

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

JAN 2 4 16 PM '86

OF THE STATE OF OREGON

3 A.W. COLWELL, KARON V.)
 JOHNSON and 1000 FRIENDS OF)
 4 OREGON, an Oregon non-profit)
 corporation,)
 5)
 Petitioners,)
 6)
 vs.)
 7)
 WASHINGTON COUNTY,)
 8)
 Respondent,)
 9)
 and JIM ALLISON, HARRY-FARR)
 10 and FARR BROS., INC.)
)
 11 Participants.)

LUBA No. 85-063

FINAL OPINION
AND ORDER

12 Appeal from Washington County.

13 Robert E. Stacey, Jr., Portland, filed the Petition for
14 Review and argued the cause on behalf of Petitioners Colwell,
et al.

15 Dan R. Olsen, Hillsboro, filed the response brief and
16 argued the cause on behalf of Respondent Washington County.

17 Jim Allison, Sherwood, filed the response brief and argued
the cause on his own behalf.

18 BAGG, Referee; KRESSEL, Chief Referee; DUBAY, Referee;
19 participated in this decision.

20 DISMISSED 01/02/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a decision of the Washington County
4 Planning Commission to amend the Rural/Natural Resource Plan
5 Element of the Washington Comprehensive Plan. The amendment
6 substitutes Agricultural and Forest 10 (AF-10), a rural
7 residential plan designation, for the existing Agricultural and
8 Forest 20 (AF-20) designation. The decision includes an
9 exception to LCDC Goal 3, the agricultural lands goal, and Goal
10 4, the forest lands goal.

11 Petitioners ask us to reverse the decision.

12 FACTS

13 The amendment encompasses 68.35 acres on the north side of
14 Gales Creek Road near its intersection with Stringtown Road.
15 Property to the north, south and west is in farm and woodland
16 use. The Forest Grove city limits and the Forest Grove Urban
17 Growth Boundary border the property on the east. All but 10
18 acres contain United States Soil Conservation Service, Class II
19 or III agricultural soils. Also, all soils are suitable for
20 forest use. At present, the parcel is used for grazing,
21 Christmas tree farming and as woodlot. There are seven tax
22 lots, each with a dwelling, and one tax lot with two dwellings
23 and an office building.

24 FARR Bros., applicants herein, requested enactment of
25 county legislation to change the designation of their property
26 from AF-20 to AF-10. The request was denied in December,

1 1984. The applicants then applied for a quasi-judicial plan
2 amendment for the same change.

3 The planning commission considered the request at a hearing
4 on April 24, 1985. The commission voted to approve the
5 request. A "Notice of Decision" was issued by the county
6 Department of Land Use and Transportation on April 25, 1985.
7 The county's ordinance provides the planning commission
8 decision is final unless appealed to the county board of
9 commissioners within 14 days. See Washington County Community
10 Development Code, Section 202-3.2(C) and 202-3.3 controlling
11 "Type III" actions.

12 Pursuant to the county ordinance, petitioners filed a
13 petition for review on May 7, 1985, alleging various errors
14 including violation of LCDC Goals 2, 3 and 4, LCDC Goal 2
15 Administrative Rule, ORS 197.732 and ORS 215.050 and 060.
16 Petitioners' appeal was dismissed by Washington County Board of
17 Commissioners. Petitioners then filed this review proceeding.

18 ASSIGNMENTS OF ERROR 1 - 4

19 "FIRST ASSIGNMENT OF ERROR

20 "Washington County exceeded its jurisdiction under ORS
21 215.050 and 215.060, and improperly construed the
22 applicable law, by purporting to amend its
23 comprehensive plan without hearing and action by the
24 county governing body. The county's ordinances
25 authorizing this procedure are invalid.

26 "SECOND ASSIGNMENT OF ERROR

"Washington County violated ORS 215.050 and 215.060 by
dismissing petitioners' appeal to the board of
commissioners and refusing to hear the matter de novo.

1 "THIRD ASSIGNMENT OF ERROR

2 "In permitting its planning commission to adopt the
3 plan amendment at issue in this case and failing to
4 hold a hearing and take action to adopt or deny the
5 amendment, the county commission failed to follow the
6 procedures applicable to the matter before it in a
7 manner that prejudiced the substantial rights of the
8 petitioners.

6 "FOURTH ASSIGNMENT OF ERROR

7 "The county's appeal procedure for plan amendments
8 violate ORS 197.610 to 197.625.

8 "FIFTH ASSIGNMENT OF ERROR

9 "The county board's decision to dismiss the appeal was
10 not supported by substantial evidence in the whole
11 record."

12 In these four assignments of error, petitioners assert the
13 county planning commission does not have jurisdiction to amend
14 the comprehensive plan. Petitioners also argue that the
15 county's procedures work to prejudice the substantial rights of
16 petitioners. See ORS 197.835(8)(a)(B). Petitioners claim
17 prejudice because the county governing body dismissed their
18 appeal of the planning commission's plan amendment approval
19 rather than follow the statutory procedure for adoption and
20 revision of comprehensive plan amendments detailed in ORS
21 215.050 and 060.

22 The county development code requires filing a "petition for
23 review" with the county governing body along with a \$265
24 "appeal fee" and a transcript fee. The transcript fee is
25 typically paid in two parts. The first part represents an
26 estimate of the total cost to prepare a transcript. After the

1 transcript is finished, petitioners are given the transcript
2 along with a bill for any remaining fee. CDC Section 209-4.2.
3 Failure to pay the total balance due within seven days of
4 billing is a "jurisdictional defect" and will result in
5 dismissal of the appeal. Id.

6 The county used this provision to dismiss petitioners'
7 appeal. The county found petitioners were sent a statement for
8 \$80 on May 30, 1985, the same date the transcript was
9 transmitted. Petitioners did not make a payment until June 13,
10 1985. The payment, therefore, was well outside the seven day
11 limit provided for in Section 209-4.2 of the county's
12 ordinance.

13 Petitioners' argue that the county's appeal process
14 violates ORS 197.620. The statute concerns procedure for
15 appeals to LUBA where a jurisdiction adopts an amendment to an
16 acknowledged comprehensive plan. The statute provides:

17 "Notwithstanding the requirements of ORS 197.830(2)
18 and (3), persons who participated either orally or in
19 writing in the local government proceedings leading to
20 the adoption of an amendment to an acknowledged
21 comprehensive plan or land use regulation or a new
22 land use regulation may appeal the decision to the
23 Land Use Board of Appeals under ORS 197.830 to
24 197.845. A decision to not adopt a legislative
25 amendment or a new land use regulation is not
26 appealable.

27 "Notwithstanding the requirements of ORS 197.830(2)
28 and (3), the director or any other person may file an
29 appeal of the local government's decision under ORS
30 197.830 to 197.845, if an amendment to an acknowledged
31 comprehensive plan or land use regulation or a new
32 land use regulation differs from the proposal
33 submitted under ORS 197.610 to such a degree that the
34 notice under ORS 197.610 did not reasonably describe
35 the nature of the local government final action." ORS

1 197.620(1) and (2).¹

2 Petitioners contend this statute establishes a liberal
3 policy for appealing amendments to acknowledged plans to LUBA.
4 Petitioners then say the county code is incompatible with this
5 policy. That is, because the governing body applied the code's
6 stringent internal procedures to petitioners' appeal of the
7 planning commission's post-acknowledgement plan amendment, the
8 county has effectively negated the provisions of ORS
9 197.610-625.² We disagree.

10 Nothing in ORS 197.610-625 prohibits a county from
11 requiring and establishing internal procedures for, appeals of
12 planning commission actions on quasi-judicial plan amendments.
13 ORS 197.610 exempts a challenger of a post-acknowledgement plan
14 amendment from the standing requirements normally applicable to
15 LUBA appeals, but the statute is silent on the question of
16 whether such a petitioner must fully participate in the local
17 appeals process first. On this question, we believe it is
18 significant that the statute petitioners rely on does not
19 exempt them from the jurisdictional rule, set forth in ORS
20 197.825(2)(a), requiring a petitioner in LUBA to first exhaust
21 all local remedies (e.g., appeals) available by right. Had the
22 legislature wished to limit the exhaustion rule to
23 pre-acknowledgement plan actions, and thereby liberalize the
24 appeal procedure in the manner suggested by petitioners, it
25 could easily have done so.

26 ORS 215.422(1)(a) specifically allows the county to

1 establish procedures to control the local appeals process.
2 Further, ORS 215.422(1)(c) allows the county to levy a
3 transcript fee. Although the governing body's dismissal of
4 petitioners' appeal for failure to timely pay the transcript
5 balance may be a harsh result, we find no legal error as
6 alleged.

7 There remains one additional claim petitioners raise in an
8 attempt to avoid operation of the county's procedural
9 requirements. Petitioners say that ORS 215.050 and ORS 215.060
10 require county commission action to effectuate any change in
11 the comprehensive plan.³ Because state law requires the
12 governing body to act on any plan change, the Washington County
13 Commission was obliged to hear the matter of this plan change,
14 whether the appeal was timely filed or not.

15 We reject petitioners' view. ORS 197.825(2)(a) provides
16 that our jurisdiction

17 "is limited to those cases in which the petitioner has
18 exhausted all remedies available by right before
petitioning the board for review."

19 As noted, this provision requires a petitioner to exhaust all
20 local avenues available to remedy an allegedly erroneous land
21 use decision before asking for our review. In this case, the
22 ordinance required petitioners to perfect an appeal of the
23 planning commission decision to the Washington County
24 Commission.⁴ This process was not followed. The county held
25 petitioners' failure to respond to the billing in time
26 warranted dismissal of the appeal.

1 Substantial evidence in the record supports the county's
2 decision. The record includes a transcript of a June 26, 1985
3 telephone conversation, between Judy Angevine, a staff person
4 in the planning department and Alan S. Bachman, of the county
5 counsel's office. Ms. Angevine said she mailed a bill to
6 petitioners' counsel for the balance owing on the transcript on
7 May 30, 1985. Record 24. Therefore, we conclude the county
8 was within its power when holding petitioners did not make
9 payment within the required seven day period.⁵

10 Because petitioners failed to properly perfect their appeal
11 below, they failed to exhaust "all remedies available by right
12 before petitioning the board for review."⁶ Assignments of
13 Error 1-5 are denied.

14 "SIXTH ASSIGNMENT OF ERROR

15 "The county prejudiced petitioners' substantial rights
16 by refusing to permit cross-examination of the appeals
17 secretary or permit rebuttal or cross-examination of
18 the staff report or its authors."

19 Petitioners argue they were not given the opportunity to
20 cross-examine Ms. Angevine on the substance of her telephone
21 conversation of June 26, 1985. Petitioners cite Washington
22 County Development Code, Sections 205-5.2 and 250-5.3 allowing
23 cross-examination of witnesses including staff persons. We
24 note the right to cross-examination must be "asserted at the
25 first reasonable opportunity." CDC Section 205-5.2.

26 The county states petitioners were given a copy of the
transcript of the telephone conversation but failed to ask that
Ms. Angevine be present for cross-examination. Further,

1 petitioners did not request cross-examination of any other
2 county staff person.

3 Our review of this record does not show a timely request to
4 cross-examine Ms. Angevine. A request to cross-examine her is
5 in petitioners' "Petition for Reconsideration" filed after the
6 county had made its decision in this matter. See Record 8
7 through 10. This request does not meet county ordinance
8 requirements that opportunity for cross-examination be asserted
9 at the "first reasonable opportunity." We therefore decline to
10 find the county at fault as alleged. We deny the Sixth
11 Assignment of Error.

12 ASSIGNMENTS OF ERROR, 7, 8, and 9

13 "SEVENTH ASSIGNMENT OF ERROR

14 "The plan amendment violates LCDC Goals 2, 3, and 4,
15 ORS 197.732 and LCDC's Goal 2 administrative rule by
16 redesignating agricultural and forest land to a rural
17 residential classification without a demonstration
18 that existing adjacent uses, physical development of
19 the subject land or other relevant factors make farm
20 or forest use impracticable."

18 "EIGHTH ASSIGNMENT OF ERROR

19 "The plan amendment is not supported by the findings
20 of fact and statement of reasons required by ORS
21 197.732(4) and Goal 2.

21 "NINTH ASSIGNMENT OF ERROR

22 "The plan amendment is not supported by substantial
23 evidence in the whole record that the subject property
24 is irrevocably committed to nonfarm and nonforest
25 uses."

25 In the last three assignments of error, petitioners ask
26 that we review the planning commission decision on the merits.

1 We decline to do so. The county board did not consider the
2 planning commission decision on the merits because petitioners
3 failed to comply with procedural requirements. If our
4 disposition of this appeal is mistaken, the merits of the
5 controversy will be back before the county board for
6 consideration. At that time, the county board may consider
7 petitioners' claims. A review of the merits by this Board,
8 before county board review, would be premature.

9 Assignments of Error 7, 8 and 9 are denied.

10 The appeal is dismissed.

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FOOTNOTES

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4 ORS 197.830(2) and (3) control standing to appeal local
5 government decisions to LUBA.

6 We understand ORS 197.620(1) and (2) to permit any person
7 who participated in the adoption of the comprehensive plan
8 amendment to appeal the amendment, whether or not he can meet
9 standing requirements outlined in ORS 197.830(2) and (3). We
10 do not understand ORS 197.620(1) to excuse a person from
11 following normal avenues of appeal existing within the local
12 jurisdiction. However, where the amendment eventually adopted
13 "differs from the proposal submitted...to such a degree that
14 the notice...did not reasonably describe the nature of the
15 local government final action," may require a different
16 result. ORS 197.620(2). That is, if a local government
17 publishes a notice of amendment to a comprehensive plan which
18 does not adequately describe the amendment actually made, a
19 person should be excused from having to follow not only the
20 usual standing requirements, but also the local appeal
21 procedure and the exhaustion requirements contained in ORS
22 197.825(2)(a). It is unreasonable to require an individual to
23 follow an exhaustion requirement where notice of the plan
24 amendment does not adequately describe the amendment eventually
25 enacted. Under such circumstances, an individual could not be
26 expected to exhaust all local remedies where the individual had
no reason to believe the plan amendment was important to his
interests.

17 2
18 ORS 197.610-625 provide for Land Conservation and
19 Development Commission and LUBA review for certain changes to
20 local land use plans and ordinances.

20 3
21 ORS 215.050(1) provides:

22 "The county governing body shall adopt and may from
23 time to time revise a comprehensive plan and zoning,
24 subdivision and other ordinances applicable to all the
25 land in the county. The plan and related ordinances
26 may be adopted and revised part by part or by
geographic area."

25 ORS 215.060 provides:

26 "Action by the governing body of the county regarding

1 the plan shall have no legal effect unless the
2 governing body first conducts one or more public
3 hearings on the plan and unless 10 day's advance
4 public notice of each of the hearings is published in
5 a newspaper of general circulation in the county or,
6 in case the plan as it is to be heard concerns only
7 part of the county, is so published in the territory
8 so concerned and unless a majority of the members of
9 the governing body approves the action. The notice
10 provisions of this section shall not restrict the
11 giving of notice by other means, including mail, radio
12 and television."

8 4

9 In the appeal to the governing body, petitioners could
10 argue the planning commission had no power to enact the
11 amendment. The resultant ruling would be subject to our review
12 under ORS 197.825.

11 5

12 Petitioners argue that the seven day time limit was not
13 exceeded. Petitioners say they received the transcript on
14 June 4, 1985, but deny they received any billing for the
15 transcript. Petitioners' attorney called the county to inquire
16 about any balance due on June 7. The call was returned on
17 June 10, but it was not until June 11 that the county appeals
18 secretary and the county attorney made contact. Petitioners'
19 attorney learned of the \$80 balance due at that time. On the
20 next day, petitioners' attorney mailed a check for \$80 to the
21 county, and the county received the check on June 13.

17 Were this evidence the only evidence about a billing for
18 the remaining transcript balance, our view might be different.
19 However, because there is substantial evidence in the record to
20 support the county's conclusion that a billing was made on
21 May 30, 1985, we find we are required to uphold the county's
22 order.

21 6

22 Arguably, a declaration that a county planning commission
23 action is a nullity is within circuit court jurisdiction. Our
24 jurisdiction does not include power to grant declaratory
25 relief. ORS 197.825(4)(a) reserves that power to the circuit
26 courts.