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

PHILIP TURRELL, BARBARA TURRELL,)
RODNEY SCOTT FRANKLIN, ELLEN)
FRANKLIN, DIANE C. MOLT, SAM)
KAZER, LOUIS MOLT, MELODI MOLT)
LARRY IMBACH, ROBERT EUGENE)
SCRIVNER, RONALD E. WHITING,)
LINDA R. WHITING, DELMER)
CLEMMENS and JOHN D. CLEMMENS,)
Petitioners,)
vs.)
HARNEY COUNTY,)
Respondent,)
and)
CLYDE AMBURN,)
Intervenor-Respondent.)

LUBA No. 97-103
FINAL OPINION
AND ORDER

Appeal from Harney County.

Robert S. Lovlien, Bend, filed the petition for review and argued on behalf of petitioner. With him on the brief was Bryant, Lovlien & Jarvis.

No appearance by respondent Harney County.

Meyer Avedovech, Bend, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 05/01/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's preliminary plat approval
4 of a subdivision in the county's Rural Residential 1 (R-1)
5 zone.

6 **INTERVENOR**

7 Clyde Amburn (intervenor), the applicant below, moves to
8 intervene in this proceeding on the side of respondent. There
9 is no objection to the motion, and it is allowed.

10 **FACTS**

11 Intervenor proposes to subdivide approximately 60 acres
12 in an area known as the Hebener Tracts into 11 five-acre
13 parcels. In 1980, the county took an exception to Statewide
14 Planning Goal 3 (Agriculture) to allow it to zone the Hebener
15 tracts for residential uses. In 1984 the Land Conservation
16 and Development Commission (LCDC) acknowledged that exception.
17 The subject property has since been used for alfalfa
18 production, and the surrounding properties are developed with
19 a mix of agricultural and residential uses.

20 The county court reversed the planning commission's
21 denial of the application, and granted preliminary plat
22 approval on May 7, 1997.

23 **PRELIMINARY MATTER**

24 The "Implementation, Revisions and Process" section of
25 the Harney County Comprehensive Plan (HCCP). The policies for
26 process in that section include "Criteria for judging zoning

1 and subdivision matters," as follows:

2 "The criteria below are to be the basis of
3 consideration and decision making on zoning and
4 subdivisions matters. Other factors that are judged
5 appropriate and applicable to a particular case may
6 be used by the [planning] Commission and [the
7 county] Court. The applicant bears the burden of
8 proof of these criteria and the Commission and/or
9 Court must make specific findings that these
10 criteria are met based on information made available
11 in the applicant's application and the public
12 hearing(s). The diversity and impact of a given
13 case will determine the degree of proof that an
14 applicant must submit. Zone changes and
15 subdivisions require a greater burden than
16 conditional uses and variances.

17 "A. That the proposed use is in conformance with both
18 the land use map and goals and polices of the
19 'Harney County Comprehensive Plan', or that there
20 was a mistake in the Plan, or that conditions have
21 substantially changed since the Plan was adopted.

22 "B. That there is a demonstrated public need for the
23 proposed use.

24 "C. That there is no other appropriately zoned and
25 available lands that could be used to satisfy the
26 public need.

27 "D. That the particular property is better suited to
28 meet the public need than other potential
29 properties.

30 "E. That there will be no undue impacts on the
31 provisions of public facilities and services
32 including but not limited to schools, roads,
33 sheriff, etc.

34 "F. That any particular provisions of a zone designation
35 or a comprehensive plan designation are complied
36 with. This includes the criteria for creation of
37 non-farm and non-forestry uses in the EFRU
38 [Exclusive Farm, Forest and Range Use] zone." HCCP
39 178.

40 The county subdivision ordinance contains additional
41 procedural and substantive regulations for approval of
42 subdivisions and partitions.

1 In his response to several assignments of error and at
2 oral argument, intervenor stressed that, while the
3 comprehensive plan zoning and subdivision criteria may be
4 significant to zone change applications, this property is
5 subject to an acknowledged exception, and has already been
6 designated and zoned for residential development. Thus, he
7 argues that the subdivision criteria set forth in the
8 comprehensive plan have been previously satisfied as to this
9 property and, therefore, that intervenor's burden of proof as
10 to these criteria should be correspondingly lower.

11 While we may agree that the subdivision review criteria
12 in the comprehensive plan may be onerous, these criteria have
13 been adopted by the local government for subdivision
14 preliminary plat approval, and have been acknowledged. Thus,
15 these criteria are directly applicable to every subdivision,
16 and specifically state that the applicant bears the burden of
17 proof, and that the county must make specific findings that
18 the criteria are met.¹

19 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

20 Petitioners argue that the finding of compliance with
21 HCCP 5.B. is inadequate and lacks substantial evidence. That
22 provision requires that there be "a demonstrated public need
23 for the proposed use." The challenged decision states:
24 "Letters of Record from several real estate agencies stat[e]

¹The applicant bears the burden of proof regardless of whether the HCCP so states.

1 that there are no five (5) acre parcels listed or available
2 through their offices." Record 7.

3 Petitioners argue that the decision does not identify the
4 "demonstrated public need" for the proposed use. Petitioners
5 suggest that there could be a variety of potential needs
6 including a need for residential lots, hobby farms or rural
7 residential lots, and argue that the county must make a
8 determination of what kind of need the subdivision fulfills.
9 Additionally, petitioners suggest that the county should
10 inventory available parcels to assess the need.

11 While intervenor does not concede that the findings are
12 inadequate, intervenor responds that the letters from realtors
13 explaining the lack of listings for five-acre parcels and
14 anecdotal reports of requests for such property are
15 substantial evidence of such weight as to overcome any
16 inadequacy in the finding.

17 The finding is clearly inadequate. It is well
18 established that findings must (1) identify the relevant
19 approval standards, (2) set out the facts which are believed
20 and relied upon, and (3) explain how those facts lead to the
21 decision on compliance with the approval standards. Heiller
22 v. Josephine County, 23 Or LUBA 551, 556 (1992); see also,
23 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
24 21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or LUBA
25 829, 835 (1989). Additionally, findings must address and
26 respond to specific issues, raised in the proceedings below,

1 that are relevant to compliance with applicable approval
2 standards. Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45
3 Or App 285, 293, 608 P2d 201 (1980); Norvell v. Portland Area
4 LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Skrepetos v.
5 Jackson County, 29 Or LUBA 193, 208 (1995); Mc Kenzie v.
6 Multnomah County, 27 Or LUBA 523, 544-45 (1994). The county's
7 finding does not even identify the public need, let alone
8 explain how that need is met.

9 We understand intervenor to argue that notwithstanding
10 the inadequacy in the findings, evidence clearly establishes
11 compliance with the public need criterion. Under ORS
12 197.835(11)(b), in the absence of adequate findings, we are
13 required to affirm any part of a challenged decision where a
14 party identifies evidence in the record that "clearly
15 supports" the decision.² However, the threshold for
16 establishing that the evidence "clearly supports" a decision
17 is high. As we have explained, "where the relevant evidence
18 in the record is conflicting, or provides a reasonable basis
19 for different conclusions, such evidence does not 'clearly
20 support' the challenged decision." Waugh v. Coos County, 26 Or

²ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1 LUBA 300, 307 (1993). Moreover, where the standards at issue
2 require the exercise of considerable judgment by the local
3 government, it is less likely that evidence will 'clearly
4 support' a decision that the standards are met under ORS
5 197.835(11)(b)." Id., at 308.

6 The real estate agents' letters describing their lack of
7 listings for five-acre parcels do not clearly support a
8 demonstrated public need for the proposed use. The county
9 must first identify the need before we can determine if there
10 is substantial evidence in the record to support the county's
11 conclusion.

12 The first and second assignments of error are sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 Petitioners contend that the findings are inadequate to
15 establish compliance with HCCP 5.D. which requires that
16 findings must establish that the proposed property is better
17 suited to meet the public need than other potential
18 properties. The county's finding of compliance with HCCP 5.D.
19 states:

20 "The proposed subdivision does not require a zone
21 change or an exception to goal 3. The property is
22 already zoned rural/residential with a five-acre
23 minimum." Record 7.

24 This finding is not adequate to establish that the
25 subject property is better suited to meet the public need than
26 other potential properties. Intervenor's response that the
27 property is already zoned for residential use does not address
28 the adequacy of the finding.

1 The third assignment of error is sustained.

2 **FOURTH ASSIGNMENT OF ERROR**

3 Petitioners contend that the challenged decision does not
4 address a comprehensive plan provision for rural residential
5 and rural recreational subdivisions that states:

6 "Rural Residential subdivisions should be located
7 only adjacent to existing urban areas, rather than
8 in remote parts of the county. Rural Recreational
9 subdivisions should have their occupancy limited, to
10 assure that the housing is secondary and not primary
11 for the owner. Rural Recreational subdivisions may
12 be located anywhere in the county that is judged
13 appropriate and in conformance with this plan and
14 the LCDC Goals and Guidelines." (Emphasis added)
15 HCCP 124.

16 Petitioners argue that this provision requires the county to
17 impose limits "so the housing is secondary and not primary to
18 the owner." Petition for Review 6. Intervenor responds that
19 this comprehensive plan policy is not directly applicable to
20 the proposal because the property is already zoned for
21 residential use.

22 This comprehensive plan provision is found in a housing
23 goal compliance section of the comprehensive plan and not in
24 the process section, HCCP 5, that sets forth standards
25 directly applicable to subdivision plat approvals.
26 Petitioners do not explain why this provision is directly
27 applicable to approval of a subdivision plat. Moreover, we
28 observe that petitioners' argument concerning occupancy
29 limitations is premised on a misreading of the criterion.
30 This proposal is for a rural residential subdivision, not a
31 rural recreational subdivision to which the occupancy

1 limitation applies.

2 The fourth assignment of error is denied.

3 **FIFTH ASSIGNMENT OF ERROR**

4 Petitioners argue that the findings are inadequate to
5 meet the street length requirements of Article 3, section 301,
6 which limits the length of a cul-de-sac to 800 feet "except
7 where special circumstances of design are apparent[.]"
8 Intervenor responds by simply asserting that the findings on
9 page 9 of the challenged decision are adequate. However,
10 intervenor concedes that the copy of the decision provided to
11 petitioners does not include page 9.

12 We also do not find a copy of page 9 of the decision in
13 the record. Although pages 7 and 8 the decision mention a
14 cul-de-sac, the discussion does not relate the cul-de-sac to
15 the standard at issue. Based on the record before us, we do
16 not see that the cul-de-sac discussion in the challenged
17 decision is responsive to the requirements of Article 3,
18 section 301.

19 The fifth assignment of error is sustained.

20 **SIXTH ASSIGNMENT OF ERROR**

21 Petitioners argue that the hearing notice impermissibly
22 omits a statement of the criteria specifically applicable to
23 the application. Petitioners acknowledge that "this
24 procedural error provides no basis for a reversal or a remand
25 of the Decision, where Petitioners failed to establish the
26 error caused prejudice to their substantial rights[.]"

1 Petition for Review 8. Petitioners argue, however, that their
2 substantial rights are prejudiced by this error because some
3 of the then unrepresented petitioners were confused by the
4 notice and not fully aware of the applicable criteria.

5 Intervenor does not dispute that the county's notice was
6 defective. Intervenor responds, however, that the defect did
7 not prejudice petitioners' substantial rights because all of
8 the applicable criteria were raised and addressed at the
9 public hearing. Because the defect did not cause prejudice,
10 intervenor explains that the remedy for the county's
11 procedural error is that petitioners may raise issues to LUBA
12 for the first time. ORS 197.835(4)(a).

13 We agree with intervenor. Petitioners have not
14 established that the defective notice prejudiced their
15 substantial rights. Thus, petitioners' remedy is the ability
16 to raise new issues for the first time on appeal, a remedy to
17 which they have not availed themselves. See Shapiro v. City
18 of Talent, 28 Or LUBA 542 (1995).

19 The sixth assignment of error is denied.

20 **SEVENTH ASSIGNMENT OF ERROR**

21 Petitioners contend that the subdivision will convert
22 agricultural land to urban uses by providing primary housing,
23 which they contend is an impermissible "urban-type use."
24 Petition for Review 9. Intervenor responds that the exception
25 to Goal 14 taken in 1980 obviates any need for this
26 discussion.

1 Petitioners do not explain what criterion is violated by
2 approving a subdivision plat in an area zoned for residential
3 use, albeit one that has been used for growing crops.

4 The seventh assignment of error is denied.

5 **EIGHTH ASSIGNMENT OF ERROR**

6 Petitioners argue that the challenged decision identifies
7 several subdivision criteria for which it does not make
8 findings. These criteria generally relate to the adequacy of
9 infrastructure such as water and sewage disposal.

10 Intervenor responds:

11 "The decision by the county court addresses all of
12 the applicable criteria that are appropriate for a
13 subdivision and partition ordinance at the level it
14 was prior to this appeal. Page 6 outlines the
15 findings and decision by the County court, 6 and 7
16 deal with this issue and supply that evidence."
17 Intervenor's Brief 7.

18 Pages 6 and 7 of the challenged decision contain
19 conclusory statements for each infrastructure criterion. They
20 generally state that intervenor testified that the criteria
21 would be met. Such conclusory statements do not identify the
22 standards, set out the facts which the county believed and
23 relied on, or explain how those facts led to the decision on
24 compliance with the approval standards. Heiller v. Josephine
25 County, 23 Or LUBA at 556.

26 The eighth assignment of error is sustained.

27 The county's decision is remanded.