhetorical questions and
11 generalized statements of beliefs unsupported by any reference
12 to facts.

13 The findings are defective in several manners. First, they
14 indicate the county viewed the applicants' request as divisible
15 into two parts, a destination resort and rural residential
16 housing development. The application was more appropriately
17 viewed as a request for a multi-use destination type resort in
18 the flavor of a Black Butte Ranch or Bowmans Resort. The
19 applicant submitted its plans for an entity or complete
20 package, not something to be divided so as to enhance the
21 likelihood of conquer. Second, the order appears to be nothing
22 more than a sophomoric evaluation of "need" measurements when
23 the standard (albeit an evasive one) to be applied by the local
24 government is "why these other uses should be provided for."
25 Third, the order applies goal 10 to a request for what
26 apparently should have been viewed as a tourist or recreational
development. The order does not adequately explain how it is

1 that Goal 10 applies to such a request. Fourth, the local
2 government apparently has based part of its decision on its
3 disagreement with statistical analyses used by the applicant in
4 deciding the market price, structure, design, etc. of the
5 product it would offer to the public. The county appears to
6 have compared projections of demand for the proposed
7 development with projections for urban housing requirements of
8 people already living in the area. This could be likened to
9 comparing apples with oranges because they are both fruit.

10 The order as a whole evidences a misunderstanding of the
11 purpose the exceptions process should serve and therefore has
12 made the applicant "guess under which shell lies the pea." The
13 standard is not, as the order seems to indicate, an objective
14 test which results in yes or no answers to each of its parts.
15 It does not require an objective showing of "need;" it does not
16 require that there be no alternative site for the proposed
17 project; it does not require a showing of absolute
18 compatibility with the surrounding land, and it does not
19 require a showing that there will be no economic environmental,
20 social or energy consequences.

21 I would remand for proper findings.
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FOOTNOTES

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Goal 2, Part II Exceptions provides:

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

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

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

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

21 "(c) What are the long term environmental,
22 economic, social and energy consequences to
23 the locality, the region or the state from
24 not applying the goal or permitting the
25 alternative use;

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

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28 The cover letter to WRECO from Ragatz shows this market
29 analysis was apparently prepared for WRECO to assist it in
30 deciding whether to proceed with plans for development. It
31 states:

32 "Enclosed please find a copy of 'A Market
33 Analysis for the McKenzie River Property: A
34 Proposed New Community Development by the
35 Weyerhaeuser Real Estate Company.' Based upon
36 material contained herein, it appears that a high
potential demand exists for this proposed
project. It is therefore recommended that your

1 company proceed with the undertaking. We enjoyed
2 working on the project and hope you find the
3 contents useful."

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4 At what point psychological need may become more than
5 simply market demand and may become a basis for the county to
6 say, "yes, this use should be provided," is certainly not clear
7 and may not, as petitioner suggests, even be susceptible of
8 proof. What we do know, and are bound by, given the holding in
9 Still, is that market demand cannot be used as the yardstick by
10 which psychological need can be measured.

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9 It is assumed here that need to supply housing for a rural
10 subarea could, if proven, be a basis for allowing an exception
11 to the forest lands goal. Such an assumption has shakey
12 underpinnings at least absent a showing non-resource land is
13 unavailable to supply the subarea's housing need. See 1000
14 Friends of Oregon v Douglas County, 4 Or LUBA 164 (1981).

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14 This development could probably be filled with people who
15 would move to Lane County from out of state big city
16 environments solely because of the attraction of this
17 development. But it is not in furtherance of Goal 10 to
18 provide housing for people who would not be likely to move to
19 this state but for the housing. Goal 10 speaks to providing
20 housing for Oregonians. It does not speak to providing housing
21 which will then be marketed in Los Angeles, Chicago or New
22 York. We are not suggesting that is the intent, here; only
23 that the applicant's duty, if justification for housing is to
24 be based on Goal 10, is to show the housing is geared to the
25 needs of people who will be needing housing in Lane County.



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 11/02/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: WEYERHAEUSER REAL ESTATE v LANE COUNTY
LUBA No. 82-014

Enclosed for your review is the Board's proposed opinion and order in the above captioned appeal.

This appeal concerns Lane County's denial of a request for a comprehensive plan amendment and zone change for 1,070 acres of forest land east of Springfield. The county's denial was based, among other things, on the county's belief that WRECO had not met its burden of proof justifying an exception to Goal 4. If approved, the plan amendment and zone change would allow the construction of 800 dwelling units, a restaurant, a 30 room lodge and some additional accessory facilities.

This is the second time this case has been before the Commission. The first time, the Board recommended that the denial be found to be not inconsistent with Goal 2 because the decision to deny the exception could not be said to arbitrary or capricious. The Commission did not agree with LUBA's recommendation that a local government's decision to deny an exception is subject to review only to determine if it is arbitrary and capricious. The Commission's determination stated:

"Goal 2 provides a second standard because it requires a local government's land use decisions, whether quasi-judicial or legislative, to be based on findings. There is nothing in LUBA's proposed opinion to indicate it applied the Goal 2 requirement or that Lane County's denial of the exception was based on findings as required by Goal 2. Therefore, the Commission directs LUBA to apply the Goal 2 requirement that land use decisions be based on findings and review the record to determine whether Lane County made adequate findings, supported by substantial evidence in the record, to support its decision."

The Board has completed its review of Lane County's findings in accordance with the above determination. A majority of the Board believes the county's findings are adequate to explain why the applicant failed to present compelling reasons why this use should be provided at this



particular location. Referee Cox dissents, recommending that the Commission conclude the county's findings are inadequate to support denial of the exception.

The Board is of the opinion that oral argument will not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.

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

3 WEYERHAEUSER REAL ESTATE)
4 COMPANY, a Washington)
5 corporation,)
6)
7 Petitioner,)
8)
9 v.)
10)
11 LANE COUNTY, et al,)
12)
13 Respondents.)
14)
15 and)
16)
17 LOWER MCKENZIE COMMUNITY)
18 COUNCIL, GORDAN VANCE and)
19 GORDON CARLSON,)
20)
21 Respondents.)

LUBA No. 82-014

PROPOSED OPINION
AND ORDER

14 Appeal from Lane County.

15 Michael E. Farthing, Eugene, filed the Petition for Review
16 and argued the cause on behalf of Petitioner. With him on the
17 brief were Husk, Gleaves, Swearingen, Larsen & Potter.

18 William A. Van Vactor, Eugene, filed the brief and argued
19 the cause on behalf of Respondent Lane County.

20 Timothy J. Sercombe, Eugene, filed the brief and argued the
21 cause on behalf of Respondents Lower McKenzie Community
22 Council, et al.

23 REYNOLDS, Chief Referee; BAGG, Referee; participated in the
24 decision; COX, Referee; dissents.

25 AFFIRMED

11/02/82

26 You are entitled to judicial review of this Order.
27 Judicial review is governed by the provisions of Oregon Laws
28 1979, ch 772, sec 6(a).

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BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

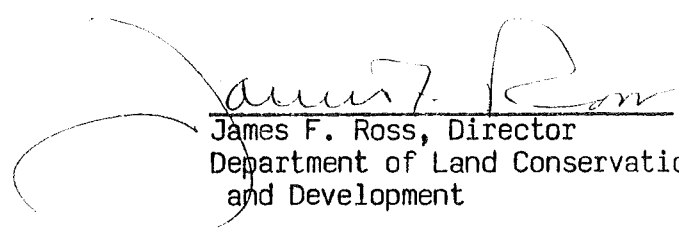
WEYERHAEUSER REAL ESTATE)
COMPANY, a Washington)
Corporation)
Petitioner,)
v.)
LANE COUNTY, et al.,)
Respondents,)
and)
LOWER MCKENZIE COMMUNITY)
COUNCIL, GORDAN VANCE and)
GORDON CARLSON,)
Respondents.)

LUBA NO. 82-014
LCDC Determination

The Land Conservation and Development Commission hereby approves
the recommendation of the Land Use Board of Appeals in LUBA Case
No. 82-014.

Dated this 22 day of November, 1982.

For the Commission:


James F. Ross, Director
Department of Land Conservation
and Development

JFR:DB:af
2005B-4/7B