

LAND USE  
BOARD OF APPEALS

FEB 16 5 44 PM '89

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

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DEPARTMENT OF LAND )  
CONSERVATION AND )  
DEVELOPMENT, )  
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Petitioner, )  
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vs. )  
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DOUGLAS COUNTY, )  
 )  
Respondent, )  
 )  
and )  
 )  
GIL PETERSON, )  
 )  
Intervenor-Respondent. )

LUBA No. 88-096

FINAL OPINION  
AND ORDER

Gabriella I. Lang, Salem, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent Douglas County.

Wallace D. Cegavske, Roseburg, filed the response brief and argued on behalf of intervenor-respondent.

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

Remanded 02/16/89

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals a Douglas County Board of Commissioners'  
4 order amending the comprehensive plan map and zoning map  
5 designations for a 79.33 acre parcel.

6 MOTION TO INTERVENE

7 Gil Peterson moves to intervene in this proceeding on the  
8 side of respondent. There is no opposition to the motion, and  
9 it is allowed.

10 FACTS

11 The county's order amends the Douglas County Comprehensive  
12 Plan (plan) map designation for the subject property from  
13 Agriculture to Public/Semi-Public and Rural Residential-5. The  
14 order also changes the zoning map designation from Exclusive  
15 Farm Use - Grazing (FG) to Public Reserve (PR) and Rural  
16 Residential-5 Acre (5R). The plan and zone map changes were  
17 adopted to allow intervenor-respondent (intervenor), the owner  
18 of the property, to develop 12 to 13 residences as a planned  
19 unit development in conjunction with an existing airstrip.

20 The property is located one mile west of the City of  
21 Roseburg and approximately one mile outside the acknowledged  
22 urban growth boundary. The property includes an existing 2,400  
23 foot by 100 foot grass airstrip (Felts Field) which is parallel  
24 to and approximately 600 feet from the South Umpqua River.

25 There are several buildings on the property adjacent to the

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1 airstrip, including a dwelling, a shop building and several  
2 hangars.<sup>1</sup>

3 FIRST ASSIGNMENT OF ERROR

4 "The county's decision violated Goals 2 and 3 by  
5 failing to demonstrate compliance with exception  
6 criteria in Goal 2, ORS 197.732 and OAR 660  
7 Division 4. \* \* \*"

8 Petitioner initially identifies a fatal problem with  
9 the county findings it challenges under the first  
10 assignment of error. The exception findings are not  
11 incorporated by the amendment into the county's  
12 comprehensive plan as required by OAR 660-04-015(1).  
13 Confederated Tribes v. Wallowa County, 14 Or LUBA 92, 100  
14 (1985); Johnson v. Tillamook County, \_\_\_ Or LUBA \_\_\_  
15 (LUBA No. 87-074, August 8, 1988). This failure, alone,  
16 requires that we remand the county's decision.<sup>2</sup>

17 Our review of the first assignment of error is  
18 complicated by the county's failure to identify clearly  
19 the findings it adopted and what kind of goal exception it  
20 was taking.<sup>3</sup> See 1000 Friends of Oregon v. LCDC  
21 (Jefferson County), 69 Or App 717, 731, 688 P2d 103  
22 (1984). The board of commissioners' order simply adopts  
23 the findings of fact and decision of the planning  
24 commission. Record 4. The planning commission findings  
25 identify Douglas County Land Use and Development Ordinance  
26 (LUDO) Section 6.500.3 as establishing the relevant  
27 criteria for the exception.<sup>4</sup>

1 The planning commissions' findings adopted to address  
2 the exception criteria in LUDO Section 6.500.3 are as  
3 follows:

4 "11. The portion of the parcel utilized for the  
5 airport has been physically developed with the  
6 runway and hangars and is no longer usable for  
7 agricultural purposes. This use has been  
8 established as a preexisting use since 1950.  
9 There has been no agricultural activity on this  
10 parcel since 1955.

11 "12. There exists parcelization and development around  
12 the parcel which would conflict with any  
13 reestablishment of agricultural use on this  
14 parcel. The record shows several committed areas  
15 varying in density which already have homesites  
16 developed as well as vacant lots which can be  
17 anticipated to develop in the near future.

18 "13. The reason that an exception to Goal 3 is  
19 justified is that the resource upon which the  
20 proposed activity is dependent can be reasonably  
21 obtained only at the proposed exception site and  
22 the use and activity requires a location near the  
23 resource.

24 "14. We find that Felts Field is a unique resource in  
25 Douglas County as it is the only privately owned  
26 airport open to the public use. There is no  
27 other airport were [sic] the types of facilities  
28 proposed can be located within the County. This  
29 unique parcel would provide the opportunity to  
30 locate a dwelling adjacent to a runway and  
31 incorporate both uses in a harmonious manner.  
32 The evidence shows that the proposed exception  
33 site is the only one within the market area at  
34 which the resource depended upon can reasonably  
35 be obtained.

36 "15. The use of the airport has existed in conjunction  
37 with adjacent residential uses and testimony was  
38 given that residents accept the level of current  
39 aviation activity.

40 "16. The project will not be requiring urban type  
41 services as an on site septic system and  
42 drainfield will be provided. Evidence submitted  
43 indicates that such a subsurface system is

1           feasible. The residential density provided for  
2           is rural in nature and not an urban use.

3           "17. We adopt the findings of the staff report  
4           consistent with our decision."

5           As petitioner correctly notes, ORS 197.732(4) explicitly  
6           provides:

7           "A local government approving or denying a proposed  
8           exception shall set forth findings of fact and a  
9           statement of reasons which demonstrate that the  
10          standards [for an exception] have or have not been  
11          met."

12          Thus, under ORS 197.732(4), the county must (1) find relevant  
13          facts that support an exception to the goals and (2) supply the  
14          reasoning to explain why those facts lead it to the conclusion  
15          that the relevant exception criteria are met. LCDC has adopted  
16          administrative rules which provide both guidance and additional  
17          requirements that must be addressed by the county in performing  
18          its obligation to supply the required findings of fact and  
19          statement of reasons to support an exception. OAR 660-04-020  
20          through 660-04-028.<sup>5</sup>

21          The above quoted findings are inadequate to comply with the  
22          requirements of ORS 197.732(4) and OAR 660-04-020 through  
23          660-04-028. They neither explain what type of exception is  
24          approved nor address the specific requirements of  
25          OAR 660-04-020 through 660-04-028. Further, the findings  
26          establish few relevant facts, are impermissibly conclusionary  
27          and do not supply the reasoning necessary to demonstrate why  
28          the facts found lead to the conclusion that the applicable  
29          legal criteria are met.<sup>6</sup>

1 For example, as petitioner notes, finding 13 simply repeats  
2 the first sentence of OAR 660-04-022(1)(b). It does not find  
3 facts or provide the reasoning that is necessary to explain  
4 compliance with the rule. Finding 14 does state that Felts  
5 Field "is the only privately owned airport open to the  
6 public." However, petitioner complains the next sentence in  
7 the finding simply

8 "concludes this site is the only one within the market  
9 area at which the resource dependent upon can  
10 reasonably be obtained. This is a conclusion without  
11 facts or explanation. The last part of the finding  
12 merely recites the last part of OAR 660-04-022(1)(b),  
13 while ignoring an essential requirement of that rule.  
14 There must be an analysis of the market area to be  
15 served by the proposed use. No such analysis is  
16 present in this finding. OAR 660-04-022(1)(a) also  
17 requires a demonstrated need for the proposed use. No  
18 need has been demonstrated in the findings or the  
19 staff report." Petition for Review 8-9.

20 Intervenor responds by citing testimony in the record which  
21 he argues is summarized by finding 14 and supports that  
22 finding. Intervenor further argues finding 14 shows a "market  
23 demand for housing generated by existing or planned rural  
24 residential, commercial or other economic activity in the  
25 area." Intervenor-respondent's Brief 6 (quoting  
26 OAR 660-04-032(2)). Intervenor argues the county's findings  
27 need not resolve every conflict in the evidence and need not  
28 refer specifically to the underlying evidence. Lee v. City of  
29 Portland, 57 Or App 798, 803-804, 646 P2d 662 (1982); Texaco,  
30 Inc. v. King City, 15 Or LUBA 198, 207 (1987).

31 Intervenor's citation to testimony in the record that might

1 have formed the basis for the findings of fact and reasoning  
2 required under ORS 197.732(4) does not excuse the county's  
3 failure to adopt such findings and reasoning as part of its  
4 decision.<sup>7</sup> Further, while it is true the county need not  
5 resolve every conflict in the evidence, or specifically  
6 reference all of the underlying evidence it relies upon in its  
7 decision, neither can it state conclusions in language  
8 repeating the standards to be satisfied and then on appeal  
9 point to testimony that might provide the basis for the  
10 required findings and reasoning. McNulty v. City of Lake  
11 Oswego, 15 Or LUBA 16, 24 (1986); Krueger v. Josephine  
12 County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-074, January 31, 1989)  
13 slip op 8-9. While we appreciate that it is not always easy to  
14 determine precisely how much detail and specificity is required  
15 for adequate findings to support a good exception, the above  
16 quoted findings fall substantially short of the mark.

17 To summarize, on remand the county must (1) clearly  
18 identify in its decision what type or types of exceptions it  
19 wishes to adopt; (2) adopt findings of relevant fact, based on  
20 the evidence in the record, which support an exception; (3)  
21 adopt a statement of reasons explaining why it concludes the  
22 applicable exception criteria are or are not met; and (4) if it  
23 concludes the exception criteria are met, amend its  
24 comprehensive plan to include the exception and the findings  
25 and reasons which support the exception.

26 The first assignment of error is sustained.

1 SECOND ASSIGNMENT OF ERROR

2 "The county has failed to demonstrate compliance with  
3 Goal 14."

4 Petitioner argues that a number of issues were raised by  
5 the parties in the local proceeding concerning compliance of  
6 the proposal with Goal 14 (Urbanization).<sup>8</sup> Specifically,  
7 petitioner argues concerns about the intensity of the proposed  
8 development and its proximity to the Roseburg Urban Growth  
9 Boundary (UGB) were expressed.

10 Intervenor correctly notes that the Oregon Supreme Court  
11 has suggested that one of the options local governments have  
12 when presented with such Goal 14 concerns, is to develop a  
13 record that will support a finding that the proposal does not  
14 convert rural land to urban use. 1000 Friends of Oregon v.  
15 LCDC (Curry County), 301 Or 447, 477, 724 P2d 268 (1986).

16 Intervenor directs us to evidence in the record concerning the  
17 nature of the uses existing in the area and cites the following  
18 finding:

19 "16. The project will not be requiring urban type  
20 services as an on-site septic system and drain  
21 field will be provided. Evidence submitted  
22 indicates that such a subsurface system is  
23 feasible. The residential density provided for  
24 is rural in nature and not an urban use."  
25 Record 8.

26 As was the case under the first assignment of error, the  
above finding is simply not sufficient to explain why the  
proposal is not properly viewed as a conversion of rural land  
to urban use. The use of an on-site sewage disposal system is



1 not dispositive, and the county offers no explanation for why  
2 the proposed residential density is not urban.<sup>9</sup> See 1000  
3 Friends of Oregon v. LCDC (Curry County), supra at 505-506.

4 The second assignment of error is sustained.

5 THIRD ASSIGNMENT OF ERROR

6 "The county has failed to demonstrate compliance with  
7 Goal 11."

8 Petitioner argues that because the proposed development is  
9 relatively close to the Roseburg UGB, the development is  
10 potentially inconsistent with orderly and efficient arrangement  
11 of public facilities and services as required by Goal 11  
12 (Public Facilities and Services).<sup>10</sup> Petitioner argues the  
13 county failed to address Goal 11 even though concerns about the  
14 pressure the proposed development might cause for premature  
15 extension or improvement of public facilities were expressed in  
16 the local proceedings.

17 Intervenor answers "given the low density of the use,  
18 little impact would result on existing facilities."  
19 Intervenor-respondent's Brief 16. Intervenor again cites  
20 finding 16, quoted supra.

21 Finding 16 is inadequate to explain why Goal 11 will not be  
22 offended by the proposal. The finding must explain why the  
23 number of houses and the density of development proposed will  
24 not cause premature extension of, or unduly impact, public  
25 facilities such as water and sewer, notwithstanding the  
26 proximity of the development to the UGB and the existing level

1 of such public facilities and services in the area.

2 The third assignment of error is sustained.

3 FOURTH ASSIGNMENT OF ERROR

4 "The County failed to comply with its Comprehensive  
5 Plan and Policies, specifically Section 6.500.2 of the  
LUDO and its transportation policies."

6 LUDO Section 6.500.2.a requires that the proposal comply  
7 with the statewide planning goals. LUDO Section 6.500.2.b  
8 requires a demonstration of public need.

9 The findings intervenor cites in response to this  
10 assignment of error were found to be insufficient to support an  
11 exception under the first assignment of error. They are  
12 insufficient to show compliance with LUDO's Section 6.500.2.a  
13 and b for the same reasons.

14 Petitioner also cites a transportation policy in the  
15 transportation element of the plan which refers to a road  
16 serving the area as being congested and requiring  
17 improvements. Petitioner argues a staff report found the  
18 proposed development would have a negative impact on this road,  
19 and the county's decision does not explain how the proposal is  
20 consistent with the policy.

21 Intervenor argues any transportation impacts would be  
22 de minimus. If that is the case, the county must explain why  
23 in its findings.

24 The fourth assignment of error is sustained.

25 The county's decision is remanded.

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FOOTNOTES

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Felts Field is a privately owned public airstrip which has been in use on the site since 1950. The property includes three parcels: a 45 acre parcel north of the airstrip, a 15 acre parcel to the south along the river and the remaining parcel with the airstrip and associated structures.

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In accordance with ORS 197.835(10)(a), we nevertheless decide the issues presented by petitioner in this appeal to provide guidance to the county on remand.

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As explained infra, ORS 197.732(1), Goal 2 Part II and OAR 660 Division 4 provide for three types of exceptions -- "physically developed," "irrevocably committed" and "reasons."

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LUDO Section 6.500.3 provides:

- "3. If it appears that it is not possible to apply an appropriate Goal to specific properties or situations, then the application shall set forth the proposed exception to such Goal when:
  - "a. 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;
  - "b. The land subject to the exception is irrevocably committed as described by the Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or
  - "c. The following standards are met.
    - "i. Reasons justifying why the state policy embodied in the applicable goals should not apply;

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- 1 "ii. Areas which do not require a new  
2 exception cannot reasonably  
3 accommodate the use;
- 3 "iii. The long term environmental,  
4 economic, social and energy  
5 consequences resulting from the use  
6 at the proposed site with measures  
7 designed to reduce adverse impacts  
8 are not significantly more adverse  
9 than would typically result from the  
10 same proposal being located in areas  
11 requiring a goal exception other than  
12 the proposed site; and
- 8 "iv. The proposed uses are compatible with  
9 other adjacent uses or will be so  
10 rendered through measures designed to  
11 reduce adverse impacts. (Compatible  
12 as used in this paragraph, is not  
intended as an absolute term meaning  
no interference or adverse impacts of  
any type with adjacent uses)."

13 The language in LUDO Section 6.500.3 is essentially  
14 identical to the exception criteria stated in ORS 197.732(1)  
15 and Goal 2 Part II. Although it is the statutory and goal  
16 standards for exceptions that must be satisfied rather than the  
17 standards included in the comprehensive plan, see 1000 Friends  
18 of Oregon v. LCDC (Curry County), 301 Or 447, 512, 724 P2d 268  
19 (1986), the standards are identical. Thus, the county's  
failure explicitly to apply the goal and statutory standards,  
if error at all, is harmless. However, as explained infra, the  
county's failures (1) to adopt findings explaining the reasons  
why the standards in LUDO Section 6.500.3 are met, as required  
by ORS 197.732(4), and (2) to address OAR 660 Division 4 in its  
findings are not harmless error.

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21 These rules are lengthy. Because, as we note infra,  
22 respondent failed to adopt findings to address the rules, no  
23 purpose would be served by setting the rules out verbatim in  
24 this opinion. OAR 660-04-020 and 660-04-022 discuss  
requirements for reasons exceptions. OAR 660-04-025 discusses  
physically developed exceptions. OAR 660-04-028 discusses  
committed exceptions.

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26 We note that finding number 17, quoted supra, attempts to

1 incorporate by reference consistent findings from the staff  
2 report. We will not take the initiative to determine which of  
3 the findings of fact from the staff report are consistent and  
4 therefore incorporated by the planning commissions' finding  
5 number 17. However, even if we were willing to do so, the  
6 findings would be of limited assistance to the county as a  
7 source of reasons which demonstrate that the standards in LUDO  
8 Section 6.500.3 are met, since the planning staff report did  
9 not address LUDO Section 6.500.3.a or b at all and found that  
10 the standards in LUDO Section 6.500.3.c were not met.

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8 Even if this failure could be overlooked under ORS  
9 197.835(10)(b), the evidence intervenor cites does not clearly  
10 support the county's decision.

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11 Goal 14 is "to provide for an orderly and efficient  
12 transition from rural to urban land use."

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13 Indeed, because the development proposed is to be a planned  
14 unit development under LUDO Section 5.000 which permits  
15 clustering of dwellings, we are not certain whether overall  
16 density is a particular relevant factor, assuming it was  
17 overall density that the county referred to in finding 16. See  
18 Holland v. Lane County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 87-106, April  
19 13, 1988).

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18 Goal 11 is "to plan and develop a timely, orderly and  
19 efficient arrangement of public facilities and services to  
20 serve as a frame work for urban and rural development."

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