

1 Opinion by DuBay.

2 THE DECISION

3 The county denied both an application to rezone property
4 from industrial and exclusive farm use to rural residential and
5 an application to subdivide a portion of the same property.
6 This is an appeal from both actions.

7 About one half of the 78-acre property is zoned industrial
8 (M-1), and the other half is zoned exclusive farm use (EFU).
9 Hurricane Creek is along the west boundary with other M-1 and
10 EFU zoned lands on the other three sides. The proposed use of
11 the property is for a residential subdivision of 35 lots, each
12 two or more acres in size.

13 The order denying the zone change lists the comprehensive
14 plan and ordinance criteria thought applicable, sets forth
15 facts regarding the property, makes seven conclusions, and
16 gives further comments labeled "discussion."¹ The comments
17 are general in nature and include a request to the planning
18 commission for further studies and recommendations for the
19 entire watershed area. The findings focus on four principal
20 matters. Petitioners' assignments of error will be combined
21 for purposes of this review.²

22 WATER SUPPLY

23 The property lies in the watershed for the City of
24 Enterprise. A county watershed review ordinance included a
25 procedure to consider the effect on the water supply of land
26 use decisions in a watershed review overlay zone. The

1 ordinance prohibits approvals of certain land use decisions
2 within the overlay zone unless the procedures and criteria in
3 the ordinance are first applied.

4 Petitioners first challenge the finding "the applicant has
5 not satisfactorily established that there is no significant
6 risk to the surrounding domestic wells nor to the City of
7 Enterprise water supply." Petitioners point out the watershed
8 review ordinance has specific provisions assigning the burden
9 of proof. The ordinance first requires notice to the city of
10 all applications, and, if the action is not a permitted use,
11 the city may respond in 30 days. The city then has the burden
12 to "present evidence" the proposal may cause or contribute to
13 an adverse effect on the water supply. If the city does
14 respond, "the burden of proof shall shift to the applicant" to
15 show there will be no significant adverse effect upon water
16 quality for the city.³ In this case the city presented no
17 evidence of adverse effect on the water supply. In fact, it
18 stated it had no objections to the proposal. Because the city
19 presented no evidence of adverse effect, petitioners claim the
20 burden to prove no risk was not shifted to them. They say in
21 these circumstances proof of non-interference with the
22 Enterprise water supply was not called for by the review
23 ordinance.

24 In addition, petitioners challenge the part of the finding
25 stating the applicant did not establish non-interference with
26 surrounding domestic wells. Petitioners claim the county did

1 not adequately explain that conclusion, particularly as there
2 was evidence from experts the proposed density would be
3 acceptable.

4 Petitioners do not challenge use of the watershed review
5 ordinance criteria, only that the procedural requirements were
6 improperly implied. Even if we assume petitioners' contention
7 to be correct that the special ordinance was misused, however,
8 the decision may still be upheld.

9 Our analysis begins with the county's findings. To be
10 adequate for review, the findings must clearly and precisely
11 state the applicable criteria, the relevant and important facts
12 upon which the governing body relied, and describe how and why
13 the facts lead to the decision. Sunnyside Neighborhood v.
14 Clackamas Co. Comm., 280 Or 3, 569 P2d 1063 (1977); Green v.
15 Hayward, 275 Or 693, 552 P2d 815 (1976).

16 Section 4 of the watershed review temporary ordinance
17 states the watershed review procedures are in addition to
18 review procedures specified in the zoning ordinance and
19 subdivision ordinance. The criteria of the watershed review
20 ordinance, then, were not the only standards the county applied
21 or was required to apply in the matter before it.

22 The criteria applicable to this issue of water supply
23 considered by the county court were listed in the order. In
24 summary, they were:

- 25 (1) Section 9.010 of the county's zoning ordinance
26 requiring consideration of various factors prior
to any zone change, including suitability of the

1 area for the proposed zone and uses. Findings IA4.

2 (2) The Agricultural Guidelines of the county land
3 use plan requiring findings, among others, that
4 physical, social, economic and environmental
5 considerations have been taken into account and
6 that the resulting uses will not create a burden
7 on existing water rights and uses. Findings
8 IB(2)C,E.

6 (3) The Air, Water and Land Resource Quality
7 Guidelines of the plan noting that land divisions
8 or development which exceeds the carrying
9 capacity of an area's air, land or water
10 resources should not be approved. Findings IC.

9 The facts on this water supply issue considered relevant to
10 those criteria and relied upon by the county were listed in the
11 findings as follows:

12 "4. The soils are formed in poorly sorted, very
13 gravelly sands. The soils are excessively and
14 very rapidly drained."

14 "5. There are no water rights to tax lot 1901."

15 * * *

16 "8. Tax lot 1901 lies entirely within the designated
17 City of Enterprise Watershed Review Zone. The
18 property is south (upslope) from the city springs
19 at a distance of approximately 1.0-1.5 miles."

18 * * *

19 "10. The area has exhibited no noticable decline in
20 water well levels accompanying the increased
21 number of water wells in the area since 1960."

21 * * *

22 "12. The record reveals nothing as to the mechanism of
23 ground water movement in the watershed."

24 "13. The record reveals no site specific data with
25 regard to the impact of sewer systems and
26 possible chemical contamination in the Hurricane
Creek aquifer and existing domestic wells."

1 Those findings of fact generally apply to the criteria
2 listed in the order. The findings of soil porosity and lack of
3 information about how ground water moves through the soil and
4 lack of data regarding the effect on the Hurricane Creek
5 aquifer by sewage systems are particularly relevant. For
6 example, the mechanics of underground hydrology and the
7 resulting effect on water supply and watershed protection would
8 appear to be pertinent to the issue of suitability for
9 residential use, a criterion listed in Section 9.010 of the
10 zoning ordinance. They are also relevant to the carrying
11 capacity of the land or water resources, the criterion stated
12 in the Air, Water and Land Resource Quality Guidelines of the
13 county plan.

14 The next question is whether the findings describe how or
15 why the porous soils and lack of data regarding ground water
16 movement lead to the decision the rezoning and subdivision
17 should be denied. Conclusion C is the explanation given by the
18 county. It states:

19 "C. In light of the extensive testimony regarding the
20 extraordinary hydrology of the area, the
21 applicant has not satisfactorily established that
22 there is no significant risk to the surrounding
23 domestic wells nor to the City of Enterprise
24 water supply."

25 We understand Conclusion C to be based on findings of fact
26 numbered 4, 12, and 13, and to conclude there is an
insufficient showing of suitability for the proposed use for

1 residential purposes. The question of interference with the
2 city's watershed and other domestic ground water supply was an
3 issue considered by both applicants and opponents during these
4 proceedings as subject to the criteria cited in the order. It
5 is the applicant's burden to prove the proposal meets the
6 criteria. Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d
7 23 (1973). If that burden isn't met, the findings may so
8 state, as was done here. The basic requirements, according to
9 Sunnyside, supra, are findings stating the facts relied upon
10 and the reasons those facts applied to the criteria result in
11 the decision. The findings above discussed are adequate for
12 such purposes.

13 Petitioners say, however, the findings should include a
14 further analysis of the evidence, particularly two documents
15 submitted by experts regarding the issue of water supply
16 protection. Petitioners argue the findings must explain why
17 those documents were ignored as they are in conflict with the
18 findings.

19 The documents, memos from a soil scientist and
20 hydrogeologist of the Oregon Department of Environmental
21 Quality (DEQ), discuss a field inspection of the site made two
22 years before the county order. At that time they considered a
23 40 acre subdivision of 20 lots. They did not address the
24 effect of rezoning the entire 78 acres to allow residential
25 use. They did not make any comments conflicting with the
26 findings about porous, rapidly drained soil and the lack

1 of information of ground water movement, the facts relied upon
2 by the county. To explain the basis for the application of
3 facts to criteria, it is not always necessary to include
4 comments on all evidence submitted. It is sufficient for
5 review if the findings meet the fundamental requirements set
6 forth in Sunnyside, supra, and Green, supra. Those authorities
7 require reasons in the findings to describe how or why the
8 proposed action will serve the policies and objectives
9 applicable to the decision. If that is done, there is little
10 reason to describe how and why the governing body fulfilled its
11 function in weighing and deciding questions of fact.

12 Of course, the findings must be supported by substantial
13 evidence, and petitioners also challenge the findings on this
14 ground. The memos in evidence from DEQ include the information
15 "(t)he soils are formed in poorly sorted very gravelly
16 sands. As a result, the soils are excessively drained, deep
17 and very rapidly draining." Record at 54. The DEQ
18 hydrogeologist also noted "(t)he coarse gravels are very
19 permeable and must be considered as highly sensitive to surface
20 and subsurface waste disposal practices." Record at 55. The
21 same hydrogeologist stated

22 "(T)he proposed subdivision is only one of many future
23 land uses that may be requested. It is important to
24 begin collection of factual ground water data on local
25 water wells and chemical water quality now, prior to
26 future land developments... (T)he addition of single
family homes on 20, two acre lots, in the proposed 40
acre subdivision should have little measurable impact
on the local ground water quality. However, future
growth is anticipated and septic tank density may be

1 increased, thereby creating future ground water
2 quality problems for the city." Record at 56.

3 A neighbor testified "the water sinks in this area, it's like
4 pouring a pail of water through a fiber substance or a
5 cheesecloth to filter it, and this area is like the
6 cheesecloth." Record at 149.

7 "Substantial evidence consists of evidence which a
8 reasonable mind could accept as adequate to support a
9 conclusion." Bay v. State Board of Education, 233 Or 601, 605,
10 378 P2d 558 (1963); Metro v. City of Portland, 24 Or App 477,
11 480, 546 P2d 777 91976). We find the evidence of rapid
12 draining of water through unknown routes in the soil and the
13 possible problems associated with future development meets that
14 standard.

15 Petitioners also urge that the decision in Jurgenson v.
16 Union Co. Court, 42 Or App 505, 600 P2d 1241 (1979) requires a
17 consideration of substantial evidence based on whether the
18 applicant has sustained his burden of proof as a matter of
19 law. In Jurgenson the Court upheld a denial of a partition
20 request because the findings were supported by substantial
21 evidence showing the property was agricultural land as defined
22 in Goal 3 and not available for non-farm uses. The applicant
23 there had not shown entitlement to a favorable decision as a
24 matter of law.⁴ Here the findings on this issue were
25 adequate and were supported by substantial evidence. It is not
26 necessary to look at and comment upon all the evidence when

1 these elements exist. Nevertheless a review of the record on
2 this issue to see if petitioners proved their entitlement to a
3 rezoning for the proposed subdivision as a matter of law
4 convinces this Board they have not. Although there is credible
5 evidence the previously proposed 20 lot subdivision would not
6 jeopardize the Enterprise water supply, the applicant presented
7 no evidence of the effect of the larger 35 lot subdivision.
8 The experts on whom petitioners rely state increased septic
9 tank density may create future ground water quality problems
10 for the city. There is no proof of a safe water supply after
11 development sufficient to meet the Jurgenson test.

12 The first and second assignments of error and that part of
13 the fourth assignment of error addressing the issue of water
14 supply is denied.

15 FLOOD DAMAGE

16 Petitioner assigns error to Conclusion G in the order.

17 That conclusion states:

18 "Residential uses in the flood plain will need
19 protection from periodic inundation to prevent
possible major economic damage."

20 The criteria listed in the order include the general
21 requirement of suitability and consideration of physical,
22 social, economic and environmental matters discussed
23 previously. In addition, the county land use plan states
24 development shall not be planned nor located in areas subject
25 to major damage or that could result in loss of life.⁵

26

1 The findings note two facts specifically relevant to these
2 criteria.

3 "6. Tax lot 1901 lies entirely within a designated
4 Flood Zone A as designated by HUD. At the time
5 of the last major flooding along Hurricane Creek
6 in 1974-5 the area experienced about 6 inches of
7 water on the land.

8 "7. No evidence of major flood loss in the area is
9 contained in the record."

10 Petitioners first challenge Conclusion G on the basis the
11 property is not in a flood plain. The relevant plan guideline
12 is specific about limiting development in flood plains.
13 Petitioners say those criteria do not apply to this property as
14 the applicant's property is not in a designated flood plain.
15 Respondent does not dispute the property is not so classified
16 and therefore impliedly admits the flood plain criterion does
17 not apply. On the other hand, petitioners do not deny the
18 property is within a flood zone or that the property had six
19 inches of water over it in the 1974-75 flood. Therefore,
20 neither those facts nor the evidence to support them are
21 challenged. The question, then, is whether Conclusion G states
22 reasons to show proper application of the criteria to the facts
23 and forms a basis for the denial.

24 We find it does not. The conclusion does not state reasons
25 why the property should not be rezoned nor why it could not be
26 used for residences. It merely states protective measures are
required if or when the property is so used. There is no
evidence such measures are not possible or not feasible,

1 rendering the property unsuitable for the proposed uses.
2 Lacking an explanation why the facts measured against the
3 criteria lead to the denial, the findings themselves are
4 deficient. They cannot be used to support the decision. The
5 portion of the fourth assignment of error regarding the flood
6 damage issue is sustained.

7 SUBSURFACE SEWAGE DISPOSAL

8 The order of denial includes two conclusions relating to
9 subsurface sewage disposal. They are

10 "D. The proposed zone change and resulting
11 possibility of individual subsurface sewage
12 disposal at a density as concentrated as two
13 acres per residence poses a significant risk of
14 severe economic damage."

15 * * *

16 "F. The soil characteristics of the area create a
17 significant risk to the functioning of subsurface
18 sewage disposal systems and other development
19 factors in the case of a flood."

20 The criteria to which the above conclusions relate are the
21 same criteria discussed above in connection with the issue of
22 water supply protection. There are no other plan or ordinance
23 criteria specifically directed to subsurface sewage disposal.
24 The difference between this issue and the water supply issue is
25 the different form of conclusion. The conclusion in reference
26 to water supply states there are rapidly drained, porous soils
with no information as to the ground water movement, and there
was no evidence those conditions did not pose a threat to the
ground water supply. On this issue, however, the conclusions

1 state the proposed development on these soil conditions "create
2 a significant risk." There is a positive statement of
3 conditions, a cause and effect. The claimed effects - severe
4 economic damage and loss of function of subsurface sewage
5 disposal systems - do have a relationship to the plan and
6 zoning ordinance criteria, including the general criteria of
7 suitability and the policy discouraging development exceeding
8 the carrying capacity of the land or water resources.
9 Petitioners contend there is no substantial evidence to support
10 this portion of the findings.

11 Before reaching the substantial evidence question, however,
12 we must look at the findings to determine what facts were
13 relied upon as relevant and the explanation how such facts
14 carry out the applicable policies. The findings of porous
15 soils with unknown underground water movement and the 1974-75
16 flood depth of six inches have been previously discussed, but
17 are also relevant here. In addition, there are two findings
18 about subsurface disposal systems. They are:

19 "11. Site suitability for subsurface sewage disposal
20 has been given on numerous parcels lying in the
vicinity of Tax Lot 1901."

21 * * *

22 "13. The record reveals no site specific data with
23 regard to the impact of sewer systems and
24 possible chemical contamination on the Hurricane
Creek aquifer and existing domestic wells."

25 Such facts do not show how or what economic damage may
26 occur or how the soil conditions affect functioning of

1 subsurface systems. There must be an explanation why such
2 facts lead to the decision to deny, but Conclusions D and F
3 assume the explanation has been made, i e., the increased
4 density will pose a significant risk of damage, and the soil
5 conditions will contribute to loss of function in a flood.
6 There is no recitation of facts showing such significant
7 risks. The conclusion, then, assumes facts not in the
8 findings. This type of explanation cannot suffice for
9 review.⁶ What is required is an explanation that provides a
10 reasonable nexus between the facts relied upon and the final
11 decision. An explanation assuming facts in the findings or an
12 explanation including unwarranted conclusions from stated facts
13 relied upon does not provide the rationale required.

14 NEED FOR R-1 ZONED LAND

15 Petitioners challenge conclusions A and E of the order
16 because there was "virtually uncontroverted evidence" there is
17 a need for affordable two acre lots allowing home based
18 occupations. The conclusions state:

19 "A. There is a public need for residential uses in
20 Wallowa County but not necessarily for uses
classified as R-1, nor for residential lots of
two acres in size."

21 * * *

22 "E. If there were a public need for two acre
23 residential lots, the need is not reasonably met
at the proposed site."

24 The Conclusions A and E address the criteria in the zoning
25 ordinance requiring consideration of public need before any
26

1 zone change. They also address the plan provisions requiring a
2 determination of "need consistent with related plan objectives
3 and policies" for conversion of agricultural land to
4 residential or urban uses.

5 Although there is no evidence in the record of the amount
6 of other R-1 land in the county or where it is located, there
7 was testimony of "a fair amount of R-1 land going begging."
8 Record at 144. Petitioner argues need is evidenced by the plan
9 policy encouraging diversification of home based industry, and
10 the testimony of one of petitioners that there is a limited
11 amount of land in the county that allows for home occupations.
12 Record at 164.

13 How the county viewed the limited evidence is uncertain,
14 however, as the findings lack any mention of the available
15 supply of R-1 land or other vacant land available for small lot
16 development. Neither do the findings set forth any facts about
17 the type or amount of land available for home occupations.
18 Without facts sufficient to establish a basis for a finding of
19 need, the findings are insufficient for review. Philippi v.
20 Sublimity, 4 Or LUBA 291 (1981).

21 Although the order cannot be sustained on the basis of
22 findings addressing the issues of flood protection, subsurface
23 sewage disposal and the need for additional R-1 land, the
24 findings are adequate and supported by substantial evidence on
25 the issue of water supply protection. A denial order may be
26 affirmed where there are findings supported by substantial

1 evidence showing any criterion has not been met. Heilman v.
2 City of Roseburg, 39 Or App 71, 591 P2d 390 (1979).

3 Therefore, the order appealed from is affirmed.

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FOOTNOTES

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1 The order denying the zone change request includes the findings. Those findings were incorporated by reference in the order denying the subdivision preliminary plan. No additional findings were made in the subdivision order, and were the basis of the decision.

2 Petitioners' assignments of error are:

"Assignment of Error No. 1

"Wallowa County failed to follow the applicable procedure regarding the temporary watershed protection zone to the substantial prejudice of petitioners.

"Assignment of Error No. 2

"Wallowa County erred in finding a significant risk to the City of Enterprise's water supply in that there is no substantial evidence to support [sic] said conclusion.

"Assignment of Error No. 3

"No substantial evidence exists for Wallowa County's conclusion #G that a flood plain exists here and protective measures are necessary.

"Assignment of Error No. 4

"Wallowa County improperly denied Petitioner's request for zone changes and a subdivision by failing to state adequate reasons for its conclusions and where there is not substantial evidence to support said conclusions."

3 Section 6, Wallowa County Ordinance dated March 10, 1982, titled "An Ordinance Creating a Temporary Watershed Review Zone and Providing Additional Procedures and Criteria Applicable to all Land Use Approvals Affecting Property Therein."

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The court in Jurgenson compared a land use case of denial with a personal injury case where the defendant could rest without presenting evidence. The normal appellate approach in such a situation would be to affirm a verdict adverse to the party with the burden of proof unless the court could say that party sustained his burden as a matter of law. The court adopted the same rationale for review of a denial in land use cases.

5
Section 1, "Areas Subject to Natural Disasters and Hazards," Wallowa County Land Use Plan.

6
Based on the facts in the record regarding soil conditions, the reliance on wells as a source of water for the area, and the possible effects of malfunctioning subsurface sewage disposal systems, it would seem possible to frame an explanation sufficient for review. See the discussion on the findings regarding the water supply issue, supra. LUBA, however, can only review the order and findings presented for review.