

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

LAND USE
BOARD OF APPEALS
APR 29 4 30 PM '85

MARGARET CHAMBERS, BURTON)
EIKLEBERRY, MICHAEL KARPINSKI,)
RAYMOND PRAG and STEPHEN)
WILLIAMS,)

LUBA No. 84-090

Petitioners,)

FINAL OPINION
AND ORDER

vs.)

JOSEPHINE COUNTY, ROBERT)
MARKOVICH and BERTHA)
MARKOVICH,)

Respondents.)

Appeal from Josephine County.

Margaret Chambers, Burton Eikleberry, Michael Karpinski, Stephen Williams and Raymond Prag, Williams, filed the Petition for Review; and Raymond Prag and Stephen Williams argued the cause on behalf of petitioners.

Patrick J. Kelly, Grants Pass, filed a response brief and argued the cause on behalf of Respondents Markoviches.

No appearance by Josephine County.

DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee, participated in the decision.

REMANDED 04/29/85

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Petitioners appeal the county's decision to amend its
4 unacknowledged comprehensive plan and to change the zoning
5 classification from Residential (RR) to Rural Commercial (RC)
6 for a six acre tract.

7 FACTS

8 The property is in the unincorporated community of
9 Williams. There are six acres already zoned for commercial use
10 in the community, two of which are not developed. The
11 applicants testified the zone change is requested for future,
12 but unspecified, commercial use. The change was recommended by
13 the planning commission. The board of commissioners agreed,
14 and ordered the change. Petitioners are residents of the area.

15 ASSIGNMENTS OF ERROR

16 Petitioners' assignments of error can be grouped into four
17 categories: (1) those alleging no proper exception to
18 statewide land use planning goals was taken; (2) those alleging
19 violation of other statewide goals; (3) those alleging
20 violation of various comprehensive plan policies; and (4) a
21 challenge to the evidence relied on by the county
22 commissioners. For convenience, the assignments of error will
23 be considered in the above groups.

24 Requirements for a Goal Exception

25 Petitioners' first three assignments of error challenge the
26 decision on the ground no exception to statewide land use

1 planning Goal 3 was taken at the time the zone and plan changes
2 were adopted. Petitioners say the requirement for an exception
3 is in the Land Conservation and Development Commission
4 Administrative Rule, OAR 660-04-018(1).¹ Respondents answer
5 by pointing out that OAR 660-04-018 only requires a new or
6 modified exception when certain changes are made in
7 comprehensive plans acknowledged by the Land Conservation and
8 Development Commission (LCDC) to be in compliance with
9 statewide land use planning goals. The county's plan has not
10 been acknowledged. OAR 660-04-018 is not applicable in this
11 appeal for this reason, and we deny petitioners' first
12 assignment of error.

13 Petitioners' second and third assignments of error allege
14 the county's order does not show compliance with certain
15 exception criteria set forth in LCDC's rules. Fairly read,
16 these assignments of error challenge the decision for failure
17 to include an exception to Goal 3, the agricultural lands
18 goal.² The county seems to concede the land is agricultural
19 land, but nonetheless found Goal 3 is inapplicable because an
20 exception was taken when the comprehensive plan was
21 adopted.³

22 The unacknowledged exception relied upon by the county is
23 subject to our review in this appeal. As the courts and this
24 board have held, if an unacknowledged exception is relied upon
25 as a basis for a land use decision, the findings supporting the
26 exception may be reviewed in conjunction with examination of

1 the decision. Hilliard v. Lane County Commissioners, 51 Or App
2 587, 626 P2d 905 (1981); Hilliard v. Lane Cty, 5 Or LUBA 33,
3 (1982).

4 The county's exception for the area was not incorporated as
5 part of its decision, and no findings supporting it are
6 included in the record. We are therefore unable to review the
7 decision to determine the merits of petitioners' second and
8 third assignments of error, other than to agree with
9 petitioners that compliance with the exception criteria has not
10 yet been shown. The decision must be remanded.⁴ Hoffman v.
11 Dupont, 49 Or App, 699, 621 P2d 63 (1980), rev den, 240 Or 651
12 (1981).

13 Other Statewide goal requirements

14 Petitioners allege the decision violates two other
15 statewide goals: Goal 1 (Citizen Involvement) and Goal 9
16 (Economy of the State). In their eighth assignment of error
17 petitioners note that a component of Goal 1 requires provisions
18 for involvement of a cross section of affected citizens in all
19 phases of the planning process. Petitioners claim such
20 involvement was prevented and cite three examples to make their
21 point: (1) a sketchy and incomplete notice of the Citizen's
22 Advisory Committee hearing in a community newspaper; (2)
23 limitation of public discussion and debate at the Citizen's
24 Advisory Committee hearing; and (3) refusal by the
25 commissioners to reopen the hearing after they were presented
26 with a petition signed by over 250 citizens opposed to the

1 rezoning.

2 Petitioners first complain the newspaper notice for the
3 Citizen's Advisory Committee meeting was too brief to inform
4 citizens about the details of the proposal.⁵ Petitioners do
5 not cite any comprehensive plan or ordinance provisions
6 regarding notice of Citizen's Advisory Committee meetings.

7 The record shows legal notices of the proposed change were
8 published in the Grants Pass Daily Courier prior to both
9 planning commission and county commission hearings. These
10 notices include the details petitioners say were lacking in the
11 notice of the advisory committee meeting. We also note the
12 record includes considerable testimony by interested citizens,
13 both for and against the proposal, at these hearings.

14 Goal 1 requires governing bodies to give citizens the
15 opportunity to be involved in all phases of the planning
16 process, including adoption of minor changes.⁶ The goal does
17 not include criteria for the content, method, or number of
18 notices prior to public discussion of proposed land use
19 decisions. We do not read Goal 1 to make a particular kind of
20 public notice of Citizen Advisory Committee meetings a
21 condition to the validity of decisions considered at such
22 meetings. Therefore, we reject petitioners' argument the
23 notice in the Williams News demonstrates a violation of Goal 1.

24 Petitioners' second example of an alleged Goal 1 violation
25 is illustrated, not by argument, but by quoting a citizen's
26 comments regarding the Williams town meeting. The speaker

1 objected to discourtesies and harrassments directed towards
2 those who disagreed with the proposed change. The speaker also
3 suggested the matter was rushed to a vote without allowing all
4 who wished the opportunity to speak.

5 Petitioners' claim is unclear. The quoted testimony
6 includes only vague allegations the county failed to provide
7 opportunities for citizen involvement as Goal 1 requires.
8 Without further facts and development of their argument about
9 denial of citizen involvement, petitioners have not shown a
10 violation of Goal 1. We deny this subassignment of error.

11 Petitioners' last example of a claimed Goal 1 violation
12 asserts the commissioners denied a request to reopen the
13 hearing. Petitioners neither say who made the request nor add
14 any other facts regarding the request. Instead, they simply
15 allege the commissioners ignored the views of 250 citizens who
16 signed a petition opposing the rezoning.⁷ Goal 1 makes
17 citizen involvement a necessary part of the land use planning
18 process but it does not dictate the outcome of proceedings
19 conducted by governmental bodies responsible for making final
20 decisions. The record shows the county held public hearings
21 after publishing notice of the time, place and subject matter.
22 Considerable testimony by both proponents and opponents
23 regarding the proposed change was given at these hearings.
24 Petitioners have not made a convincing argument how the county
25 violated Goal 1. We deny the eighth assignment of error.

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1 Petitioners' fourth assignment of error challenges the
2 decision on the ground it violates Goal 9, Economy of the
3 State. The Goal states in part:

4 "Economic growth and activity in accordance
5 with...plans shall be encouraged in areas that have
6 underutilized human and natural resource capabilities
7 and want increased growth and activity."

8 Petitioners argue this language permits the county to allow
9 new commercial zones only in areas wanting increased growth.
10 Petitioners cite the testimony of several opponents to the
11 increase of commercial property acreage in the Williams
12 Community. Disregarding such evidence by the commissioners,
13 the petitioners argue, is a violation of the part of Goal 9
14 above quoted.

15 We disagree. The goal does not limit commercial zones
16 solely to areas wanting economic growth. Read in entirety, the
17 goal requires encouragement of economic growth as part of
18 comprehensive plans developed by the county.

19 We do not consider Goal 9 to require the county to refrain
20 from establishing commercial zones simply because there is
21 local opposition to economic growth and activity. We therefore
22 deny the fifth assignment of error.

23 Comprehensive Plan Issues

24 Petitioners next challenge the decision on the grounds it
25 violates three provisions of the county's comprehensive plan.
26 Petitioners say the commissioners failed to address two plan
standards and misconstrued a third. The two plan provisions

1 petitioners allege were not addressed are: (1) Goal 1⁸ which
2 requires preservation of agricultural lands and the rural
3 character of the county, and (2) Policy 4 of Goal 5 regarding
4 home occupations. According to petitioners, the failure to
5 address the preservation of the county's rural character also
6 violates the county's land use hearing rules requiring the
7 commissioners to consider the character of the area.⁹

8 Respondents, who were applicants below, contend Goal 1 of
9 the plan is irrelevant when the proposed zone change is for a
10 rural commercial designation. According to respondents,
11 compatibility with the rural character of the neighborhood is
12 one of the characteristics of a rural commercial zone, and
13 further consideration of the rural character of the
14 neighborhood is therefore not required. They rely on Section
15 9.010 of the county zoning ordinance, which states:

16 "This District is intended to provide for the
17 establishment of a restricted commercial facility, to
18 serve the conveniences and needs of the immediate
19 neighborhood compatible with the rural character of
20 the area."

21 This provision is susceptible of two interpretations:

- 22 1. When the zoning ordinance was adopted, the county
23 made a legislative determination that all
24 authorized uses in the rural commercial zone are
25 compatible with the character of rural areas in
26 general; or
2. It is only when a rural commercial zone is
adopted for particular property that a
determination is made that the authorized uses
are compatible with the rural character of the
affected area.

We begin our analysis,¹⁰ by noting the ordinance

1 authorizes a broad range of permitted and conditional uses in
2 the rural commercial zone.¹¹ The allowed uses do not seem to
3 be characteristic of those found exclusively in rural
4 communities. In fact, the great variety and number of allowed
5 uses are sufficient to meet the requirements of much more
6 populated neighborhoods. That is, it is possible that some of
7 the allowed uses are inconsistent with some rural areas.
8 Keeping in mind Goal 1 of the county's comprehensive plan to
9 preserve and maintain agricultural lands and the rural
10 character of the county, we do not believe the ordinance is
11 intended to describe uses which are compatible with all rural
12 areas in all events. We therefore construe the provisions of
13 Section 9.010 to mean the determination whether the uses
14 allowed in the rural commercial zone are compatible must be
15 made at the time rural commercial zoning is adopted for
16 particular areas.¹² We consider this construction to permit
17 zone changes in accordance with Goal 1 of the comprehensive
18 plan. This construction is also consistent with the county's
19 hearing rules which appear to require a compatibility analysis
20 each time the county makes a zone change. Our adoption of this
21 construction also requires us to reject respondent's claim that
22 Goal 1 is irrelevant when considering the creation of a rural
23 commercial zone in a rural area.

24 The county's only finding regarding the character of the
25 area under consideration is as follows:

26 "The request for comprehensive plan change meets the

1 requirements of a rural commercial zoning district as
2 the expected commercial uses of the property will
3 serve the convenience and needs of the immediate
neighborhood and would remain compatible with rural
characteristics of the neighborhood."

4 This conclusional finding is not adequate for our review.

5 It does not state what facts the county relied upon or explain
6 how those facts led it to the conclusion the uses allowed in
7 the rural commercial zone are compatible with the Williams
8 Community. See Sunnyside Neighborhood v. Clackamas Co. Comm.,
9 280 Or 3, 569 P2d 1063 (1977) and Green v. Hayward, 275 Or 693,
10 552 P2d 815 (1976). Consequently, the finding is inadequate to
11 demonstrate consistency with Goal 1 of the comprehensive plan.
12 We sustain the seventh assignment of error.

13 Petitioners also allege the county failed to address Policy
14 4 of Goal 5 in the county's comprehensive plan. The objective
15 of Goal 5 is to "diversify, expand and stabilize economic
16 opportunities for the betterment of the county." Policy 4 of
17 that Goal states:

18 "Home occupations are recognized as a positive means
19 of providing for small local businesses. Standards
20 shall be established in the zoning ordinance which
allow the use of rural residential lands for home
occupations."

21 The policy gives the county guidance in the preparation of
22 its ordinances. That is, the policy requires zoning ordinances
23 to make provisions for small businesses in rural residential
24 areas. It does not establish criteria to apply to individual
25 land use decisions and is, therefore, not applicable to the
26 decision in this appeal. We do not agree with petitioners the

1 county was required to address this policy in making its
2 decision. Therefore, we deny petitioners' sixth assignment of
3 error.

4 Petitioners make one additional claim of a comprehensive
5 plan violation. In their fourth assignment of error,
6 petitioners allege the county misconstrued Policy 1 of Goal 5
7 of the plan by doubling the amount of commercial acreage in
8 Williams from 6 to 12 acres. The plan policy states:

9 "Sufficient land shall be allocated to provide for the
10 development of diversified commercial and industrial
bases."

11 Respondent argues this plan policy does no more than direct
12 the county to allocate the minimum necessary amount of land for
13 commercial and industrial purposes. We agree. The policy
14 carries out the Goal 5 objective to "diversify, expand, and
15 stabilize" economic opportunities in the county. It does not
16 set upper limits on the amount of land available for such
17 purposes. Allocating large amounts of land for commercial or
18 industrial uses may violate some other land use regulation, but
19 such allocations do not violate this comprehensive plan
20 provision. We deny the fourth assignment of error.

21 Substantial Evidence

22 In their last assignment of error petitioners allege the
23 decision is not supported by substantial evidence. They allege
24 three instances to show how evidence in the record was
25 unreliable, i.e., not substantial. In summary, petitioners'
26 allegations are:

- 1 1. Many persons signing a petition favoring the
2 change were either uncertain or deceived because
3 the size of the tract proposed for rezoning was
4 not specified.
- 5 2. The applicant gave incomplete reasons for seeking
6 a zone change, and such reasons do not justify
7 use of the entire six acre tract.
- 8 3. The commissioners made statements during the
9 hearing indicating personal beliefs in opposition
10 to land use controls.

11 Petitioners say these examples illustrate flaws in the
12 decisionmaking process because they show weaknesses or
13 unreliability in some evidence in the record or bias on the
14 part of the commissioners.

15 Our standard of review of challenges to the evidence is in
16 ORS 197.835(8). In critical part the statute states:

17 "...(T)he board shall reverse or remand the land use
18 decision under review if the board finds:

19 "...(t)he local government or special district:

20 "...(m)ade a decision not supported by substantial
21 evidence in the whole record...."

22 We follow this standard in accordance with the principles
23 stated in Christian Retreat Center v. Comm. for Washington Co.,
24 28 Or App 673, 560 P2d 1100 (1977). The court said:

25 "Where, as here, it is alleged that the findings of
26 the lower tribunal are not supported by substantial
evidence, the inquiry to be made by this court is the
limited one of whether the record contains evidence
which a reasonable mind might accept as adequate to
support the findings challenged. Where the record
includes conflicting believable evidence that conflict
is to be resolved not by this court but by the lower
tribunal which may choose to weigh the evidence as it
sees fit." Christian Retreat Center v. Comm. for

1 Washington Co., supra, at 679.

2 Petitioners' request that we reject some of the evidence
3 supporting the application asks this Board to reweigh the
4 evidence and to substitute our judgment for the county
5 commissioners. This we cannot do. See Homebuilders v. Metro
6 Service Dist., 54 Or App 60, 633 P2d 1320 (1981).

7 Petitioners' last substantial evidence claim is in
8 actuality a claim of bias on the part of two county
9 commissioners. We also reject this argument.

10 The commissioners' statements reflected personal views that
11 ownership of property includes the right to use or develop it
12 as one wishes. As we have previously held, such comments
13 during discussion of a decision do not necessarily mean the
14 appropriate law was not applied to the matter at hand.

15 Gearhard v. Klamath County, 7 Or LUBA 27 (1982).

16 The ninth assignment of error is therefore denied.

17 REMANDED.
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FOOTNOTES

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4 OAR 660-04-018(1) provides:

5 "When the jurisdiction changes the types or
6 intensities of the uses or zones allowed in an
7 exception area which the commission has previously
8 acknowledged and when the new use or uses would have a
9 substantial impact upon adjacent uses, a new or
10 modified exception is required."

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14 Goal 2, Part II provides:

15 "EXCEPTIONS: When, during the application of the
16 statewide goals to plans, it appears that it is not
17 possible to apply the appropriate goal to specific
18 properties or situations, then each proposed exception
19 to a goal shall be set forth during the plan
20 preparation phases and also specifically noted in the
21 notices of public hearing. The notices of hearing
22 shall summarize the issues in an understandable and
23 meaningful manner."

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27 The findings state the property has been "accepted" as a
28 non-resource by LCDC. This statement is not in accordance with
29 the planning department's staff report stating the property was
30 "excepted from the agricultural goal..." and that "(t)he
31 property is now slated to be included as a 'committed area'
32 when the plan is acknowledged." Record at 37. At oral
33 argument before LUBA, petitioners and respondent confirmed that
34 the property has been excepted from the agricultural goal and
35 that the exception has been approved by LCDC staff only.

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39 On remand the county has several options. It may take an
40 exception as part of its decision, or it may incorporate the
41 prior exception by reference. There may be other options. We
42 also take notice the county comprehensive plan is scheduled for
43 acknowledgement review by LCDC in May, 1985. The issues raised
44 here may be effected in the acknowledgement proceeding.

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2 A two-page issue of Williams News, attached as an appendix
3 to the petition, includes a notice of a town meeting at the
4 Williams School gym on April 23. The notice states "the
5 Markoviches are requesting a zone change for the CAC to hear."
6 We understand from the record that the Williams Town Council is
7 the designated Citizens Advisory Committee for the area.

8 6

9 Component 3 of Goal 1 provides:

10 "Citizen Involvement - to provide the opportunity for
11 citizens to be involved in all phases of the planning
12 process.

13 "Citizens shall have the opportunity to be involved in
14 the phases of the planning process as set forth and
15 defined in the goal and guidelines for land use
16 planning, including preparation of plans and
17 implementation measures, plan content, plan adoption,
18 minor changes and major revisions in the plan and
19 implementation measures."

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21 The undated petitions are not in the record but are
22 attached as appendices to the petition for review. The heading
23 on the petitions indicates the signatories oppose the zone
24 change.

25 8

26 Goal 1 of the county's comprehensive plan is:

"To preserve and maintain agricultural lands and the
rural character of Josephine County."

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Section 8(1) of the land use hearing rules states:

"...the Board or commission shall deem the following
criteria relevant and material considerations in
reaching a decision:...(d) all factors pertinent to
the preservation and promotion of the public health,
safety and general welfare, including (but not limited
to) the character of the area involved...."

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3 We note the county made no interpretation of this ordinance
4 provision in its proceedings and made no appearance here to
5 explain its view.

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8 The permitted uses in the rural commercial zone are:

- 9 "1. Meat processing and packing, excluding slaughter
10 house.
11 "2. Grocery and food store.
12 "3. General store.
13 "4. Service station and minor repair garage, and
14 towing service limited to 5 stored vehicles
15 screened from view.
16 "5. Public facilities, including post office, fire
17 and police substation, and library.
18 "6. Bus stop.
19 "7. Feed and fuel store.
20 "8. Photo copying.
21 "9. Appliance, small engine, pump, and electronics
22 sales and repair.
23 "10. Art studio, including printing, sculpting,
24 ceramics, glasswork, photography, pottery,
25 woodcarving, and similar crafts.
26 "11. Bakery.
"12. Barber and beauty shop.
"13. Book or stationary store, including newstand.
"14. Building materials store and hardware store.
"15. Frozen food store and lockers.
"16. Garden supply sales and service.
"17. Greenhouses, including retail sales.
"18. Restaurant.
"19. Ambulance and emergency medical facility.
"20. Church.
"21. Pharmacy.
"22. Off-street parking facility when operated in
conjunction with the permitted use.
"23. Single-family dwelling or mobile home.
"24. Accessory buildings to be used in conjunction
with uses addressed in Section 9.020(1) through
(23) and Section 9.025(1) through (7), pursuant
to Section 14.114.
"26. Similar uses pursuant to Section 15.227."

24 The conditional uses in rural commercial zones are:

- 25 "1. Print shop, including off-set, blueprinting and
26 bindery.
"2. Coin laundry.

- 1 "3. Veterinary Clinic.
- 2 "4. Tavern.
- 3 "5. Mini-warehouse.
- 4 "6. Medical or dental clinic.
- 5 "7. Professional office.

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8 If we are wrong in our interpretation of the ordinance
9 provisions the county may provide an explanation how it views
10 the ordinance upon remand.

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