

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Nov 13 3 55 PM '85

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2
3 CHEMEKETA INDUSTRIES)
CORPORATION,)
4)
Petitioner,)
5)
vs.)
6)
CITY OF SALEM,)
7)
8 Respondent.)

LUBA No. 85-053
FINAL OPINION
AND ORDER

9 Appeal from City of Salem.

10 Joseph S. Voboril and Jeffrey H. Keeney, Portland, filed
11 the petition for review and argued the cause on behalf of
petitioner. With them on the brief were Tonkon, Torp, Galen,
Marmaduke & Booth.

12 Paul Lee, Salem, filed a response brief and argued the
13 cause on behalf of Respondent.

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

15 AFFIRMED 11/13/85

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

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioner appeals the city's denial of a proposed zone
4 change and comprehensive plan amendment for a 9.39 acre
5 parcel.

6 FACTS

7 Petitioner owns four parcels (hereinafter A, B, C and D)
8 near the intersection of Cherry Avenue and the Salem Parkway in
9 Salem. All are south of the Parkway. Parcels A, B and D are
10 east of Cherry Avenue. Parcel C is west of Cherry Avenue.

11 Parcels A, B and D are zoned Industrial General (IG).
12 Parcel C is zoned Industrial Park (IP). All four parcels are
13 designated Industrial on the Salem Area Comprehensive Plan
14 Map.

15 In December, 1984 petitioner applied for zone change and
16 comprehensive plan map amendments with respect to the four
17 parcels. Parcels A, B and C were to be rezoned Commercial
18 Retail (CR) and redesignated Commercial on the plan map.
19 Parcel D was to be rezoned Industrial Commercial. A mixed-use
20 development consisting of business services and a commercial
21 retail center was proposed.

22 In February, 1985 the Salem Planning Commission held a
23 public hearing on petitioner's application. As a result of
24 suggestions made by the commission, petitioner modified the
25 application, requesting that the zoning on all four parcels be
26 changed to Industrial Commercial (IC) rather than Commercial

1 Retail.

2 In March, 1985, the planning commission voted to approve
3 the Industrial Commercial rezoning. Although the city attorney
4 advised that comprehensive plan map amendments would be
5 necessary to support the rezoning, the commission's action did
6 not include such amendments.

7 The city council then reviewed the planning commission's
8 rezoning action. Of particular concern at the hearing was
9 whether the zone changes from IG to IC could be granted without
10 corresponding comprehensive plan map amendments (i.e., from
11 Industrial to Industrial Commercial). At the conclusion of the
12 discussion, the council voted to hold the zone changes in
13 abeyance and to instruct the planning commission to "initiate"
14 corresponding plan map amendments.¹

15 The planning commission voted to recommend approval of the
16 necessary plan map amendments. Thereafter, the city council
17 held public hearings to consider the plan map and zone change
18 actions for all four parcels. At one of the hearings, however,
19 petitioner withdrew parcels B and D from consideration. On
20 June 10, 1985, the council voted to approve the requested plan
21 map amendment and zone change for parcel C but to deny the
22 corresponding changes for parcel A. In this appeal, petitioner
23 challenges the city's action (Resolution No. 85-57) concerning
24 parcel A.

25 ASSIGNMENT OF ERROR

26 The petition presents a single assignment of error. Four

1 challenges to the findings supporting denial of the plan map
2 amendment are presented.² We take up each challenge below,
3 concluding that the challenged decision must be affirmed.

4 1. Failure to Address Plan Amendment Criteria


5 The parties agree the plan amendment for parcel A is a
6 category 2 minor plan change under the city code. Such a
7 change is subject to the following approval criteria:

8 "(1) The proposed plan change considers and
9 accommodates as much as possible all applicable
statewide planning goals;

10 "(2) There is an overriding public need which is best
11 served by the proposed change;

12 "(3) The plan does not otherwise make adequate
provision to accommodate the public need; and

13 "(4) The proposed change is logical and harmonious
14 with the land use pattern for the greater area as
shown on the detailed and general plan maps."
Salem Revised Code 64.090.

15 Petitioner first contends that the council's findings do
16 not adequately address the quoted criteria. Specifically,
17 petitioner charges that the findings (1) discuss only one
18 statewide planning goal (Goal 9), ignoring others the planning
19 commission believed were applicable and (2) address the issues
20 presented by criteria 2, 3 and 4 indirectly or not at all. We
21 agree. 

22 As the city points out, petitioner's claim that only a
23 single statewide goal was considered by the council is
24 incorrect. The findings fully discuss the proposed plan
25 amendment in terms of Goal 9 (Economy of the State) and Goal 12
26

1 (Transportation).

2 The Goal 9 findings can be summarized as follows:

- 3 1. The site is part of a limited inventory of land
4 within the urban growth boundary that is suitable
5 for the industrial uses sought by the city.
- 6 2. The proposed amendment would permit a variety of
7 commercial uses of the site.
- 8 3. Commercial development of the property would
9 impair the city's ability to meet the economic
10 development goals of its plan.
- 11 4. The site is adjacent to other lands inventoried
12 for industrial use; allowance of commercial
13 development would detract from the area's
14 capacity to attract industrial uses.
15 Supplemental Record at 2.

16 The Goal 12 findings can be summarized as follows:

- 17 1. Commercial development of parcel A would generate
18 a volume and type of traffic which would impair
19 the area's desirability for future industrial
20 development.
- 21 2. Traffic generated by commercial use of the site
22 would infiltrate existing industrial and
23 residential areas nearby, creating undesirable
24 impacts.
- 25 3. Some of the streets serving the site are
26 inadequate to accommodate the volume of traffic
associated with commercial development. Record
at 18-19.

27 The above findings adequately explain the city's rationale for
28 concluding that the proposal does not satisfy these goals.
29 Since approval could not be granted unless all applicable goals
30 were satisfied, further goal analysis was not necessary.³

31 Petitioner's next criticize the findings because they do
32 not address criteria 2 and 3 of Section 64.090. We disagree.

1 The public need inquiries called for by the cited criteria are
2 clearly met by the city's findings that the comprehensive plan
3 gives parcel A priority for industrial use.

4 Finally, we cannot agree with petitioner's charge that
5 criterion 4 (requiring that the proposed change be logical and
6 consistent with the land use pattern) was totally ignored by
7 the city. The findings describe the industrial character of
8 nearby lands and indicate that commercial use of parcel A would
9 conflict with the desired industrial development. The findings
10 are adequate to withstand this challenge.

11 In summary, petitioner's contention that the city's
12 findings fail to address applicable criteria is denied.

13 2. Evidentiary Support for Findings

14 Petitioner next contends that several of the council's
15 findings for denial of the plan amendment are not supported by
16 substantial evidence in the record. The cited findings (in
17 most instances, parts of findings) read as follows:

18 "7. [c]ommercial uses on the 9.39 acres would
19 generate a volume and type of traffic which would
20 create adverse conditions for the traffic
21 facilities and surrounding uses."

22 * * *

23 "6. The Industrial Commercial zone category allows a
24 mix of commercial uses and industrial uses but
25 the number of uses permitted under the Standard
26 Industrial Classification (SIC) included as
permitted uses are preponderately not industrial
in nature."

* * *

1 "9. [f]ive commercial service centers exist within a
2 one-half mile radius of the subject property."
Record at 18-19.

3
4 In attacking the city's denial of the plan amendment on
5 evidentiary grounds, petitioner assumes a considerable legal
6 burden. State law authorizes us to grant relief only where the
7 decision is unsupported by substantial evidence. ORS
8 197.895(8)(a)(C). A challenge, as in this case, that certain
9 findings lack evidentiary support cannot result in remand or
10 reversal unless the challenged findings are essential to the
11 decision. The findings brought to our attention by petitioner
12 are not of this nature.

13 A related point about the burden assumed by one who
14 challenges a denial for lack of substantial evidence is made in
15 Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241
(1979). Former Chief Judge Schwab stated:

16 "When a local government has denied a requested
17 land-use change, the concept of reviewing for
18 substantial evidence to sustain the denial presents
19 difficulties. In a local land-use proceeding the
20 proponent of change has the burden of proof. Could
21 not a local government deny a land-use change on the
22 sole basis that the proponent did not sustain his
23 burden of proof because his evidence was not
24 credible? If so, in what sense would we be expected
25 to say that the denial was supported by substantial
26 evidence?"

27 "To draw an analogy, in a personal injury case the
28 plaintiff, who has the burden of proof, might present
29 evidence of the defendant's negligence. The defendant
30 could rest without presenting any evidence. The jury
31 could return a verdict for the defendant. It would be
32 passing strange for an appellate court to reverse such
33 a verdict as not supported by substantial evidence on
34 the ground that the party who did not have the burden

1 of proof presented no evidence. Instead, the normal
2 appellate approach in such a situation would be to
3 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.

4 "We perceive no reason why a local decision denying a
5 requested land-use change should be treated
6 differently. In other words, a denial is supported by
7 substantial evidence within the meaning of ORS
8 34.040(3) unless the reviewing court can say that the
9 proponent of change sustained his burden of proof as a
10 matter of law." 42 Or App at 510 (citations omitted)
11 (emphasis added).

12 The foregoing principles would justify rejection of
13 petitioner's challenge under ORS 197.835(8)(a)(C) even if we
14 agreed that the cited findings lack the requisite foundation.
15 The findings alleged to lack factual support are not essential
16 to the city's decision. For example, the denial can be upheld
17 based on the need to maintain the present inventory of
18 industrial land, a point reflected in the findings but not
19 attacked on evidentiary grounds. We cannot say that petitioner
20 sustained his burden of proof for the plan amendment as a
21 matter of law. Jurgenson v. Union County Court, supra.

22 Wholly apart from the above, there is substantial evidence
23 in the record to support the challenged findings. The evidence
24 of adverse traffic impacts consists of testimony by neighbors
25 of parcel A and by planning staff. For example, a planner
26 testified that Cherry Avenue is not adequate to accommodate
commercial development in the area and that such development
would bring commercial traffic to nearby residential areas.
The evidence reasonably supports the city's finding. It is

1 therefore substantial evidence. Homebuilders v. Metro, 54 Or
2 App 60, 633 P2d 1320 (1981).

3 Evidentiary support for the city's finding that
4 non-industrial uses would be permitted by the requested change
5 can be found in the city's zoning ordinance itself. We agree
6 with the city's contention that a variety of non-industrial
7 uses are permitted in the Industrial Commercial zone.

8 Finally, petitioner's evidentiary challenge to the city's
9 finding that "[f]ive commercial service centers exist within a
10 one-half mile radius of the subject property" cannot be
11 sustained. The record contains evidence that specifically
12 identifies the five commercial centers. Petitioner claims
13 other evidence undermines the finding, but the evidence
14 petitioner relies on describes a "large retail center," whereas
15 the finding describes five "commercial service centers" in the
16 area.

17 Based on the above, we reject petitioner's evidentiary
18 challenges to the city's findings.

19 3. Inconsistent Findings

20 Petitioner's final contention is that several of the
21 findings supporting the city's denial of the amendment are
22 inconsistent with findings the city made in approving a similar
23 amendment on parcel C. For example, although the council found
24 no public need to designate parcel A Industrial Commercial, the
25 finding approving that designation of parcel C stated:

26 "There is a public need for the change. The Salem

1 Parkway has created a need for additionally designated
2 Industrial Commercial lands to provide a mix of
3 industrial and commercial uses by creating a major
traffic barrier through the north Salem Area." Record
at 11.

4 The legal foundation for petitioner's claim about the
5 allegedly inconsistent findings is unclear. The petition
6 attributes the different findings to "a basic misunderstanding
7 on the part of the city as to what the Industrial Commercial
8 Comprehensive Plan Map designation means and how it should be
9 applied." Petition at 16. However, the connection between the
10 alleged misunderstanding and the statutory grounds for remand
11 or reversal of the decision, ORS 197.835(8), is not stated in
12 the petition and was not explained at oral argument.

13 Petitioner's claim may be that the challenged decision
14 improperly construes the applicable law (ORS
15 197.835(8)(a)(D)). However, petitioner has failed to support
16 the claim with legal argument, and the claim is not
17 self-explanatory. We note that another portion of the petition
18 characterizes the city's decision to deny the amendment for
19 parcel A as "arbitrary." Petition at 2. Thus, petitioner may
20 intend the claim of arbitrariness to be shorthand for an
21 allegation that, in approving the change for parcel C and
22 denying it for parcel A, the city has deprived petitioner of
23 the equal protection of the laws and has therefore made an
24 unconstitutional decision. See ORS 197.835(8)(a)(E). However,
25 no such argument is developed in the petition. We have
26 followed the lead of the appellate courts in refusing to

1 consider claims of unconstitutionality where, as here, they are
2 unsupported by legal argument. Megdal v. Board of Dental
3 Examiners, 288 Or 293, 296, 605 P2d 273 (1980); Mobile Crushing
4 Company v. Lane County, 11 Or LUBA 173 (1984).

5 The preceding is sufficient ground for denial of
6 petitioner's final claim. However, even if the claim of
7 arbitrariness might potentially authorize relief under ORS
8 197.835, such a claim has not been sustained in this case. As
9 the city points out, the parcels are not so similarly situated
10 so as to demand identical land use designations. Parcel C
11 abuts the intersection of the Salem Parkway and Cherry Avenue.
12 It is separated from other industrially zoned lands by Cherry
13 Avenue and from other potentially incompatible uses by the
14 Salem Parkway. By contrast, parcel A is immediately adjacent
15 to other industrially zoned lands and has no frontage on the
16 Salem Parkway. We agree with the city that the different
17 locations of the parcel are sufficient to justify differing
18 land use treatment. We therefore deny this challenge.

19 The city's decision is affirmed.
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FOOTNOTES

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4 Several courses of action were considered by the council.
5 The approved alternative, as worded by the Director of
6 Community Development, was to:

7 "Hold the Zone Change decision in abeyance but
8 instruct the Salem Planning Commission to initiate a
9 Comprehensive Plan Change from 'Industrial' to
10 'Industrial Commercial' and hold a hearing as
11 recommended in the legal opinion by the City
12 Attorney. This alternative would require the Planning
13 Commission to make findings supporting their ultimate
14 disposition of the Comprehensive Plan Amendment."
15 Supp. Rec. p. 110.

16
17 At oral argument, Respondent's attorney explained that the
18 effect of requiring the planning commission to "initiate" the
19 plan amendment was to eliminate the filing fees required for
20 such amendments.

21
22 2
23 Although Resolution 85-57 denies both the plan and zoning
24 map changes requested by petitioner, the petition does not
25 challenge the findings for denial of the zone change. The
26 challenged findings all relate to the plan map amendment.

27
28 3
29 As we have said on other occasions, where the challenged
30 action is a denial, it is not necessary to go further once a
31 single goal violation is established. Marracci v. City of
32 Scappoose, 26 Or App 131, 552 P2d 552 (1976); Portland City
33 Temple v. Clackamas County, 11 Or LUBA 70 (1982); Weyerhaeuser
34 Company v. Lane County, 7 Or LUBA 42 (1982).