BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRITZ VON LUBKEN, JOANN VON LUBKEN, and VON LUBKEN ORCHARDS, INC., Petitioners, vs. HOOD RIVER COUNTY, Respondent, and BROOKSIDE, INC., Intervenor-Respondent.	LUBA Nos. 91-102 and 91-103 FINAL OPINION AND ORDER

Appeal from Hood River County.

Steven L. Pfeiffer, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Stoel, Rives, Boley, Jones & Grey.

Sally A. Tebbet, Hood River, filed a response brief and argued on behalf of respondent.

B. Gil Sharp, Hood River, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Jaques & Sharp.

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

REMANDED 11/08/91

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

Opinion by Holstun.

NATURE OF THE DECISION

In this consolidated proceeding, petitioners appeal two ordinances. One ordinance amends the Hood River County Comprehensive Plan (plan) and the other adopts findings to support those amendments to the plan.

MOTION TO INTERVENE

Brookside, Inc., moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

In Von Lubken v. Hood River County, ___ Or LUBA ___ (LUBA No. 90-031, August 22, 1990), this Board determined a county "Goal 3 Agricultural Lands" plan standard was not an applicable approval standard for a golf course proposed for an Exclusive Farm Use (EFU) zoned parcel. The disputed plan standard is county Goal 3 Agricultural Lands standard (D)(9), hereinafter referred to as (D)(9) plan standard, which provides as follows:

> "Development will not occur on lands capable of sustaining accepted farming practices."

In Von Lubken v. Hood River County, 104 Or App 683, 803 P2d 750 (1990), adhered to 106 Or App 226, 806 P2d 306, rev den 311 Or 349 (1991), the Court of Appeals determined the (D)(9) plan standard is a mandatory approval standard applicable to approval of a proposed golf course on a parcel zoned EFU and remanded our decision. On remand, this Board

issued a decision remanding the county's decision approving the golf course on the basis that the county failed to apply the (D)(9) plan standard. Von Lubken v. Hood River County, ____ Or LUBA ___ (LUBA No. 90-031, June 27, 1991).

Thereafter, the county initiated proceedings to amend the plan to eliminate language describing plan policies and standards in general as approval criteria for land use decisions and to delete the (D)(9) plan standard. On June 3, 1991, the county adopted Ordinance 184 amending the plan by eliminating the (D)(9) plan standard.[1] On July 1, 1991, the county adopted another ordinance containing "Findings Supporting Ordinance No. 184." Record 1. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Respondent erred by failing to adopt findings of fact and conclusions of law assessing and demonstrating compliance with applicable statewide planning goals and by amending its acknowledged comprehensive plan in violation of Statewide Planning Goals 2 (Land Use Planning) and 3 (Agricultural Lands)."

SECOND ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and acted in violation of state statutes, the statewide planning goals and respondent's own comprehensive plan by approving an amendment to its acknowledged comprehensive plan text without addressing the relevant portions of the plan and

[1]The county did not adopt the proposed amendments eliminating language in the plan referring to plan policies and standards in general as approval standards for land use decisions.

in conflict with specific mandatory comprehensive plan policies and standards."

Petitioners contend the county erred by deleting the (D)(9) plan standard without adopting findings that the county's plan complies with Statewide Planning Goal 3 (Agricultural Lands), in the absence of the (D)(9) plan standard. Petitioners argue the (D)(9) plan standard is the only meaningful standard in the plan governing development approvals on EFU zoned land.[2] Petitioners argue that amending the county's plan to eliminate the (D)(9) plan standard will have a substantial effect on the plan's compliance with Goal 3.[3] Petitioners maintain the county

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[2]The plan provides that the "Land Use Designations and Standards" contained in the plan are "intended to define the extent of development and provide broad standards for such development in a given area." Plan Definitions p. 2.

[3]Before the plan amendment challenged in this appeal proceeding, the plan "Goal 3 Land Use Designations and Standards" provided:

"1. Accepted farming practices defined by ORS 215.203(3) are permitted to take place in areas designated 'farm' on the Plan Map and as 'Exclusive Farm Use' on the zoning map.

"2. Non-farm uses permitted by ORS 215.213(2) and (3) shall be minimized to allow for maximum agricultural productivity.

"3. Single family dwellings other than those permitted as accessory uses to farm use are allowed provided they meet the prescribed conditions set forth in ORS 215.213(3).

"4. Farm-related uses designed to sort, box and store (i.e., cold storage) agricultural products are permitted.

"5. Forestry and open spaces are compatible with and are permitted in agricultural lands.

failed to adopt findings explaining whether, after deleting the (D)(9) plan standard, the remainder of the plan complies with Goal 3.[4]

Petitioners also argue that ORS 197.175(2)(d)[5] requires

"6 One primary residence will be allowed per lot or parcel. The minimum size for new lots or parcels shall be 20 acres.

"7. The County Zoning Ordinance will be amended to allow golf courses as a conditional use in the Exclusive Farm Use (EFU) zone.

"8. Accepted farming practices except feed lots are permitted to take place in areas designated as "Scenic Protection" on the zoning maps. * * *

"9. Development will not occur on lands capable of sustaining accepted farming practices.

"10. Redevelopment and improvement of existing communities and other developed areas is favored over development which will utilize existing agricultural lands."

[4]Intervenor argues petitioners did not raise this issue below. The "raise it or waive it" provisions of ORS 197.763 and 197.835(2) are applicable to quasi-judicial land use decisions and do not apply to legislative decisions such as the decision challenged in this appeal. ORS 197.763(1); Parmenter v. Wallowa County, ___ Or LUBA ___ (LUBA No. 91-064, August 23, 1991). Even if they did, petitioners cite their written testimony submitted below, in which they addressed the county's original proposal to amend the plan such that it would no longer contain any approval standards applicable to individual development applications. See Record 21-23.

The county's original proposal to delete plan language describing plan goals, policies and standards as approval criteria for individual land use decisions made deleting the (D)(9) plan standard superfluous, in the sense it would no longer have been an approval criterion applicable to individual development applications in any case. Under these circumstances, it was unnecessary for petitioners to specifically address the effect of the deletion of the (D)(9) plan standard. Petitioners' submittals below were adequate to raise the issue of the original proposal's compliance with the goals. See ORS 197.835(2)(b).

[5]ORS 197.175(2)provides, in part:

that the proposed amendment be consistent with the acknowledged plan. Petitioners argue the county erred in failing to identify plan standards affected by the proposed amendment and by failing to adopt findings explaining whether the proposed amendment complies with such other relevant plan provisions.

Citing Foland v. Jackson County, 311 Or App 167, 178-80, 807 P2d 801 (1991), intervenor argues the county was not required to apply the statewide planning goals to the challenged plan amendment because it was adopted pursuant to provisions in the plan governing procedures to correct mistakes.[6] Intervenor and the county (respondents)

> "* * * every city and county in this state shall:
>
> "* * * * *
>
> "(d) If its comprehensive plan and land use regulations have been acknowledged by [the Land Conservation and Development Commission], make land use decisions in compliance with the acknowledged plan and land use regulations."

[6]Plan "Goal 2 Land Use Planning" strategy (C)(8) provides in relevant part:

> "Errors and omissions identified in [the comprehensive plan] will be corrected by the County initiating either a quasi-judicial or legislative hearing process if affirming findings are presented addressing one or more of the following applicable factors.
>
> "* * * * *
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> "(d) Inconsistencies between Comprehensive Plan Elements: For example, the County's Background Report states a specific mineral and aggregate resource site be zoned Surface Mining, however the zoning maps shows the site is planned

characterize the (D)(9) plan standard as a mistake. Respondents contend the (D)(9) plan standard was never intended to be an approval standard applicable to golf courses.

We do not believe Foland v. Jackson County, supra, is particularly helpful here. In Foland, general land areas in the county were shown to have certain soil characteristics disqualifying those parcels for destination resort development, as reflected on United States Soil Conservation Service (SCS) maps covering very large areas. However, the county's acknowledged plan included a process for using site specific soils information for particular parcels to determine whether such parcels, in fact, had the soil characteristics shown on the SCS maps. The Supreme Court held it was unnecessary to apply the statewide planning goals in such circumstances because a decision concerning soil characteristics under the county's plan process was not, in fact, an amendment to the plan.

Here, there is no question that the challenged decision involves a substantive amendment to the text of the county's comprehensive plan. Further, we do not believe the process for correcting a mistake provided in the plan applies to the challenged amendment. The process for correcting mistakes provided in the plan envisions correction of scriveners'

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and zoned for forest or farm use. Other examples include typographical errors, errata, etc."

errors. It is not reasonable to interpret that plan provision to provide a process exempting from goal review the deletion of plan approval standards governing nonfarm development approvals on EFU zoned land, on the basis of the county's dissatisfaction with the legal interpretation given the plan standard to be deleted. See Allm v. Polk County, 13 Or LUBA 257, 264-65 (1985); see also Schultz v. Yamhill County, 15 Or LUBA 87, 90 (1986).

Respondents next point out the Court of Appeals stated the (D)(9) plan standard is more stringent than required under the EFU zoning statutes, and suggested that if the county was dissatisfied with such a strict standard the county could delete it. Von Lubken v. Hood River County, supra 104 Or App at 688. According to respondents, if the (D)(9) plan standard is stricter than the standards required by the statutes governing EFU zones, then it also necessarily is stricter than the requirements of Goal 3.

Hood River County's comprehensive plan and land use regulations have been acknowledged by LCDC pursuant to ORS 197.251. In amending its acknowledged comprehensive plan, a local government is obligated by statute to assure that its amended plan remains in compliance with the statewide planning goals and that the amendment does not create a conflict with the unamended portions of the acknowledged comprehensive plan and land use regulations. ORS 197.175(2); 197.835(4); 1000 Friends of Oregon v.

Jackson County, 79 Or App 93, 98, 718 P2d 753 (1987); Ludwick v. Yamhill County, 72 Or App 224, 231, 696 P2d 536, rev den 299 Or 443 (1985).

Quasi-judicial comprehensive plan amendments must be supported by findings which explain why the plan amendment complies with applicable approval standards. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 19-23, 569 P2d 1063 (1977). Although no statute or appellate court case we are aware of specifically requires that all legislative comprehensive plan amendments be supported by findings, findings may nevertheless be required to allow this Board to determine whether the amended plan remains internally consistent and consistent with the statewide planning goals.[7] See League of Women Voters v. Klamath County, 16 Or LUBA 909, 913, (1988); Tides Unit Owners

[7]However, neither the appellate courts of this state nor this Board have ever held that the same kind of detailed findings required by ORS 215.416(9) and 227.173(2) for permits and required under appellate court decisions for other quasi-judicial land use decisions are required for legislative plan amendments. As we explained in Jentzsch v. City of Sherwood, ___ Or LUBA ___ (LUBA Nos. 90-125, 90-151 and 90-158, Order on Motions to Dismiss, February 14, 1991), slip op 10 n 11:

> "We do not mean to suggest findings necessarily are always required to support a legislative land use decision or that any particular level of detail is required of findings in support of legislative land use decisions. This Board has concluded that even without findings, or with less detailed findings than are typically required to support a quasi-judicial decision, this Board may be able to perform its review function in an appeal of a legislative land use decision, depending on the legal issues and factual context. See Tides Unit Owners Assoc. v. City of Seaside, supra; Gruber v. Lincoln County, 2 Or LUBA, 180, 186-187 (1981)."

Assoc. v. City of Seaside, 11 Or LUBA 84, 89-90 (1984); 1000 Friends of Oregon v. Marion County Board of Commissioners, 1 Or LUBA 33, 37 (1980). In Oregon Electric Sign Association v. Beaverton, 7 Or LUBA 68 (1982), rev'd on other grounds 66 Or App 436, rev den 296 Or 829 (1984), we explained that even where the challenged plan amendment is legislative, Goal 2 imposes an obligation that a local government explain why the amendment complies with applicable statewide planning goals. This explanation may be provided either in findings, or if not in findings, somewhere in the record supporting the legislative plan amendment. Where the local government does not adopt findings explaining why the challenged legislative plan amendment complies with applicable goal requirements, we rely on respondents to provide argument and citations to the record to assist this Board in resolving allegations by petitioners that the challenged decision does not comply with applicable statewide planning goals.

The approach taken by petitioners and respondents under the first two assignments of error makes our resolution of these assignments of error more difficult. Petitioners' arguments, either directly or indirectly, rest primarily on the county's failure to adopt any findings explaining why the amended comprehensive plan remains in compliance with Goal 3 following deletion of the (D)(9) plan standard. Respondents simply take the position that because the (D)(9)

plan standard is not required by either Goal 3 or the EFU zoning statutes, its repeal could not violate Goal 3.[8]

We first address the nature of the county's obligation under Goal 3 in adopting an amendment to its acknowledged plan standards governing agricultural lands briefly, before discussing the substantive Goal 3 issue raised by petitioner and respondents' response.

A. The Requirements of Goal 3 and the EFU Zoning Statutes

As relevant in this appeal, Goal 3 imposes the following obligation on counties:

> "To preserve and maintain agricultural lands.
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> "Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."
>
> "* * * * *
>
> "Farm Use -- is as set forth in ORS 215.203 and includes the non-farm uses authorized by ORS

[8]The findings adopted by the county in support of its decision to delete the (D)(9) plan standard identify other provisions in the county's plan with which the county contends the (D)(9) plan standard conflicts. Of course, even if the county is correct in this contention, that does not mean repeal of the (D)(9) plan standard is justified if such action results in the amended plan no longer complying with Goal 3. In that circumstance, amendment, rather than repeal, of the (D)(9) plan standard may be required to both remove the inconsistencies from the plan and have the plan remain in compliance with Goal 3.

215.213." (Emphases added).

Although Goal 3 generally directs that agricultural lands be "preserved and maintained," it also directs the manner in which this goal directive is to be accomplished. Agricultural lands are to be inventoried and placed in EFU zones. Beyond imposing minimum lot size requirements and directing that agricultural lands be identified and placed under EFU zoning which complies with ORS 215.203 to 215.337, Goal 3 itself provides no explicit direction to counties concerning how it should regulate the nonfarm uses allowable in EFU zones.[9]

ORS 215.213(2)(f) and 215.283(2)(e) specifically provide that golf courses are an allowable nonfarm use in EFU zones. Although the EFU zoning statutes impose use-specific standards which counties must apply in approving certain nonfarm uses,[10] the EFU zoning statutes do not impose specific standards which counties must apply in considering approval of golf courses in EFU zones. However, ORS 215.296(1) provides the following standards applicable to nonfarm uses generally:

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[9]Similarly, OAR 660 Division 5, the Land Conservation and Development Commission's administrative rule interpreting Goal 3, explains how agricultural lands are to be identified and minimum lots sizes are to be established and dwellings (both farm related and nonfarm related) are to be reviewed and approved. However, OAR 660 Division 5 imposes no precise obligation, and offers no guidance, on how nonfarm uses allowable in EFU zones, other than nonfarm dwellings, should be reviewed and approved.

[10]See e.g. ORS 215.298 (mining); 215.452 (wineries).

> "A use allowed under ORS 215.213(2) or 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:
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> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

In sum, under the above quoted Goal 3 and statutory provisions, with the exception of use-specific standards applied to certain nonfarm uses and the generally applicable nonfarm use standards required by ORS 215.296, the standards a county is required by Goal 3 and ORS 215.213(2) and 215.283(2) to apply in approving nonfarm uses in its EFU zone are to be developed by the county. As noted above, neither Goal 3 nor the EFU statutes provide explicit guidance concerning what these remaining standards should require.

B. Goal Compliance of Challenged Decision

Petitioners' position is that the county may not assume the (D)(9) plan standard may be deleted from the plan without addressing the possible impacts of that deletion on the sufficiency of the remaining portions of the plan to comply with Goal 3.[11] In other words, petitioners argue the

[11]In performing our review function, we repeatedly have held that we consider only those arguments that are sufficiently developed by petitioners in their brief to warrant review. Deschutes Development Co. v. Deschutes County, 5 Or LUBA 218, 220 (1982). However, we believe petitioners' allegations in the petition for review are minimally

comprehensive plan and land use regulations acknowledged by LCDC included the (D)(9) plan standard. Therefore, even if it is assumed the (D)(9) plan standard goes beyond what Goal 3 and the EFU zoning statutes require of the county in regulating nonfarm uses in EFU zones, it does not necessarily follow that what is left after the plan is amended to delete the (D)(9) plan standard is sufficient to comply with Goal 3.

Petitioners contend, and respondents do not dispute, that under the county's existing regulatory scheme, nearly all of the substantive standards governing nonfarm uses in EFU zones are contained in the comprehensive plan.[12] See n 3, supra. It may be that the remaining plan and land use regulation provisions are sufficient to comply with Goal 3. However, contrary to respondents' argument, it is not obvious to us from the decision or the record supporting the decision that petitioners' Goal 3 argument is without merit.[13] 1000 Friends of Oregon v. Washington County, 17 Or LUBA 671, 685 (1989). Because the county adopted no findings, and because respondents do not explain why the

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sufficient to require that we review the decision to determine whether the amended comprehensive plan no longer complies with Goal 3, as petitioners allege.

[12]But see Von Lubken v. Hood River County, supra, 18 Or LUBA at 20-24, where we considered the Hood River County Zoning Ordinance provisions applicable to administrative actions in the EFU zone.

[13]For example, the standards generally applicable to nonfarm uses in the EFU zone under ORS 215.296(1), quoted supra, do not appear to be included in the plan or zoning ordinance.

remaining plan or land use regulation standards are sufficient to comply with Goal 3, the county's decision must be remanded.

Petitioners also argue that certain plan standards are applicable to and are violated by the challenged decision.[14] We must remand the county's decision for the reasons already stated, so that the county can explain why the amended plan remains in compliance with Goal 3. On remand the county also must explain whether the cited plan standards are applicable to the challenged decision and, if so, whether the challenged decision violates those plan standards.

The first and second assignments of error are sustained.[15]

THIRD ASSIGNMENT OF ERROR

> "Respondent erred as a matter of law in making a final land use determination in advance of the preparation and consideration of required findings of fact and conclusions of law and by adopting such post HOC justification subsequent to its final determination in the matter."

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[14]The plan Agricultural Lands provisions cited by petitioners include Policies 1, 4-7, Strategy 2 and Standards 2, 3, 4 and 10. Those provisions were set out in our prior decision in Von Lubken v. Hood River County, supra, 18 Or LUBA at 22-24. The cited plan Standards are also set forth at n 3, supra.

[15]We emphasize that we do not determine here whether we agree with petitioners that the amended plan violates Goal 3 or whether the challenged amendment violates the plan provisions petitioners cite. We simply are unable to reject those arguments without assistance from the county in the form of findings, or from respondents in the form of argument in their briefs with citations to relevant portions of the record and plan and land use regulation provisions.

Petitioners point out that the county did not adopt findings supporting the plan amendment until several weeks after the adoption of the ordinance amending the plan. Citing Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 390, 393-93 (1979), petitioners argue that the written findings required to support the county's decision in this matter were required to be adopted before or contemporaneously with the challenged decision.

We agree with petitioners that in order for findings to support a quasi-judicial plan or land use regulation amendment, they must be adopted before or contemporaneously with such quasi-judicial land use decisions.[16] However, for the reasons explained under the first two assignment of error, the decision challenged in this appeal must be remanded, and presumably the county will adopt new findings. Although the requirement that plan amendments and any findings supporting such amendments be adopted contemporaneously may well extend to legislative as well as quasi-judicial plan amendments, we need not reach that issue in this appeal.

The county's decision is remanded.

[16]The decision challenged in Heilman concerned an application for a zone change for a three acre parcel.