

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal a comprehensive land use plan and zone
4 change along with a variance and a preliminary subdivision plat
5 granted by the Klamath County Board of Commissioners. The
6 comprehensive plan and zone change was from a "Transitional"
7 (TZ) designation to "Rural Residential" (RR). The approvals
8 will permit a subdivision to be placed on the property.

9 FACTS

10 The property is a 20.5 acre tract of land surrounded by a
11 platted subdivision called "Cedar Trails." The Cedar Trails
12 Subdivision is 500 acres in size and is divided into 118 lots
13 varying from 1 1/2 acres to 20 acres apiece. The subject
14 subdivision, "Deer Knoll" is for 18 single-family residential
15 lots of not less than one acre in size. The subdivision
16 project is not part of the Cedar Trails Subdivision. The
17 property is about 17 miles from the urban growth boundary of
18 Klamath Falls and 2 miles from the unincorporated community of
19 Keno.

20 The subject property is inside a "secondary buffer zone" of
21 the Bear Valley Bald Eagle Roost. The county record includes
22 no explanation of what this designation means.¹ The property
23 has a "medium wildfire hazard rating" and is within the Keno
24 rural fire protection district.

25 The Board of Commissioners considered the requests on
26 October 4 and November 8 and issued an order approving the plan

1 and zone change on November 29, 1982. The matter of the
2 variance for an excessive cul-de-sac length was approved on the
3 same day.²

4 FIRST ASSIGNMENT OF ERROR

5 The first assignment of error challenges the plan and zone
6 change and alleges the commissioners failed to comply with the
7 procedures set forth in the Klamath County Land Development
8 Code. The Code at Section 31.011 requires the order of the
9 hearings body (in this case the county board) to set out

10 "A. A statement of the applicable criteria and
11 standards against which the proposal was tested,
12 and of the hearing body's interpretation of what
would be required to achieve compliance with the
criteria and standards.

13 "B. A statement of the facts which the hearing body
14 found establishing compliance or noncompliance
15 with each applicable criteria and assurance of
compliance with applicable standards.

16 "C. The reasons for a conclusion to approve or deny."
17 Article 31, Section 31.011, Klamath County Land
Development Code.

18 In addition, a comprehensive plan and zone change are subject
19 to the following criteria:

20 "A proposed Change of Comprehensive Plan Designation
21 shall be approved if the reviewing authority finds
that:

22 A. The proposed change is in compliance with
23 the Statewide Planning Goals;

24 B. The proposed change is in conformance with
25 all policies of the Klamath County
Comprehensive Plan; and

26 C. The proposed change is supported by specific
studies or other factual information which

1 documents the public need for the change.

2 Finally, a proposed change of zone shall be approved
3 if the reviewing authority shall find that:

4 A. The proposed change of zone is in compliance
5 with the Klamath County Comprehensive Plan
6 and the provisions of this code; and

7 B. The proposed change of zone adequately
8 responds to site specific conditions to
9 minimize adverse effects upon surrounding
10 property that would be affected by the
11 proposed change." Klamath County Land
12 Development Code, Articles 48 and 48A.

13 Petitioners assert the county has no statement of this
14 criteria in the order, and the order does not say what facts
15 the hearing body found to establish compliance with each of
16 these criteria.

17 Respondent says the code sections cited by the petitioners
18 simply provide a format for the mechanics of an order.
19 Respondent advises the order does discuss the applicable
20 comprehensive plan criteria and the specific approval
21 standards. Respondent points to findings that consider
22 applicable statewide planning goals and comprehensive plan
23 policies. Finally, respondent argues the petitioners failed to
24 show how they are prejudiced by the county decision.

25 The county order does set out what the county believes to
26 be the relevant criteria and standards applicable for the
change. The order addresses the statewide planning goals and
the policies in the Klamath County plan. The order even
addresses the matter of whether the change will have any
adverse impact on surrounding property. See Record of Zone

1 Change pages 2-6.

2 However, we see no finding addressing public need, however
3 that term may be defined, for the change. See Articles 48 and
4 48A(C), supra. The record includes information that might
5 suggest a public need for the change. See Record 46, 48, 49
6 and 64-69. But this "factual information" addresses what
7 appears to be a market demand for small lots. Even if the
8 record materials could be substituted for the required
9 findings, the Court of Appeals has held that market demand
10 alone is an insufficient basis for establishing a public need.
11 Still v. Marion County, 42 Or App 115, 600 P2d 433 (1979). We
12 believe, therefore, that the county owes an explanation of what
13 it means by public need, and further information in the
14 findings to support a public need for the zone change.

15 To the extent the county order fails to address the issue
16 of public need as required by Articles 48 and 48A(C), supra,
17 assignment of error no. 1 is sustained.

18 SECOND ASSIGNMENT OF ERROR

19 The second assignment of error alleges the county order is
20 not supported by substantial evidence in the record.
21 Petitioners attack specific findings and also claim that
22 conclusions, nos. 1, 2 and 3, appearing at pages 5 and 6 of the
23 record, are neither supported by adequate findings of fact nor
24 are they adequately supported in the record.

25 The petitioners first attack that portion of the county's
26 order addressing statewide planning Goal 5. The finding states:

1 "The Board of County Commissioners find [sic] that in
2 reviewing the policies of Goal No. 5, there appeared
3 to be no policies that were relevant to this proposed
4 change as well as L.C.D.C. Goal No. 5, therefore
5 addressing Policies of L.C.D.C. Goal No. 5." Record
6 at 4.

7 Petitioners claim the county staff noted the property was
8 in the Bear Creek Valley Eagle Roost Secondary Buffer Area.
9 See Record 57.³ Petitioners' argument appears to be that the
10 county had information to suggest Goal 5 was applicable because
11 of the land's proximity to the eagle roost. They claim the
12 county failed to fully address the Goal.

13 Petitioners next turn their attention to findings of Fact
14 16 and 19, findings that discuss fire danger and the fact that
15 the area is served by the Keno Fire District. Petitioners
16 argue the fire district stated it could not provide adequate
17 protection to the subject property. Petitioners claim the
18 finding that fire protection will be provided is therefore
19 unsupported.

20 The petitioners conclude with an argument that the county's
21 conclusions 1, 2 and 3 are not supported by findings of fact or
22 by evidence in the record. Those conclusions are as follows:

23 "1. The Board of County Commissioners conclude
24 that this change in Comprehensive Land Use Plan and
25 zone permits orderly and beneficial development, while
26 protecting the character of neighborhoods and
27 communities, and the social and economic stability of
28 the County.

29 //

30 //

1 "2. The Board of County Commissioners conclude
2 that this change in Comprehensive Land Use Plan and
3 zone supports the protection and preservation of the
County's space and recreational resources while
providing for appropriate development.

4 "3. The Board of County Commissioners conclude
5 that this change in Comprehensive Land Use Plan and
6 zone will further the goals and policies of the
Klamath County Comprehensive Plan."

7 We agree with the petitioners that the county's finding
8 does not appear to adequately address Goal 5. There is
9 evidence in the record to suggest that the property does have
10 wildlife habitat significance. The staff report mentions the
11 property is within the Secondary Bald Eagle Roost. The
12 county's findings should at least address the significance of
13 such proximity before concluding there is no Goal 5 issue..

14 As to the matter of fire protection, we note a letter in
15 the record from the Keno Rural Fire Protection District does
16 not say that service can not be provided, it simply suggests
17 conditions. However, the county did not find that service by
18 the Keno Rural Fire Protection District will be adequate. The
19 county's findings simply state that the site is to be served by
20 the fire district and the site is in a "medium fire hazard
21 area." We do not know what medium fire hazard area means, and
22 the county has failed to find the fire district service will be
23 adequate to serve a medium fire hazard area. We view the issue
24 of fire protection as relevant to the zone change and a proper
25 inquiry in the zone change proceeding. Article 48A, supra,
26 makes "site specific conditions" an inquiry for any zone

1 change. On remand, we believe the county should provide more
2 explanation on fire protection.

3 As to the matter of the county's conclusions, we only note
4 that without adequate findings of fact, we can not tell if the
5 county has complied with all applicable criteria. Dupont v.
6 Jefferson County, 1 Or LUBA 736, aff'd Hoffman v. Dupont, 49 Or
7 App 699, 621 P2d 63; rev den, 290 Or 651 (1981)..

8 THIRD ASSIGNMENT OF ERROR

9 In assignment of error no. 3, petitioners attack the
10 findings of fact and conclusions in support of the variance for
11 an excessive length cul-de-sac. Petitioners also argue the
12 county did not enter an order that includes a statement of the
13 applicable criteria and a showing of compliance with the
14 criteria. This statement is required by Article 31.011 of the
15 Land Development Code.

16 Petitioners first consider compliance with variance
17 criteria. Article 43 of the County Land Development Code
18 requires a showing of hardship for the issuance of a variance.

19 "SECTION 43.003 - REVIEW CRITERIA

20 "A Variance shall be granted only if the reviewing
21 authority shall find that it satisfies the following
22 criteria:

22 "A. That a hardship peculiar to the property and not
23 created by any act of the owner exists. In this
24 context, personal, family or financial
25 difficulties, loss of prospective profits and
26 heighboring [sic] violations are not hardships
justifying a Variance. Further, a previous
Variance can never have set a precedent, for each
case must be considered only on its individual
merits.

1 "B. That exceptional or extraordinary circumstances
2 apply to the property which do not apply
3 generally to other properties in the same zone or
4 vicinity and result from size or shape, legally
5 existing prior to the effective date of this
6 Code, topography, or other circumstances over
7 which the applicant has no control.

8 "C. That the granting of the Variance will not be
9 materially detrimental to the public health,
10 safety or welfare or will not impair an adequate
11 supply of light and air to adjacent property."

12 Petitioners assert these criteria were not met.⁴

13 Respondent objects to petitioners' attack on the ground
14 that petitioners could have attacked the grant of the variance
15 below but did not raise the issue. Petitioners have failed to
16 exhaust their administrative remedies, according to
17 respondent.

18 The requirement of exhaustion is to procedural matters.
19 The Board has stated that where a potential petitioner has the
20 opportunity to raise a procedural issue before the governing
21 body and fails to do so, he may not raise the issue first to
22 LUBA. Dobaj v City of Beaverton, 1 Or LUBA 237 (1980); Twin
23 Rocks Water District v Rockaway, 2 Or LUBA 36 (1980). In this
24 case, however, the adequacy of the findings on the variance
25 request is a matter of substance, not simply procedure.

26 As noted in the criteria listed above, the county ordinance
requires a showing of "hardship peculiar to the property" and
"exceptional or extraordinary circumstances" that apply to the
property. That language has been held in the past to result in
a very strict variance standard. The county's findings

1 addressing this standard are as follows:

2 "The excessive cul-de-sac length variance is
3 necessary due to the fact that the 20-acre proposed
4 subdivision is completely surrounded by a
5 subdivision. Due to the shape of the property and the
6 location of existing roads in the subdivision, the
7 excessively long cul-de-sac was designed. The
8 exceptional circumstance does not apply to other
9 properties in the area and result from size and shape
10 legally existing prior to the effective date of this
11 Code."

12 This finding does not fully address the criteria. A
13 showing of hardship requires a showing that the owner will, if
14 the zoning rules are strictly enforced, be deprived of a
15 reasonable return from any permitted use. See 3 Anderson,
16 American Law of Zoning, Sec 18.17 (2d ed, 1977). There is no
17 such showing in the county's findings. Further, there is no
18 discussion of how exceptional or extraordinary circumstances
19 apply to this property. The "extraordinary circumstances"
20 language imposes a similarly tough standard. Such
21 circumstances must arise out of the land itself, not the
22 applicant's desire for a particular lot configuration or
23 numbers of lots. See 3 Anderson, supra at sec 18.33 and Lovell
24 v. Independence Planning Commission, 37 Or App 3, 7, 586 P2d 99
25 (1978). The discussion in the findings only shows a potential
26 inconvenience to the applicant by the shape of the property.
Without more explanation of how this property is subject to
unique conditions or circumstances, the variance must fail.⁵
Lovell, supra; 3 Anderson, supra at Sec 18.51.

This assignment of error is affirmed.

1 FOURTH ASSIGNMENT OF ERROR

2 Assignment of error no. 4 complains that the county order
3 denying petitioners' appeal of the subdivision tract is not
4 supported by substantial evidence. Petitioners attack the
5 county finding stating that there are one acre lots in the
6 subdivision that conform to lot sizes in the general area.
7 Petitioners claim the evidence shows that the subject property
8 is surrounded by lots varying in size from 1.5 to 20 plus
9 acres. Our review of the record suggests that petitioners are
10 correct. The finding about lot size is inaccurate when
11 compared to the assessor's map in the record. An error in a
12 single finding, however, may not be enough to require we
13 overturn the county decision if critical findings are accurate
14 and well supported.

15 Petitioners next attack county finding no. 3 that the site
16 has adequate access to streets and highways on the ground that
17 if the site had adequate access, there would be no need for a
18 variance. Further, petitioners refer to testimony of the Keno
19 Rural Fire Protection District included in the Record at page
20 81 questioning whether adequate access exists for firefighting
21 purposes.

22 We find petitioners to misread the finding. The finding on
23 access may be read to mean that without the variance, there is
24 adequate access to the site. The finding may also mean that
25 the site as a block of land has adequate access. However, we
26 can agree with petitioners that the finding is unclear and does

1 not address questions by the Rural Fire Protection District
2 about the adequacy of access for firefighting purposes.

3 Unlike an erroneous finding on lot sizes in the area, the
4 question of whether adequate access exists to the site is
5 critical. We believe the county must address more fully the
6 matter of access to and within the site.

7 Petitioners attack finding of fact no. 4 which indicates
8 the subdivision will have no significant adverse impacts on
9 surrounding property. They claim the finding does not take
10 into consideration the wildfire hazard. To the extent that the
11 county did not adequately address the matter of fire protection
12 in its zone change and plan change order, we agree with
13 petitioners. See discussion under assignment of error no. 2,
14 supra. Somewhere in the approval process, these issues must be
15 discussed.

16 Petitioners next attack the findings discussing LCDC
17 planning goals. Petitioners' attack is difficult to
18 understand, but fairly read, they seem to be particularly upset
19 that the county has not addressed statewide Goal 14, the
20 urbanization goal. Petitioners say Goal 14 applies to this
21 proposal.⁶

22 We agree with the petitioners that Goal 14 should be
23 addressed. We understand the property is surrounded by a
24 platted and approved subdivision, but that fact alone does not
25 relieve the county of an obligation to make findings on the
26 applicability of Goal 14 when rural land is to be converted to

1 small size lots. 1000 Friends v. Clackamas County, 3 Or LUBA
2 317 (1981).The property is not within an urban growth boundary,
3 and there is no discussion as to how it is that subdividing the
4 area into one acre lots will comply with Goal 14.⁷

5 This matter is remanded to Klamath County for proceedings
6 not inconsistent with this opinion.

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FOOTNOTES

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Attached to petitioners' brief is a portion of a Department of Land Conservation and Development staff report of February 18, 1982. The staff report discusses the Klamath County plan and mentions the Bear Valley Eagle Roost area. The record does not show that the staff report was before the county at the time the county made its decision. We will not consider materials that do not appear in the record.

8 2

The approval of the subdivision tract, "Tract 1234," was first made by the Klamath County Planning Commission on August 24, 1982. Petitioners herein and others appealed approval of Tract 1234 to the county board.

11 3

They point to a portion of an LCDC continuation order appearing as an appendix to their brief to show that the county failed to comply with Goal 5 by identifying subdivision use as a conflicting use. We will not consider the DLCDC or the LCDC continuance order for the reasons stated in footnote 1.

15 4

Petitioners make a curious argument that the hearings body did not issue a formal decision on the matter of the variance. Petitioners appear to attack a staff report in the order of the hearings body rather than the order of the county commission. The order of the county commission does discuss the requested variance, and we will consider petitioners' challenge to be to the county order.

20 5

Lovell, supra at 7 states:

"To obtain a variance, the individual property owner must demonstrate a peculiar hardship or practical difficulty not shared by others. See Bienz v. City of Dayton, 29 Or App 761, 778, 566 p2d 904 (1977); Erickson, 9 Or App at 262-63; 3 R. Anderson, American Law of Zoning Sec 18.32 at 224, 226 (2d ed 1977); 2 E. Yokley, supra Sec 15.9 at 162, 166-67; 168 ALR 25, 28 (1947). Even if Hein could use her land more profitably, as suggested by finding 3, that would be

1 insufficient to establish a practical difficulty
2 warranting a variance. See 3 R. Anderson, supra Sec
18.51 at 281-82; 101 CJS Zoning Sec 293, at 1074
3 (1958).

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5 The subdivision approval does not discuss Goal 14 at
6 all. The plan and zone change order does discuss Goal 14
7 as follows:

8 "The Board of County Commissioners find [sic] in
9 reviewing the policies of Goal 14, that the policies
appear not to be relevant to this proposal. The site,
however, is approximately two miles outside the
established area known as the Rural Community Boundary
of Keno, therefore addressing L.C.D.C. Goal No. 14."

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11 This property appears to be subject to resource lands
12 protection under Goals 3 and 4. The county's findings on
Goals 3 and 4 are as follows:

13 "3. The SCS soils class is VII which soils are
14 suitable only to occasional grazing and do not
fall under the State's definition of Agricultural
15 Lands.

16 "4. The area has no Timber Site Productivity Rating;
therefore, Goal 4 does not apply."

17 These findings do not adequately address whether the property
18 is agricultural land under the "other lands" definition
included within LCDC Goal 3. The finding does not adequately
19 address whether the land is suitable for one of the timber uses
listed in Goal 4. It appears, therefore, that the land is
20 rural resource land and conversion of such land must be fully
addressed. See Albany v. Linn County, 2 Or LUBA 8 (1980) and
1000 Friends v. Clackamas County, 3 Or LUBA 317 (1981).



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 4/5/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: PATZKOWSKY V. KLAMATH COUNTY
LUBA No. 82-115

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

This case is about a subdivision and a plan and zone change in Klamath County.

Petitioners' second assignment of error asserts a violation of Statewide Planning Goal No. 5. The goal is allegedly broken because of the near proximity of an eagle roost to the proposed subdivision. We agree with the petitioners that the county failed to adequately address Goal 5 given the presence of the potential wildlife habitat.

In assignment of error 4, petitioners attack the proposal for failure to comply with Statewide Goal 14. We agree with the petitioners that Goal 14 should have been addressed. As we mentioned earlier, it appears that the land is subject to resource goal protection, and the county has not discussed whether its actions will, in effect, urbanize this land.

The Board is of the opinion that oral argument would 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.



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