BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT C. GEANEY and LUE GEANEY, Petitioners, vs. COOS COUNTY, Respondent, and JOHN BRUGH and ANITA BRUGH, Intervenor-Respondent.	LUBA No. 97-104 FINAL OPINION AND ORDER

Appeal from Coos County.

Kaye C. Robinette and Richard W. Cleveland, Eugene, filed the petition for review on behalf of petitioners. With them on the brief was Cleveland & Robinette. Kaye C. Robinette argued on behalf of petitioners.

No appearance by respondent.

Frederick J. Carleton, Bandon, filed the response brief and argued on behalf of intervenors-respondent.

HANNA, Board Member, GUSTAFSON, Board Chair, participated in the decision.

REMANDED 03/24/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's decision amending the comprehensive plan and zoning map designation from rural residential to commercial.

MOTION TO INTERVENE

John and Anita Brugh (intervenors), the applicants below, move to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

The subject property is a 5.28-acre parcel developed with several structures, located 2.5 miles from the city of Coquille along the Coquille-Fairview county road. The parcel is designated residential and zoned rural residential 2-acre minimum (RR-2). A nursing home was operated on the property from the late 1940s until it was closed in 1991. Intervenors bought the property in 1994, and currently rent the structures as residential units.

In 1975 the property was zoned interim commercial (IC-1), under which the nursing home was a listed outright use. In 1985, as part of the acknowledgment process for its plan and zoning ordinance, the county took a "physically developed" and "irrevocably committed" exception to Goal 3 for the area surrounding and including the subject property, from which the property received its current rural residential designation

and zoning.

Intervenors now apply to the county to change the plan map designation from "Rural Residential" to "Commercial," and to rezone the property from RR-2 to Commercial 1 (C-1). The record does not indicate what commercial use intervenors contemplate developing on the property.[1] The planning commission denied the application on the basis that the prior commercial use (the nursing home) had been abandoned. Intervenors appealed to the board of county commissioners (commissioners). The commissioners approved the application, stating "[t]hese amendments are necessary in order to allow the continuation of commercial enterprise on the subject property." Record 5. The commissioners interpreted the county's plan and the provisions of OAR 660-04-018(2), governing plan or zone designations in exceptions areas, to permit the county to rezone the subject property to permit commercial uses, because a commercial use (the nursing home) existed on the subject property in 1985, when the county's plan was acknowledged.

This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners argue that the county misconstrued OAR 660-

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[1]In 1995 intervenors applied to the county to convert an abandoned nonconforming use (the nursing home) into a 30-unit mini-storage warehouse. The county denied that request. Intervenors appealed to LUBA, and we affirmed the county's decision. Brugh v. Coos County, 31 Or LUBA 158 (1996). The record of that decision is included in the record of the present decision. All citations to the record in this opinion are to the record of the current proceeding.

04-018(2) in amending its comprehensive plan designation of the subject parcel from RR-2 to C-1. Petitioners contend that OAR 660-04-018(2) limits redesignation or rezoning of property within exception areas to the uses or types of uses recognized or justified by the exception. Petitioners argue that, because the 1985 exception did not recognize commercial uses within the exception area, the county cannot adopt the challenged amendment without first going through the Goal 2 exception process and adopting findings and conclusions justifying exceptions for Goal 3 (Agriculture) and Goal 14 (Urbanization).

OAR 660-04-018(2) provides, with respect to "physically developed" and "irrevocably committed" exception areas:

> "* * * Plan and zone designations shall limit uses to:
>
> "(a) Uses which are the same as the existing type of land use on the exception site; * * *
>
> "(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.
>
> "(c) Changes to plan or zone designations are allowed consistently with subsections (a) or (b) of this section, or where uses or zones are identified and authorized by specific related policies contained in the acknowledged plan.
>
> "(d) Uses not meeting the above requirements may be

approved only under provisions for a reasons exception as outlined in OAR 660-04-020 through 660-04-022." (Emphasis added).

The challenged decision hinges on the county's interpretation of comprehensive plan Policy 5.16(8), which the county identifies as a "specific related policy" within the meaning of OAR 660-04-018(2)(c). Policy 5.16(8) states:

> "Coos County shall designate as commercial or industrial all parcels legally established and currently in use as commercial or industrial, recognizing that a commercial or industrial designation rather than a non-conforming use designation ('grandfathering') is necessary and appropriate to give maximum protection to the integrity of existing uses." (Emphasis added).

The focus of the argument before the county was whether Policy 5.16(8) required the commercial or industrial use to exist on the date of intervenor's application in 1996, or whether it suffices that the use existed in 1985, when the county's plan was acknowledged. The county considered testimony from a former county commissioner that in 1985 the county submitted to the state for acknowledgment its existing zone maps and plan designations, without completing the additional inventories and zone changes necessary to recognize existing nonconforming industrial and commercial enterprises. The former commissioner testified that the county wrote Policy 5.16(8) to allow it to make the zone and plan changes necessary to protect industrial and commercial properties existing in 1985 by redesignating them to industrial or commercial zones. The county relies on this "legislative history" to interpret Policy 5.16(8) as obliging it to redesignate the subject property to commercial zoning, because in 1985 the property supported an

existing commercial use, notwithstanding that that commercial use has since been abandoned.

Petitioners contend that the county's application of Policy 5.16(8) is inconsistent with OAR 660-04-018(2) and case law addressing changes of use or type of use in exceptions areas. Leathers v. Marion County, 144 Or App 123, 925 P2d 148 (1996); Allm v. Polk County, 13 Or LUBA 257 (1985). At issue in Leathers was OAR 660-04-18(3)(b),[2] which provides that, after a local government takes a "reasons" exception, any changes to the types or intensities of uses within the exception area require a new "reasons" exception.[3] The county interpreted its zoning ordinance to permit the proposed uses without triggering the need for a "reasons" exception. The Court of Appeals held that "questions pertaining to the need for or sufficiency of statewide goal exceptions are governed by applicable provisions of state law," i.e. OAR 660-04-

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[2]OAR 660-04-018(3) provides:

"'Reasons' Exceptions:

"(a) When a local government takes an exception under the 'Reasons' section of ORS 197.732(1)(c) and OAR 660-04-020 through 660-04-022, plan and zone designations must limit the uses and activities to only those uses and activities which are justified in the exception;

"(b) When a local government changes the types or intensities of uses within an exception area approved as a 'Reasons' exception, a new 'Reasons' exception is required."

[3]Although certain differences exist between "reasons" exceptions, such as that at issue in Leathers, and "physically developed" and "irretrievably committed" exceptions such as that at issue here, both types of exceptions are similar in restricting the extent to which local governments can change the type of uses permitted in an exception area without taking another exception. Cf. OAR 660-04-018(1), (2) and (3).

018(3), and thus no deference was owed to the county's interpretation of its ordinance to avoid taking an exception. 144 Or App at 130.

Allm involved a 12-acre parcel within an area subject to a "physically developed" and "irrevocably committed" Goal 3 exception. Pursuant to the exception, 1.4 acres of the parcel were zoned commercial and 11.3 acres zoned acreage residential. The applicant sought to change the plan and zone designations for the entire parcel to commercial, to allow the applicant to build a large commercial office building. The county argued that no goal exception was required pursuant to an earlier version of OAR 660-04-018(2) (1983), which stated:

> "A new or modified exception is not required where the changed uses or zones were clearly identified and authorized by the previously acknowledged exception."

We disagreed, finding that the "overall thrust" of the previously acknowledged exception is that "the area is suitable for rural residential use," and thus concluded the previous exception did not clearly identify or authorize the proposed commercial uses. 13 Or LUBA at 272.

Similarly, in Leonard v. Union County, 15 Or LUBA 135 (1986), we applied the current version of OAR 660-04-018(2) to a proposal to redesignate a property subject to a prior "physically developed" and "irrevocably committed" exception to permit surface mining. The county found that the proposed surface mining was a "rural use" subject to the exception at OAR 660-04-018(2)(b). We rejected that finding as inadequate.

Leonard, 15 Or LUBA at 138. We then rejected an argument based, apparently, on the exception at OAR 660-04-018(2)(c):

> "The county makes an argument that the county's acknowledged comprehensive plan includes policies identifying the uses contemplated for this property. The difficulty with respondent's argument is that the uses are not contemplated for this particular property. That is, nothing in the county's comprehensive plan effectively designates the subject property for mining uses." Leonard, 15 Or LUBA at 138, 149 n5 (emphasis added).

Petitioners argue that Leonard, Allm and Leathers, read together, demonstrate (1) that whether Policy 5.16(8) fits within the exception at OAR 660-04-018(2)(c) is a matter of state law; and (2) that uses or zones are "identified and authorized by specific related policies" in the county's plan within the meaning of OAR 660-04-018(2)(c) only if the policy refers to specific uses or zones in relation to the particular property in question.

Petitioners' argument finds support in OAR 660-04-018(1), which describes the general purpose of the rule:

> "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 660-04-028 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." (Emphasis added).

OAR 660-04-018(1) explains that the uses recognized or justified by the exception determine the scope of the exception, and hence whether further exceptions are necessary for proposed rezonings. In the present case, the county in 1985 took an exception to Goal 3 for several parcels in the exception area, including the subject parcel, finding them to be "physically developed" and "irrevocably committed" to rural residential uses. The parties do not identify any evidence in this record that the county's 1985 exception or any other plan provision recognized the existing nursing home specifically or commercial uses generally anywhere within the exception area.

Intervenors' responses do not address the meaning of OAR 660-04-018(2) or the county's application of it. Instead, intervenors make four arguments why, regardless of OAR 660-05-018(2), we should affirm the county's decision.

Intervenors respond, first, that we must affirm the county's decision because petitioner assigned error only to the plan amendment, and failed to assign error to the zone change. Intervenors' reason that the plan amendment is severable from the zone change, and thus that any error with respect to the plan amendment cannot affect the zone change, which will remain valid, and become acknowledged, no matter how we resolve petitioners' assignment of error regarding the plan amendment.

We disagree that petitioners' failure to assign error to the zone change compels us to affirm the decision. The

county's zoning ordinance implements the comprehensive plan. As a result, the zoning ordinance must conform to and cannot conflict with the plan. See ORS 197.175(2)(b); 197.835(7)(b). Thus, if our review determines that the county erred in amending the plan designation from residential to commercial, the legal effect of remand on that basis would be to return the plan designation to residential. It follows that any remand on the basis of error with respect to the plan designation would necessarily invalidate the corresponding zone change.[4] Accordingly, we conclude that petitioners' failure to assign error to the county's zone change does not preclude or affect our review.

Intervenors respond next that the plan amendment in this case is not subject to review for compliance with statewide planning goals, and hence the need to take an exception to the goals, because it merely implements a previously acknowledged plan provision that directs the county to make such amendments, i.e. Policy 5.16(8). Intervenors cite to Foland

[4]Intervenors' citation to DLCD v. Josephine County, 18 Or LUBA 798 (1990), does not assist them. In DLCD v. Josephine County, DLCD assigned error to the county's failure to take Goal 3 and 4 exceptions in rezoning land from forest to residential, but failed to assign error to the county's determination that the pertinent goals were inapplicable because the property was not agricultural land or forest land within the meaning of Goals 3 and 4. We affirmed the decision because where property is not agricultural or forest land the county may rezone the property without taking a Goal 3 or 4 exception, and therefore DLCD's assignment of error directed at failure to take a goals exception provided no basis to reverse or remand. DLCD v. Josephine County, 18 Or LUBA at 802-03. Thus, in that case, the county's actual basis for its decision, which DLCD failed to assign as error, obviated the assignment of error DLCD did make. In the present case, the zone change does not obviate in any way petitioners' assignment of error with respect to the plan amendment. Indeed, under the circumstances of this case, any assignment of error directed at the zone change would be redundant.

v. Jackson County, 311 Or 167, 807 P2d 801 (1991), and League of Women Voters v. Metro Service District, 99 Or App 333, 781 P2d 1256 (1989), for the proposition that when a county's acknowledged plan contains a specific policy permitting certain amendments to the plan, that such amendments need not comply with statewide planning goals.

Intervenors read too much into both Foland and League of Women Voters. Foland involved an amendment to the county's plan to adopt a more detailed soils map, as contemplated by an acknowledged "refinement clause" in the county's plan. The Supreme Court held that petitioners' argument essentially challenged the refinement clause, rather than the county's amendment, for lack of compliance with the Goals. Foland, 311 Or at 180. Because the refinement clause had already been acknowledged as complying with all statewide planning goals, the Court rejected goal compliance challenges directed at the refinement clause. Id. Similarly, League of Women Voters involved an acknowledged regulation that specifically exempted certain plan amendments from compliance with two aspects of Goal 14. The petitioners' appeal argued that the amendment adopted pursuant to that acknowledged regulation failed to comply with those same two aspects of Goal 14. The Court of Appeals held that, under those "unique circumstances," petitioners could not challenge the amendment for lack of compliance with the two factors of Goal 14 without challenging the acknowledged regulation, and thus that the amendment was

deemed to share the

presumptive goal compliance of the regulation. League of Women Voters, 99 Or App at 338.

The acknowledged plan provision at issue in the present case does not resemble the ones at issue in Foland or League of Women Voters. Policy 5.16(8) neither states nor implies that amendments adopted pursuant to it are exempt from compliance with any statewide planning goals, or any part of one goal. It does not merely "refine" data in the comprehensive plan, like the refinement clause at issue in Foland. Nor have intervenors demonstrated that a goals compliance challenge to an amendment adopted pursuant to Policy 5.16(8) is necessarily a goals compliance challenge to Policy 5.16(8) itself.

Third, intervenors argue that the county's amendment "'is consistent with specific related land use polices contained in the acknowledged comprehensive plan' and therefore is not subject to review against state land use goals" under ORS 197.835(7)(b).[5] Intervenors' Brief 7. Intervenors acknowledge that ORS 197.835(7)(b) applies only to amendments

[5]ORS 197.835(7)(b) provides:

> "The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
>
> "(a) The regulation is not in compliance with the comprehensive plan; or
>
> "(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

of land use regulations and not amendments to comprehensive plans, but argue nonetheless that the plan amendment adopted in the challenged decision is essentially an amendment to the county's "land use regulations" rather than to the county's comprehensive plan.

We disagree. The aspect of the challenged decision at issue in this appeal purports to be, and plainly is, an amendment to the county's comprehensive plan. It follows that ORS 197.835(7)(b) is not implicated in our review, and does not provide, by negative implication, any basis to affirm the decision in this case.

Finally, with respect to petitioners' argument in the second assignment of error that the county failed to find compliance with or take an exception to Goal 14 (Urbanization), intervenors argue that petitioners failed to raise compliance with Goal 14 as an issue below, and thus have waived that issue. ORS 197.763(1).[6] At oral argument, petitioners responded that Goal 14 is an applicable approval criterion, but the county failed to list Goal 14 on the notice of hearing, and thus petitioners may raise the issue of

[6]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

compliance with Goal 14,

notwithstanding failure to raise it below, pursuant to ORS 197.835(4)(b).[7]

We agree with petitioners that Goal 14 appears to be an applicable approval standard. Goal 14 is "[t]o provide for an orderly and efficient transition from rural to urban land use." All land outside an acknowledged Urban Growth Boundary (UGB) and not the subject of an exception to Goal 14 is "rural" land by definition. When amending its acknowledged comprehensive plan and zone designations for such land, a local government must demonstrate that the new plan and zone designations comply with Goal 14 or adopt an exception to Goal 14. Churchill v. Tillamook County, 29 Or LUBA 68, 75 (1995).

In the present case, the city of Coquille is 2.5 miles from the subject property. The subject property is not within any UGB, is surrounded by land designated for either rural or resource uses, and is not subject to any exception to Goal 14. The challenged decision allows any commercial use, of any

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[7]ORS 197.835(4) provides:

"A petitioner may raise new issues to the board if:

"* * * * *

"(b) The local government failed to follow the requirements of ORS 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government."

Neither party addresses the last sentence of ORS 197.835(4)(b), whether petitioners could have raised the issue of Goal 14 compliance.

size, as a permitted use in the newly-designated C-1 zone.[8] We have held that determining whether proposed uses are rural or urban, and thus trigger Goal 14, will in most cases require a case-by-case analysis. Hammack & Associates v. Washington County, 16 Or LUBA 75, 80 (1987). Because the challenged decision permits a wide range of possible commercial uses of indeterminate size and intensity, including many that are indisputably urban uses, we conclude that Goal 14 is an applicable approval criterion. It follows that petitioners may raise the issue of compliance with Goal 14, notwithstanding failure to raise that issue below.

Turning to the merits of petitioners' assignments of error, we agree with petitioners that whether Policy 5.16(8) fits within the exception at OAR 660-04-018(2)(c) is a matter of state law, and we owe no deference to the county's interpretation of OAR 660-04-018(2)(c). We further agree that the county misconstrued and misapplied OAR 660-04-018(2)(c). Our cases indicate that whether uses or zones are "identified and authorized by specific related policies" in the county's plan within the meaning of OAR 660-04-018(2)(c) depends on whether the policy refers to specific uses or zones in relation to the particular property in question. Policy 5.16(8) does not refer to specific uses or zones in relation

[8]At oral argument, intervenors conceded that the county could approve on the subject property under the C-1 zoning large commercial uses such as a Wal-mart store.

to the subject property or any property within the exception area. By its terms, it is a general policy provision of county-wide application.

We conclude that Policy 5.16(8) is not a "specific related policy" within the meaning of OAR 660-04-018(2)(c). Because the challenged decision authorizes uses not recognized by the 1985 exception, it follows that the county is required by OAR 660-04-018(2)(d) to take a "reasons" exception to Goals 3 and 14 in order to authorize commercial uses on the subject property.

The first and second assignments of error are sustained.

The county's decision is remanded.