

Nov 14 10 05 AM '88

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

1
2
3 JOHN W. FREELS,)
4 Petitioner,)
5 vs.))
6 WALLOWA COUNTY,))
7 Respondent,))
8 DELBERT W. PRATT and EDWIN E.))
9 SHEETS,))
 Intervenors-Respondent.)

LUBA No. 88-046

FINAL OPINION
AND ORDER

10 Appeal from Wallowa County.

11 William R. Kirby, Enterprise, filed a petition for review
12 and argued on behalf of petitioner.

13 Respondent county did not appear.

14 Ray W. Shaw, Salem, filed a response brief on behalf of
15 intervenors-respondent.

16 HOLSTUN, Chief Referee; BAGG, Referee, SHERTON, Referee,
participated in the decision.

17 REMANDED 11/14/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals an order granting a minor partition of a
4 110 acre parcel to create two six acre parcels and conditional
5 use permits for single family residences on those two parcels.

6 FACTS

7 The applicants, intervenors-respondent (intervenors) Pratt
8 and Sheets, requested county approval for a partition of a 110
9 acre parcel located in rural Wallowa County on Hurricane Creek
10 Road, a gravel surface county road. The requested partition
11 will create two six acre parcels, leaving the parent parcel
12 with approximately 98 acres. The 110 acre parcel is located in
13 the county's Timber Grazing (TG) zone. In addition to the
14 partition, the county granted conditional use permits allowing
15 single family dwellings to be placed on the two six acre lots.

16 STANDING

17 Intervenors challenge petitioner's standing. Under the
18 section of the petition for review entitled "Standing of
19 Petitioner," petitioner alleges

20 "On June 8, 1988, Respondent approved the findings of
21 fact and conclusions of the Wallowa County Planning
22 Commission which, on May 2, 1988, approved the minor
partition and conditional use request of the
applicants Delbert W. Pratt and Edwin E. Sheets.

23 "Petitioner appeared and gave testimony before the
24 Wallowa County Planning Commission which conducted
25 hearings on the application herein identified on
26 March 29, 1988 and April 26, 1988, and at the hearing
before the Wallowa County Court on June 1, 1988
* * *." Petition for Review 1.

1 Intervenor's argue the above statement does not allege facts
2 adequate to demonstrate petitioner's standing.

3 ORS 197.830(9) requires, in part, that the petition for
4 review "shall state * * * the facts that establish the
5 petitioner has standing." See, Jefferson Landfill Comm. v.
6 Marion County, 297 Or 280, 286, 686 P2d 310 (1984); Warren v.
7 Lane County, 5 Or LUBA 227, 229 (1982), rev'd on other grounds,
8 297 Or 290 (1984). As the Supreme Court explained in Jefferson
9 Landfill Comm. v. Marion County,

10 "this would include the facts concerning a
11 petitioner's appearance before the local governing
12 body and those needed to meet one of the three
13 statutory tests: (1) entitlement as of right to prior
14 notice and hearing; (2) interest adversely affected;
15 or (3) aggrievement by the decision." 297 Or at 286.

16 The Oregon Supreme Court explained the statutory
17 requirement for "aggrievement" as follows:

- 18 "1. The person's interest in the decision was
19 recognized by the local land use decisionmaking
20 body;
- 21 "2. The person asserted a position on the merits; and
- 22 "3. The local land use decisionmaking body reached a
23 decision contrary to the position asserted by the
24 person." 297 Or at 284.

25 The above-quoted statement of standing is adequate to
26 allege the required appearance before the local governing
body. However, it is inadequate to allege compliance with the
remaining requirements for standing as explained by the Oregon
Supreme Court in Jefferson Landfill Comm. v. Marion County,
supra. There is no allegation of "entitlement as of right to

1 prior notice and hearing." Neither does the quoted statement
2 allege facts showing petitioner's interests are "adversely
3 affected," or "aggrieved."

4 However, although petitioner fails to allege facts adequate
5 to establish his standing in the above-quoted section of the
6 petition for review entitled "Standing of Petitioner,"
7 petitioner does allege sufficient facts elsewhere in the
8 petition. Petitioner alleges in his statement of facts that he
9 appeared and gave testimony on the applicants' proposal and "in
10 spite of questions raised by petitioner * * * the application
11 for the minor partition and conditional use permit was approved
12 * * *." Petition for Review 3. We conclude these allegations
13 of fact, when read together with the earlier quoted
14 allegations, are sufficient to demonstrate (1) petitioner's
15 interest was recognized; (2) he asserted a position on the
16 merits and (3) the decisionmaker reached a decision contrary to
17 his position. These allegations of fact are sufficient to
18 allege standing as a person aggrieved. Jefferson Landfill
19 Comm. v. Marion County, supra.

20 While the determination of a petitioner's standing is
21 simplified if the allegations of fact establishing standing are
22 concisely stated as a separate section of the petition for
23 review, ORS 661-10-030(3)(a) and ORS 197.830(9) only require
24 that such allegations of fact be included in the petition for
25 review. Accordingly, contrary to intervenors' suggestion, we
26 have no basis for limiting our review for allegations of fact

1 establishing standing to the "Standing of Petitioner" section
2 of the petition for review. See Hilliard v. Lane County
3 Commsr, 51 Or App 587, 595, 626 P2d 905, rev den 291 Or 368
4 (1981) (LUBA may not invoke "technical requirements of pleading
5 having no statutory basis"). Intervenors' motion to dismiss is
6 denied.

7 DECISION

8 Petitioner presents argument but does not separately state
9 specific assignments of error as required by
10 OAR 661-10-030(3)(d).¹ Although the Court of Appeals has
11 made it clear we are not to invoke technical rules of pleading,
12 Hilliard v. Lane County, supra, we will not overlook a
13 petitioner's failure to follow our rules where we cannot
14 determine with reasonable certainty the error petitioner
15 asserts. Accordingly, we limit our review in this proceeding
16 to alleged errors that are clearly presented in the
17 petitioner's argument. Schoonover v. Klamath County, ___ Or
18 LUBA ___ (LUBA No. 88-024, August 3, 1988) slip op at 4;
19 Standard Insurance Co. v. Washington County, ___ Or LUBA ___
20 (LUBA No. 87-020, September 1, 1987) slip op at 2-3.

21 A. Forest Land Goal Policy 2

22 Petitioner argues the county violated Policy 2 of the
23 Forest Land Goal contained in the county's comprehensive
24 plan.² Forest Lands Goal Policy 2 provides as follows:

25 ** * * conversion of timbered or grazing lands to
26 residential uses will be approved according to the
following guidelines:

1 "(A) The proposed use is compatible with the
2 Oregon Forest Practices Act.

3 "(B) The proposed use will not interfere
4 seriously with the physical, social,
5 economic and environmental considerations.

6 "(C) It will not create an economic hardship on
7 the county due to other needed public
8 facilities and services."

9 The county commissioners adopted by reference the decision
10 and findings previously adopted by the planning commission
11 approving the partition and conditional use permits. The
12 planning commission's findings of fact simply identify the
13 current plan and zone designations, the nature of the request,
14 physical characteristics of the property and surrounding land
15 uses. Record 3-4. These findings are followed by eight
16 conclusions.³

17 In order to constitute adequate findings of compliance with
18 Policy 2, the findings must be (1) responsive to the criteria
19 in Policy 2 and (2) demonstrate why the county believed the
20 criteria are met by the proposal. ORS 215.416(9); Green v.
21 Hayward, 275 Or 693, 706-708, 552 P2d 815 (1976); Sunnyside
22 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 23, 569 P2d 1063
23 (1977); Phillips v. Coos County, 4 Or LUBA 73, 80 (1981). As
24 explained below we believe the challenged findings and
25 conclusions are inadequate.

26 Conclusions 1, 5, 6 and 7 (see n 3, supra) are not
27 responsive to the criteria in Policy 2. Conclusion number two
28 simply explains why the county believes there will be no

1 interference with logging and farming operations on adjoining
2 property. The explanation is not adequate, by itself, to show
3 there will be no serious interference with "physical, social,
4 economic and environmental considerations," as required by
5 criterion B of Policy 2. Conclusion three is simply a
6 conclusion that criterion A of Policy 2 is met. A conclusion
7 that a criterion is met is inadequate unless accompanied by
8 findings explaining the reasoning and facts that support that
9 conclusion. Moore v. Clackamas County, 7 Or LUBA 106, 112
10 (1982); Phillips v. Coos County, supra. Finally, conclusions
11 four and eight address criterion C of Policy 2, but only
12 address impacts on roads and ditch companies without
13 determining whether other public facilities and services may be
14 impacted. The findings are therefore inadequate to show
15 compliance with criterion C.

16 Petitioner also claims the evidence in the record does not
17 support the challenged findings, but he provides no discussion
18 of the evidence and does not explain why he believes the
19 evidence is inadequate. Similarly, intervenor claims the
20 findings are supported by substantial evidence but does not
21 cite any evidence supporting the county's decision. We will
22 not independently search the record for evidence bearing on the
23 findings without the assistance of the parties. Bowman Park v.
24 City of Albany, 11 Or LUBA 197, 214 (1984); City of Salem v.
25 Families for Responsible Govt., 64 Or App 238, 249, 668 P2d 395
26 (1983).

1 In any event, because we agree with petitioner that the
2 findings are inadequate to demonstrate compliance with Policy
3 2, review of the record for evidentiary support of those
4 findings would serve no useful purpose, and we will not do so.
5 DLCD v. Columbia County, ___ Or LUBA ___ (LUBA No. 87-109,
6 March 15, 1988) slip op at 7; McNulty v. City of Lake Oswego,
7 14 Or LUBA 366, 373 (1986).

8 B. WCZO Section 3.110

9 Petitioner next argues the county's findings are inadequate
10 to demonstrate compliance with Wallowa County Zoning Ordinance
11 (WCZO) Section 3.110, which provides:

12 "Purpose. The purpose of the TG zone is to encourage
13 the conservation of forest land for forest uses."

14 In its order, the county identified WCZO Section 3.110 as a
15 review criterion. Because the county apparently treats the
16 purpose statement as an approval criterion, we will assume that
17 it is. But see Standard Insurance v. Washington County, supra,
18 slip op at 4-5 (concluding a zoning district description
19 statement is not an approval criterion).

20 Petitioner does not explain why the county findings and
21 conclusions are inadequate to demonstrate compliance with WCZO
22 Section 3.110. We note that conclusions 2 and 5 (see n 3,
23 supra) state the land at issue is unsuitable for production of
24 trees, commercial forest land would not be taken out of
25 production and logging activities on adjoining properties would
26 not be affected. Petitioner offers no explanation as to why he

1 believes these findings are inadequate and does not challenge
2 their evidentiary support. It is petitioner's responsibility
3 to present legal argument and theory in support of his claims
4 of error. Doughtery v. Tillamook County, 12 Or LUBA 20, 33
5 (1984); Deschutes Development Co. v. Deschutes County, 5 Or
6 LUBA 218, 220 (1982). In the absence of such argument or
7 explanation, we reject petitioner's claim that the county's
8 findings are inadequate to demonstrate compliance with WCZO
9 Section 3.110.

10 C. WCZO Section 3.130

11 WCZO Section 3.130 provides in relevant part: .

12 "Conditional Uses Permitted. In a TG zone, the following
13 uses and their accessory uses are permitted * * *:

14 * * * * *

15 "(5) Single-family residential dwellings may be
16 established upon a finding by the commission that each such
proposed dwelling:

- 17 "(a) Is compatible with the provisions of the
18 State of Oregon's Forest Practices Act and
any amendments thereto; and
- 19 "(b) Does not interfere seriously with accepted
logging or farming practices; and
- 20 "(c) Will not create an economic hardship on the
21 county due to required road maintenance or
other needed public services; and
- 22 "(d) Is situated upon generally unsuitable land
23 for the production of timber or farm crops;
and
- 24 "(e) Complies with such other conditions as the
25 commission considers necessary."

26 Petitioner argues the county's findings are inadequate to

1 show there will be no serious interference with accepted
2 logging or farming practices, as required by WCZO 3.130(5)(b).
3 As noted supra, the county concluded the proposal would not
4 interfere with accepted logging or farming practices because
5 "adjoining properties are in recreational use" and the subject
6 parcel is not suitable for forest uses. See n 3, supra. In
7 the absence of argument by petitioner explaining why those
8 findings are not adequate, we reject petitioner's claim.⁴

9 D. Water Well and Property Tax Impact Findings

10 Finally, petitioner argues representations made by the
11 applicant concerning his ability to drill wells on the property
12 successfully and the property tax impact of the proposal were
13 not reflected in the county's findings. Petitioner is
14 correct. However, petitioner fails to identify any legal
15 criterion requiring such findings. Without a showing that an
16 applicable legal criterion has been violated by the county's
17 decision, we cannot grant relief. Sellwood Harbor Condo Assoc.
18 v. City of Portland, ___ Or LUBA ___ (LUBA Nos. 87-079/080,
19 April 1, 1988), slip op at 8; Lane County School District v.
20 Lane County, 15 Or LUBA 150, 152 (1986).

21 E. Conclusion

22 Petitioner's claim that the county failed to adopt findings
23 demonstrating compliance with Policy 2 of the plan Forest Lands
24 Goal is sustained. This requires remand of the county's
25 decision. All of petitioner's remaining claims of error are
26 denied for the reasons discussed supra.

1 The county's decision is remanded.

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1 FOOTNOTES

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4 Pursuant to ORS 197.820(4), LUBA has adopted rules of
5 procedure which govern our review proceedings.
6 OAR 661-10-030(3)(d) requires in part that petitioner "[s]et
7 forth each assignment of error under a separate heading.
8 * * *" Assignments of error are to be followed by argument in
9 support of the assignment of error.

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12 The requirement for separate assignments of error is
13 important. The assignments of error should identify precisely
14 what the petitioner believes the local government did wrong so
15 that the parties and LUBA can understand the issue to be
16 resolved before considering arguments advanced for resolving
17 the issue in a particular way.

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20 Petitioner's argument suggests other forest land policies
21 not addressed by the county may also apply. However, the
22 county only identified Policy 2 in its order and petitioner
23 does not identify the other policies he thinks may apply. We
24 limit our review to petitioner's arguments concerning Policy 2.

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27 Petitioner also suggests in several places that the
28 policies contained in the county's acknowledged plan and
29 implementing provisions in the county zoning code are not
30 consistent with Statewide Planning Goal 4 or that the county
31 should have applied Statewide Planning Goal 4 in approving the
32 partition and conditional use permits. These suggestions are
33 rejected. The Wallowa County Comprehensive Plan and land use
34 regulations have been acknowledged pursuant to ORS 197.251.
35 After acknowledgment, the plan and land use regulations, not
36 the Statewide Planning Goals, control the county's decision to
37 approve a partition and conditional use permits.
38 ORS 197.835(3); Byrd v. Stringer, 295 Or 311, 319, 666 P2d 1332
39 (1983).

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42 Those conclusions are as follows:

- 43 "1. The partition proposal complies with the general
44 provisions of the Land Use Plan and purposes of the
45 ordinance and zone.
- 46 "2. A reasonable balance of forest uses is maintained by
47 the partition proposal as they will not be taking
48 commercial forest land out of production nor will the

1 conditional use permit to site dwellings on the
2 parcels interfere with accepted logging or farming
3 practices as those adjacent properties are in
4 recreational use.

5 "3. The conditional use permit to site recreational homes
6 on the proposed parcels is compatible with the Oregon
7 Forest Practices Act.

8 "4. The conditional use permit will not create an economic
9 hardship on the county as Hurricane Creek Road which
10 serves the parcels is a county maintained road.

11 "5. The proposed parcels are situated upon land generally
12 unsuitable for the production of timber or farm crops
13 due to thin soils and rockiness.

14 "6. Approval is Conditioned upon satisfactorily meeting
15 DEQ regulations.

16 "7. These parcels will not create an undue hardship on the
17 watershed.

18 "8. These parcels in residential use will not create an
19 unreasonable burden on the ditch companies involved."
20 Record 6-7.

21 4

22 Petitioner also argues the county improperly interpreted
23 "forest use" to include only logging operations and failed to
24 address "conservation of wildlife habitat, protection of ground
25 and surface water from contamination, protection from
26 man-caused fire and preservation of the natural condition of
the land * * *." Petition for Review 6. If petitioner's point
is that Statewide Planning Goal 4 defines "forest use" to
include such considerations, he is correct. The Wallowa County
Zoning Ordinance also defines forest use broadly. WCZO Section
1.030(10). It may be that there are policies in the plan or
the WCZO requiring consideration of the factors petitioner
claims the county failed to address. However, the petitioner
identifies only WCZO 3.130(5) and that code provision does not
expressly require that the county consider the proposal's
impact on wildlife habitat, ground and surface water,
man-caused fire problems or the natural condition of the land.
To the extent individual paragraphs of Section 3.130(5) could
be interpreted to require such considerations, petitioner
offers no argument that such is the case. We will not develop
a legal theory for petitioner. Dougherty v. Tillamook Co.,
supra; Deschutes Development Company v. Deschutes County, supra.