BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY L. SCHULTZ, SHARI CAPONE and IRENE TEDRICK, Petitioners, vs. YAMHILL COUNTY, EDWARD HOEM, and JEAN HOEM, Respondents.	LUBA No. 86-053 FINAL OPINION AND ORDER

Appeal from Yamhill County.

Gary L. Schultz, McMinnville, filed the petition for review and argued on behalf of petitioners.

Timothy S. Sadlo and Thomas C. Tankersley, McMinnville, jointly filed respondents' brief and argued on behalf of Respondent County and Participants Hoems, respectively.

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

REMANDED 10/22/86

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

Opinion by DuBay.

NATURE OF THE DECISION

Petitioners appeal changes to the county's comprehensive plan and zoning map designations for 5.5 acres outside acknowledged urban growth boundaries. Ordinance 430 changed the plan designation from Very Low Density Residential (VLDR) to Light Industrial (LI) and also adopted an exception to Statewide Planning Goal 3. Ordinance 431 changed the zoning on the same property from AF-10 to Light Industrial (LI).

FACTS

The property was zoned for agricultural use in 1971 when the present owner applied for, and received, a change to LI.[1] However, the county zoning maps never reflected the changed designation.

In 1974 the county adopted a comprehensive plan that included a map with plan classifications of all land in the county. The property is shown as VLDR on the plan map. In 1976 the countywide zoning ordinance was adopted to implement the comprehensive plan. The property was designated AF-10 on the 1976 zoning map.

In 1978, the county enacted Order No. 78-135, identifying parcels in the rural area that were physically developed for nonfarm uses. On June 20, 1979, the county adopted Ordinance 202 to take exceptions to both Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) on the grounds all the parcels designated in Order No. 78-135 were either physically developed or

irrevocably committed to nonfarm or nonforest uses. The property in question was not included.

In 1980 the county took additional exceptions to the resource goals. The county based the exception for the tract that includes the 5.5 acres on the ground that the several parcels in the tract were irrevocably committed to rural residential uses.

The owners have operated a metal fabrication business on the property since 1957. When they became aware in 1985 that the property was not zoned LI, they applied to the county for plan and zone changes to LI. The planning commission made no recommendation on the proposed changes but merely forwarded the request to the county board of commissioners. The board granted both plan and zone change requests. Petitioners appealed both ordinances.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners allege the county has no legal basis for granting the plan and zone changes to cure mistakes. Further, petitioners say neither decision is supported by substantial evidence. Petitioners point out that the county's sole rationale for granting the changes is to correct an error, and that in using this rationale the county failed to find that the changes meet current plan and zoning criteria. Petitioners contend that because the county justified the changes solely to correct past errors, no evidence was presented showing compliance with plan and ordinance criteria.

Respondents say the initial failure to change the designation on the zoning maps in 1971 was a clerical error. This error was the cause of each later failure to show the LI designation in the various planning documents. Respondents also argue that the county did not intend to depart from the LI zoning when the comprehensive plan map was adopted in 1974. The county supports this argument by referring to statements by a county commissioner at the 1986 hearings that the county policy in 1974 was to safeguard existing uses. Respondents also say this evidence of intent in 1974 is buttressed by the fact that the 1971 rezoning ordinance was never repealed. The county argues that the intent of the 1974 ordinance is carried out by correcting the prior error.

In Allm v. Polk County, 13 Or LUBA 257 (1985), the respondent approved comprehensive plan and zoning map amendments without addressing applicable policies in the comprehensive plan on the ground that the changes would cure prior errors. We rejected that rationale, noting that the respondent had not articulated a legal basis for its action. We also concluded that in any event the mistake theory did not obviate the need to address applicable plan criteria.

In a footnote to the opinion, we said that where plan policies do not apply, an amendment to correct purely typographical or other clerical errors might be sustainable on that ground alone. That issue, however, was not before us then and is not before us now. Assuming that the county's failure

to reflect the LI designation on the zoning map in 1971 was clerical error, the county's decisions now purport to correct more than that error. The decisions seek to correct four later decisions made since 1971 all of which were subject to standards in the comprehensive plan adopted after 1971.[2] The 1971 error may have misled county personnel when the later decisions were made. However, nothing in the later decisions required duplication of the 1971 zoning designation in subsequent plan or zoning maps.

Because Ordinances 430 and 431 changed planning and zoning map designations without showing compliance with criteria in statewide goals and the county's comprehensive plan, the first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners allege their substantial rights were prejudiced because notice of the county hearings did not disclose that an exception to the resource goals was to be considered.

On May 27, 1986, the county published notice of a public hearing before the county commissioners regarding the proposed plan and zoning map changes. The notice described the proposed change of the comprehensive plan and zoning maps to reflect a zoning designation of LI rather than AF-10 on the property. The property was described as located approximately one mile northeast of the City of McMinnville and the southside of Highway 99W. The notice also included the following:

"In addition, the requested action may require the

taking of a modified exception pursuant to OAR 660-04-018." Record at 44.

Petitioners have not alleged how this notice fails to meet the requirements of ORS 197.732(5).[3]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners allege the county failed to give notice to the Land Conservation and Development Commission (LCDC) of a proposed change to its comprehensive plan in compliance with ORS 197.610 and 197.615.

Respondents allege the requisite notices were given although the proof is not included in the record. Respondents' brief includes an affidavit of the county's senior planner stating that both pre-adoption and post-adoption notices were mailed to the director of the Department of Land Conservation and Development within the time prescribed by statute.

Failure to send notice of proposed comprehensive plan or land use regulation amendments in accordance with the statutory requirements is grounds for a remand. Confederated Tribes v. Wallowa County, 14 Or LUBA 92 (1985). As we noted in Confederated Tribes, the apparent purpose of the statute is to provide the opportunity for comments by the Department of Land Conservation and Development about the proposal's compliance with the statewide planning goals. According to the affidavit submitted to respondents, the Department was given the opportunity to comment. Respondents' submission of the

affidavit in their brief is adequate to demonstrate compliance with the requirements of ORS 197.610.[4] This assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners allege Ordinance 430 fails to take an exception to Statewide Goal 3 according to criteria in ORS 197.732 and Goal 2. Petitioners allege the findings do not set forth facts showing the property is physically developed or irrevocably committed to nonresource uses as required by ORS 197.732(1)(a) and (b), Goal 2, part 2 and LCDC's interpretative rules. In addition, petitioners say no evidence in the record shows the nature or extent of development on the property.

Petitioners acknowledge the property was included in the area excepted from Goal 3 in 1980. That exception was based on the ground that 236 acres, including the property in question, were irrevocably committed to nonresource use. The county found the property was committed to rural residential uses. See Appendix A-8, Respondents' Brief. According to petitioners, that exception justifies rural residential zoning only, and the county could not authorize LI zoning without taking another exception.

Respondents reiterate their theory that the current exception is justified to correct the error on the 1971 zoning map. In connection with the argument, they insist the 1971 rezoning decision established that the property was physically developed for light industrial uses. Alternatively,

respondents contend the findings addressing the exception criteria are adequate to demonstrate the property is now developed for light industrial uses and has been committed to those uses since 1957.

Ordinance 430 includes findings that recite the zoning and planning history of the property, beginning with the zone change to LI in 1971. The county also found:

> "...that the light industrial uses that have existed on the property were present prior to and during the 1979 and 1980 countywide exceptions process and that an oversight was made in not recognizing the light industrial use, plan designation and zoning of the subject property in addition to the rural residential use of the property.
>
> "19. In the event that a modified exception must be made to address the light industrial use rather than the rural residential use of the subject property, the board finds:
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> "A. That the use of the property for light industrial purposes consistent with applicable goal requirements in that industrial type uses have been made to the property since 1957 and a comprehensive plan amendment and zone change to LI was approved for the property in 1971 by Ordinance No. 39 to reflect that industrial type use of the property. Further, abutting lands to the east were specifically excepted for light industrial uses in 1979 (Code Areas 4.5 and 4.9) by Ordinance No. 202. The board finds that the subject property was mistakenly omitted from those exception code areas and that the findings made to except the abutting lands is equally applicable to the subject property, and, therefore, the findings set forth in Ordinance 202 for taking an exception to Code Areas 4.5 and 4.9 are adopted by reference thereto."

As noted in the discussion of the first and second assignments of error, we reject respondents' argument that an exception can be based on a desire to correct prior errors in

the designation of the property. We also reject the proposition that the 1971 zoning ordinance established the status of the property as physically developed or committed to light industrial or any other nonresource uses. In 1971, Ordinance 39 adopted the zone change to LI without any findings about the nature or extent of development of the property on neighboring property.[5]

Whether the findings in Ordinance 430 are adequate to take an exception to Goal 3 is a more difficult question. The difficulty arises in part because the findings do not clearly specify whether the exception is based on physical development or by reason of commitment to nonresource uses. We must also consider the related question whether the county may authorize nonresidential uses on the property based on the 1980 ordinance. For the reasons set forth below, we hold that the county may not authorize light industrial uses in the absence of an appropriate exception recognizing or justifying these uses. Neither the exceptions taken in 1980 nor Ordinance 430 may serve as a basis to designate the property for light industrial uses on the plan or zoning maps.

The relationship between the type of exception taken and the uses allowable afterward was recently explained in 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, ___ P2d ___ (1986), referred to hereafter as Curry County. The Court said:

"Built exceptions recognize what already exists on the

parcels for which an exception is taken. 'Committed' exceptions require an analysis of how existing development on some parcels affects practicable uses of others, and 'must be based on facts illustrating how past development has cast a mold for future uses.' See Halvorsen v. Lincoln County, LUBA No. 84-099 (Or LUBA July 19, 1985), slip op at 8. By definition, a 'built' exception does not change the existing use, but a 'committed' exception does permit the use to be changed as provided for in the actual zoning of the parcel." Curry County at 501.[6]

The Curry County Court also held that built or committed exceptions to the resource goals do not authorize particular uses of land. The Court said:

"By themselves, the county's exceptions to Goals 3 and 4 could neither define all restrictions upon the uses of lands in the exception areas nor authorize particular uses of these lands." Curry County at 487.

We understand Curry County to say that although "built" and "committed" exceptions do not by themselves authorize or restrict uses on the exception site, the type of exception (i.e., either "built" or "committed") provides a basis for the appropriate zoning designation.

The appropriate zoning designation on exception sites is controlled by OAR 660-04-018. As amended on March 20, 1986, the rule states:

"(1) Purpose. This rule explains the requirements for adoption of plan and zone designations for exception areas. Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses or activities other than those recognized or justified by the applicable exception. Physically developed and irrevocably committed exceptions under OAR 660-04-025 and 028 are intended to recognize and allow continuation of existing types of development in the exception area. Adoption of plan and zoning provisions

which would allow changes in existing types of uses requires application of standards outlined in this rule.

"(2) 'Physically developed' and 'Irrevocably Committed' Exceptions to Goals other than Goals 11 and 14.

"Plan and zone designations shall limit uses to:

"(a) Uses which are the same as the existing types of land use on the exception site; [7]

"(b) Rural uses which meet the following requirements:

"(A) The rural uses are consistent with all other applicable Goal requirements; and

"(B) The rural uses will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-04-028; and

"(C) The rural uses are compatible with adjacent or nearby resource uses."

Applying this rule, the county may zone the property for light industrial uses only if: 1) an exception to a goal is taken in accordance with statutory and statewide goal criteria, and 2) light industrial uses are either recognized or justified in the exception. We conclude that neither the 1980 exception nor Ordinance 430 satisfies both requirements.

The findings adopted in 1980 show the 5.5 acres lies in a 236 acre area comprised of 51 parcels. Thirty eight of the parcels are occupied by a house or a mobile home. The exception findings conclude:

"A mixed use pattern of commercial and residential uses, even distribution and development of small parcels make this code area committed to rural residential use except for one parcel in Area A (in agricultural use)."

Nothing in these "committed" exception findings recognize or justify light industrial use in the 236 acre area. Neither do the findings show how existing development on some parcels in the area commits the 5.5 acres to light industrial uses.

Ordinance 430, on the other hand, found that a metal fabrication and repair business has been located on the property since 1957. However, that fact alone does not show compliance with the criteria for "built" or "committed" exceptions.

A "built" exception may be taken when

> "the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;" ORS 197.732(1)(a).

The findings in Ordinance 430 are silent about the extent of physical development on the property. Without making a determination on this matter, the county has no basis to conclude the 5.5 acres is no longer available for uses allowed by Goal 3.

A "committed" exception requires findings that:

> "existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable;" ORS 197..732(1)(b).

The county's finding that the property has and is being used for a nonresource-related use does not meet this standard.[8] Without more detail than is presented, the county can not conclude that adjacent development or other factors make agricultural use impracticable on the 5.5 acre property.

This assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioners allege the decision violates Goal 11, Public Facilities and Services, by failing to take an exception to this goal when the comprehensive plan was amended. However, no argument is made to elaborate this assertion. We will not develop a legal theory to support petitioners' claim. Deschutes Development v. Deschutes County, 5 Or LUBA 218 (1982).

This assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioners allege the amendments of the comprehensive plan and zoning ordinances violate Goal 14, Urbanization, by allowing urban uses on rural land outside an acknowledged urban growth boundary. Petitioners argue that light industrial uses allowed in the LI plan and zone designations are urban uses. Urban uses may not be permitted outside urban growth boundaries without an exception to Goal 14.[9] Curry County, supra.

Respondents defend this charge by restating their position that the decisions are justified to correct an oversight in omitting the property from areas excepted from Goal 3 in 1979.

We reject this defense for the reasons set forth above. Respondents have not posited a legal basis for their assertion that the failure to change the zoning map in 1971 to reflect the rezoning of the propety to LI justifies ignoring applicable comprehensive plan and statewide goal criteria in subsequent

decisions.

The Court has pointed out the lack of definition of "urban uses" in land use planning regulations. See Curry County, supra, at 502. However, consistent with prior decisions of LUBA, we hold that nonfarm and nonforest related industrial uses are to be located inside urban growth boundaries. See Wright v. Marion County Board of Commissioners, 1 Or LUBA 164 (1980).

Any land use decision which allows urban uses of rural land converts that land to urban use and must either comply with or take an exception to Goal 14, even if that decision does not change the use of the land. Curry County, supra, at 502. The Court explained the reason for this requirement as follows:

> "By providing for 'built' exceptions, the legislature decided that local governments may not simply recognize informally uses which do not conform to goal requirements. The city or county must inventory existing uses to identify which actually conflict with the goals, officially authorize these uses, and publically articulate its reasons for legitimizing them. This is not an empty formality, but a rational process that requires local governments to characterize existing development and consider its effects upon practicable and desirable uses of neighboring land. The 'orderly and efficient transition from rural to urban land use' which Goal 14 is intended to effect cannot occur if a local government does not determine and state at the outset which areas outside of UGB's already contain 'urban' (or 'quasi-urban') uses." Curry County, supra, at 502.

The city took two exceptions for the property. The 1980 exception to Goal 3 declared the property irrevocably committed to rural residential use. Ordinance 430 also took an exception to Goal 3, in part to rectify the prior mistake in map

designation and in part on grounds of irrevocable commitment to light industrial uses. Neither action purported to take an exception to Goal 14.

Exceptions to Goal 14 were first authorized by adoption of ORS 197.732 in 1983.[10] That the county failed to take an exception to Goal 14 prior to 1983 is understandable. However, an exception to that goal is now required to authorize urban uses outside urban growth boundaries. Curry County, supra, at 476. This assignment of error is therefore sustained.

The decision is remanded.

FOOTNOTES

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1 The 1971 change was sought to allow a business sign for a pre-existing nonconforming use.

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2 The four decisions are: adoption of the 1974 comprehensive plan map, the 1976 zoning map, and two exception ordinances, one in 1979 and another in 1980.

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3 "(5) Each notice of a public hearing on a proposed exception shall specifically note that a goal exception is proposed and shall summarize the issues in an understandable manner."

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4 LUBA may take evidence on disputed allegations of procedural irregularities not shown in the record. ORS 197.830(11).

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5 We also note that Goal 2 was adopted by LCDC on December 27, 1974, after Ordinance 39 changed the zone to LI.

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6 The term "built" is the common term used to describe exceptions taken under ORS 197.732(1)(a). "Committed" exceptions refers to exceptions taken under ORS 197.732(1)(b). Prior to adoption of ORS 197.732 in 1983, "built" and "committed" exceptions were adopted by local jurisdictions as suggested by an LCDC policy memorandum, Questions Concerning the Exceptions Process as it Relates to Land Use Decisions Prior to an Acknowledged Comprehensive Plan, approved March 10, 1978 and amended May 3, 1979. ORS 197.732 was adopted after the Court of Appeals held the LCDC policy on "built" and "irrevocably committed" exceptions was invalid without amending the goals. Marion County v. Federation for Sound Planning, 64 Or App 226, 668 P2d 406 (1983). The statutory and Goal 2 provisions are functionally equivalent to exception standards in the LCDC policy. We attach no significant difference between them in our analysis of limitations on uses imposed by "built" and "committed" exceptions to resource goals.

[7] Although Curry County held that exceptions to the goals neither restrict nor authorize particular land uses, OAR 60-04-018 seems to recognize that exceptions set the stage for particular land use designations. We note that the rule was only recently adopted and was not considered by the Court in Curry County.

[8] The findings in Ordinance 430 purport to incorporate by reference the findings in Ordinance 202 regarding properties in Code Areas 4.5 and 4.9. Even if necessary findings could be promulgated by incorporating findings in another ordinance, which we doubt, Ordinance 202 does not set forth facts showing compliance with either a "built" or "committed" exception. The ordinance attached as Appendix A to the petition states a bare conclusion that properties listed on two exhibits are physically developed or irrevocably committed to several categories of nonfarm and nonforest uses. The ordinance does not disclose the use on the 5.5 acres, its state of development nor explain what factors commit any property to nonresource uses.

[9] The county's LI zone permits the following:

"A. Manufacture of machine tools, medical and dental equipment, electronic instruments, mobile homes, and food products not generating noxious odors;

"B. Farm, industrial or contractors equipment or materials manufacture, storage, sales, repair or service, including automobile repair garage;

"C. Warehousing, wholesale storage and distribution, and motor freight terminals contained only within a building;

"D. Fruit, nut or vegetable packing, processing warehousing or cold storage operations.

"E. Winery;

"F. Veterinary hospital;

"G. Accessory uses;

"H. Temporary structures as may be required during construction of an authorized permanent structure. Such temporary structure shall be removed upon final inspection of the permanent structure by the Building Inspector;

"I. Community or municipal water supply system;

"J. Community or municipal sewer systems; and

"K. Signs, pursuant to the sign provisions set forth in Section 1006."

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10 ORS 197.732 does not exclude any particular goal from its operation. After the 1983 amendments to the exceptions rules, Goal 14 is now clearly subject to the exception procedure. Perkins v. City of Rajneeshpuram, 300 Or 1, 13 note 17, 706 P2d 946 (1985).