

LAND USE  
BOARD OF APPEALS

MAR 20 3 59 PM '86

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION )  
AND DEVELOPMENT, )  
Petitioner, )  
vs. )  
CLATSOP COUNTY, )  
Respondent, )  
and )  
MARVIN COOPER, )  
Respondent-Participant. )

LUBA No. 85-094

FINAL OPINION  
AND ORDER

Appeal from Clatsop County.

Michael A. Holstun, Salem, filed the petition for review and argued on behalf of Department of Land Conservation and Development.

Kenneth S. Eiler, Astoria, filed a response brief and argued on behalf of Respondent County.

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

REVERSED

03/20/86

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioner requests reversal of a comprehensive plan and zoning designation for 4.3 acres of land within the Gearhart Urban Growth Boundary, but outside the city limits. The county decision, Ordinance No. 85-24, amends the county comprehensive plan and zone designation of the property from Low Density Residential (R-1) to Resort Commercial (C-2).

STANDING

Petitioner, the Department of Land Conservation and Development (DLCD), alleges three bases for standing. The agency asserts it is entitled to standing under the provisions of ORS 197.620(1), giving persons who participate in local acknowledgement plan amendment proceedings a right to appeal.<sup>1</sup> DLCD also alleges it has standing under ORS 197.830(3)<sup>2</sup> because it appeared orally and in writing in proceedings leading to adoption of Ordinance 85-24 and it is aggrieved or has interests adversely affected by the ordinance.

Lastly, petitioner claims entitlement to standing under ORS 197.090(2), specifically authorizing the Director of DLCD to participate in and appeal land use decisions.

"(2) Subject to local government requirements and the provisions of ORS 197.830 to 197.845, the director [of DLCD] may participate in and seek review of a land use decision involving the goals, acknowledged comprehensive plan or land use regulation or other matter within the statutory authority of the department or

commission under ORS 197.005 to 197.430 and  
197.610 to 197.850."

Respondent claims DLCD is not a "person" within the meaning  
of ORS 197.620(1) and is therefore not entitled to standing.  
As we understand the argument, respondent argues that the grant  
of authority to the director under ORS 197.090(2) is subject to  
ORS 197.620. Because ORS 197.620 was not amended to clearly  
define DLCD as a "person," the legislature has not provided a  
means for DLCD to enter this proceeding, according to  
respondent.

DLCD has standing to appeal the decision. ORS 197.090(2)  
authorizes the director to participate in and seek review of  
land use decisions. According to ORS 197.015(7), the  
"director" is the director of DLCD. To accept respondent's  
argument requires us to ignore ORS 197.620(2) and ORS  
197.015(14). We find nothing in the statutes to encourage us  
to accept respondent's view. See DLCD v. Polk County, \_\_\_ Or  
LUBA \_\_\_ (LUBA No. 85-001, June 24, 1985); aff'd without  
opinion, 75 Or App 578, \_\_\_ P2d \_\_\_ (1985).

#### FACTS

The subject property is north of the Gearhart City limits  
but within the city's urban growth boundary. It is a 4.3 acre  
parcel adjacent to an existing restaurant and motel, the  
"Windjammer." The proposed use includes expansion of the  
restaurant and construction of a 40 unit motel with 61  
offstreet parking places and a health club with an additional

60 offstreet parking places.

Both the City of Gearhart and Clatsop County enjoy acknowledged comprehensive plans and implementing ordinances. Prior to acknowledgement, however, there was some disagreement between the city and the county as to the proper designation of the area. The conflict was resolved when the parties agreed that both jurisdictions would apply the city's plan change criteria to changes outside the city limits but within the urban growth boundary. That is, they agreed that while the county has jurisdiction over this property, any change in plan and zone designation must be measured against the city's plan and zone change criteria.

ASSIGNMENT OF ERROR No. 1

"The ordinance violates Goals 2 and 14 by amending the county's comprehensive plan designation so that it is inconsistent with the plan designation applied to the same property by the City of Gearhart."

The county action changes the plan and zone designation of the property from Low Density Residential to Resort Commercial. The city's designation of the same property remains Low Density Residential. The result, according to petitioner, is that the county plan and the city plan are no longer consistent. This inconsistency results in a violation of Goal 2, according to petitioner.<sup>3</sup>

Statewide Planning Goal 2 requires that city and county plans

"be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS

1 197.707-795...."

2 OAR 660-15-000 requires that implementing measures to carry out  
3 comprehensive plans must also be consistent. We agree with  
4 petitioner that the inconsistency between the city plan and the  
5 county plan, following this action, is a violation of the Goal  
6 2 consistency requirement.

7 Respondent says petitioner's argument gives the city veto  
8 power over land planning within the county's jurisdiction.

9 Respondent argues that each jurisdiction is responsible for  
10 exercising zoning and planning authority over property within  
11 its own boundaries, and the disapproval of a neighboring  
12 jurisdiction should not result in a veto.

13 The Goal 2 consistency requirement does restrict the  
14 county's discretion over land within its jurisdiction.  
15 However, the restriction only applies where the city and the  
16 county both have legitimate planning interests in territory, as  
17 within urban growth boundaries. See LCDC Goal 14,  
18 "Urbanization." The Goal 2 consistency requirement furthers  
19 the statutory policy to eliminate the "[U]ncoordinated use of  
20 lands within this state....," and promote "coordinated  
21 state-wide land conservation and development...." ORS  
22 197.005

23 Because we find the decision violates Goal 2, we are  
24 required to reverse adoption of Ordinance 85-24.<sup>4</sup>

25 SECOND ASSIGNMENT OF ERROR

26 "Clatsop County made findings that are not supported

1 by substantial evidence."

2 THIRD ASSIGNMENT OF ERROR

3 "Clatsop County applied the Gearhart UGB ordinance  
4 incorrectly to allow a unilateral plan amendment."

5 In the second and third assignments of error, petitioner  
6 argues that the county failed to make adequate findings showing  
7 compliance with Section 10.020 of the Gearhart Urban Growth  
8 Boundary Ordinance.<sup>5</sup> Section 10.020 sets out critiera for  
9 comprehensive plan amendments.

10 Petitioner first argues Section 10.020(a) of the Gearhart  
11 Comprehensive Plan is violated. Section 10.020(a) provides:

12 "The proposed use is in conformance with both the land  
13 use map and goals and policies of the Gearhart  
14 Comprehensive plan, or that there was a mistake in the  
15 plan, or that conditions have substantially changed  
16 since the plan was adopted."

17 The county alleges circumstances have substantially changed  
18 since the plan was adopted. In the county's view, there has  
19 been an approximate 50 percent reduction in land available for  
20 commercial use. Petitioner claims the county has erred because  
21 the reduction in available commercial property was at least in  
22 part because some residential land was erroneously labeled for  
23 commercial use.

24 The county was entitled to make its own determination on  
25 whether conditions had changed within the City of Gearhart.  
26 The county perceived a reduction in available commercial land  
from 29.4 acres to 17 acres. The fact the reduction was, in  
part, the result of an error does not alter the fact that less

commercial land is available now than was apparently available when the plan was first acknowledged. As stated below, however, the finding on changed circumstances is by itself insufficient to justify the decision.

Petitioner's next attack is based on Section 10.020(b). This section requires "a demonstrated need for the proposed use." Petitioner argues that the county did not show this particular tourist facility is needed within the City of Gearhart.

The findings conclude that there is a need to encourage expansion of visitor accommodations in the Seaside and Gearhart areas. The record includes evidence from the City of Seaside that motels are often booked to capacity, and first class hotels average a 70 to 80 percent per year occupancy rate. Record 38. Also, a letter from the Seaside Chamber of Commerce recites a need for more accommodations for visitors in the Seaside and Gearhart areas. Record 40.<sup>6</sup>

We agree with petitioner that these findings do not show a need for this particular proposal -- a 40 unit motel with a health club. While the county's findings articulate a need for more tourist facilities in the Gearhart and Seaside areas, and while the record supports that finding, the county does not explain why the presently available 17 acres of commercially-zoned land is not sufficient to meet this need.

Petitioner next challenges compliance with Section 10.020(c). This section requires that no other "appropriately

zoned and available lands...can be used to satisfy the public need." Petitioner argues that nothing shows that other sites had been considered and why other sites can not satisfy any identified need.

Again we agree with petitioner. The county states that the only available commercial land is 1.32 acres and smaller. This particular facility is to occupy 3.13 acres. It appears, however, that the size of the parcel is more suited to the applicant's desire for a motel and tourist facility of particular configuration than any public need for tourist facilities of that size.<sup>7</sup>

Last, petitioner challenges compliance with Section 10.020(d) of the Gearhart Plan requiring that the property considered for change be "better suited to meet public need than other potential properties." Petitioner claims the county's order focuses on the applicant's desire, and not on whether any public need could be met at alternative locations.

The county findings on this issue discuss the property's proximity to the Windjammer resort. The county does not discuss whether other property could meet the identified tourist facility need. The county's findings under both subsections (c) and (d) of Plan Section 10.020 focus on the convenience of the site to the existing Windjammer facility, and not on whether there are other properties available.

We therefore agree with petitioner that the county has failed to meet the standards applicable in Sections 10.020 of



1 the Gearhart Comprehensive Plan. We sustain this assignment of  
2 error.

3 Ordinance 85-24 is reversed.

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FOOTNOTES

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"Notwithstanding the requirements of ORS 197.830(2)(3), persons who participate either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845."

2

"(3) Except as provided in ORS 197.620(1), a person may petition the board for review of a quasi-judicial land use decision if the person:

"(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section;

"(b) Appeared before the local government, special district or state agency orally or in writing; and

"(c) Meets one of the following criteria:

"(A) Was entitled as of right to notice and hearing prior to the decision to be reviewed; or

"(B) Is aggrieved or has interests adversely affected by the decision."  
ORS 197.830(3).

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Whenever one jurisdiction takes action that may affect the planning interests of another jurisdiction, the acting jurisdiction must attempt to "coordinate" its efforts with the other jurisdiction. This requirement exists in Goal 2:

"All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable state-wide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The

1 required information shall be contained in the plan  
2 document or in supporting documents. The plans,  
3 supporting documents and implementation ordinances  
4 shall be filed in a public office or other place  
5 easily accessible to the public. The plans shall be  
6 the basis for specific implementation measures. These  
measures shall be consistent with and adequate to  
carry out the plans. Each plan and related  
implementation measure shall be coordinated with the  
plans of affected governmental units."

7 Petitioner adds that the Goal 2 consistency requirement  
8 requires more than a mere effort to coordinate the plans and  
9 land use regulations of the two jurisdictions. Petitioner  
10 disagrees with our holding in Perkins v. City of Rajneeshpuram,  
11 10 Or LUBA 88 (1984), aff'd on other grounds, 68 Or App 726  
12 (1984) and modified 300 Or 1 (1985), and Rajneesh Travel  
Corporation v. Wasco County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 85-015,  
June 14, 1985), that the coordination requirement in Goal 2 is  
met when a city or county unilaterally amends its plan in a  
manner inconsistent with that of another jurisdiction providing  
the acting jurisdiction makes every attempt to obtain agreement  
from the other affected jurisdiction.

13 We do not understand petitioner to argue that the county  
14 has violated the coordination requirement in Goal 2.  
15 Petitioner's argument is that the plans of the two  
16 jurisdictions will not be consistent if the challenged decision  
17 is affirmed. The record shows the city's objection to this  
change communicated to the county board. Both the city and the  
county were aware of each other's views on this change. We  
express no opinion on whether or not the county has in some  
fashion violated the Goal 2 coordination requirement.

18 \_\_\_\_\_  
19 4  
20 Petitioner also argues violation of Goal 14. Petitioner  
21 cites Goal 14's requirement that urban growth boundary adoption  
22 be a "cooperative process between the city and the county..."  
and argues that inconsistency between city and county land use  
designations within an urban growth boundary violates this  
cooperative process.

23 We do not understand the county to take action to change  
24 the urban growth boundary. See Perkins v. Rajneeshpuram,  
supra, and Rajneeshpuram Travel Corporation v. Wasco County,  
supra.

25 \_\_\_\_\_  
26 5  
Respondent makes no argument on these issues.

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We note also that the county order does not discuss a need for more C-2 zoned land. This change is not conditional on construction of the proposed use. The need criterion requires the county to address the need for the zone change, not the particular use alone.

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The county's findings on this subject are illustrative.

"9. The identified public need is for land suitable for resort development and additional visitor accommodations that is both large enough for the proposed development and is located near the existing Windjammer site.

"10. The subject property is located adjacent to an existing (under construction) resort development, and includes about 4 acres of usable ground.

"11. Land already in Commercial zones does not include any lots larger than 1.32 acres. Land in the R-3 zone may also be suitable for the proposed use. The only land in this zone is located west of Marion Avenue near the Gearhart Golf Course, and includes the former Windjammer site. There is no land in the R-3 zone adjacent to the current Windjammer site.

"12. Applicant has proposed expansion of the existing Windjammer complex onto the subject property. Such expansion is estimated to require about 3.13 acres. The subject property includes a total of about 4.3 acres (sic). The largest commercial-zoned vacant parcel within the Gearhart UGB is 1.32 acres."