BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMOTHY P. SPERBER,
Petitioner,

vs.

COOS COUNTY,
Respondent.

LUBA No. 2008-046

FINAL OPINION
AND ORDER

Appeal from Coos County.

Timothy P. Sperber, Coquille, filed the petition for review and argued on his own behalf.

No appearance by Coos County.

HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 06/23/2008

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

Opinion by Holsltun.

NATURE OF THE DECISION

Petitioner appeals a county decision denying his application to rezone his property to urban residential from rural residential.

FACTS

Petitioner owns 63.5 acres of undeveloped land outside the City of Coquille city limits but within the city's urban growth boundary (UGB). The property is rectangular in shape and the southeast corner contains moderate slopes that the county's comprehensive plan classifies as "less suitable" for residential development while the remainder of the property contains steeper slopes that are classified as "least suitable" for residential development. The property is currently zoned Rural Residential - 5 acre minimum lot size (RR-5). Petitioner filed an application to rezone the property to Urban Residential (UR-2). Petitioner also filed an alternative application to remove the property from the UGB and rezone it Rural Residential – 2 acre minimum (RR-2). The county planning commission denied the application, and petitioner appealed to the board of county commissioners. The board of county commissioners upheld the planning commission's denial. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Coos County Zoning and Land Development Ordinance (ZLDO) 5.1.400 provides the applicable approval criteria for the proposed zone change:

> "The Hearings Body shall, after a public hearing on any rezone application, either:
>
> "1. Recommend the Board of Commissioners approve the rezoning, only if on the basis of the initiation or application, investigation and evidence submitted, all the following criteria are found to exist:
>
> "a. the rezoning will conform with the Comprehensive Plan * * *;
>
> "b. the rezoning will not seriously interfere with permitted uses on other nearby parcels; and

"c. the rezoning will comply with other policies and ordinances as may be adopted by the Board of Commissioners.

"* * * * *

"3. Deny the rezone if the findings of 1 or 2 above cannot be made. Denial of a rezone by the Hearings Body is a final decision not requiring review by the Board of Commissioners unless appealed."

In the first assignment of error, petitioner challenges the county's findings that the zone change application does not comply with ZLDO 5.1.400(1)(a).

A. Whether the County's Findings Are Adequate

ZLDO 5.1.400(1)(a) provides that the zone change application must "conform with the Comprehensive Plan." Petitioner argues that the county's findings that the zone change application will not conform with the comprehensive plan are inadequate and not supported by substantial evidence. The county's findings regarding ZLDO 5.1.400(1)(a) state:

"The CCCP [Coos County Comprehensive Plan] is responsible for providing sufficient acreages of lands which are 'suitable, available and necessary' for future urban development. These lands should be located within an urban growth area. At the time these areas were identified, study areas were identified including all vacant parcels. Vacant land was divided into two classes of availability: (i) 'Available' or (ii) 'Potentially Available'. Suitability for development was then assessed by dividing into: (i) Primary suitable lands; (ii) Secondary suitable lands; or (iii) Marginal/unsuitable lands. To determine the carrying capacity of the vacant lands within the City, the following classifications of buildable lands were used: Suitable; Less Suitable; or Least Suitable. These definitions recognize that any parcel of land has some development potential if the appropriate development safeguards are taken and the resulting capital expenditures are made.

"The subject property has been identified in the City of Coquille's UGB Land Suitability Map as Least Suitable. Rezoning of the property would not be consistent with CCCP. * * *" Record 5.

We agree with petitioner that these findings are inadequate to demonstrate that the zone change application does not conform with the CCCP. As petitioner notes, least suitable property is merely one of three categories of land that may be developed. The fact that it may be more expensive or require additional safeguards to develop does not mean that

development of the property is inconsistent with the comprehensive plan. The mere fact that petitioner's property is classified least suitable does not render the application for UR-2 zoning inconsistent with the comprehensive plan. The challenged decision identifies nothing in the CCCP that provides that land that is classified as least suitable, by virtue of that fact, cannot or should not be zoned UR-2. As the decision provides no other basis for finding the application inconsistent with the comprehensive plan, the findings are inadequate.

This subassignment of error is sustained.

B. Substantial Evidence in the Whole Record

In the first subassignment of error, we agree with petitioner that the county's findings regarding ZLDO 5.1.400(1)(a) are inadequate. In this subassignment of error, petitioner searches the record for evidence that might support the county's decision in order to demonstrate that such evidence is not present in the record. Because we conclude above that the county's findings are inadequate to demonstrate that the requested zoning is inconsistent with the comprehensive plan, remand is required so that the county can have an opportunity to adopt such findings or adopt a different disposition in this matter. *Wolfgram v. Douglas County*, 52 Or LUBA 536, 548 (2006); *DLCD v. Columbia County*, 16 Or LUBA 467, 471 (1988).

We do not reach this subassignment of error.

C. Whether the Application Conforms With the CCCP As a Matter of Law

In general, to successfully overcome a denial of an application on evidentiary grounds, a petitioner must demonstrate that the burden of proof was met as a matter of law. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680, 699-700, *aff'd* 194 Or App 211, 95 P3d 269 (2004). Petitioner argues that he has met that burden as a matter of law. According to petitioner:

> "There is substantial evidence in the record that supports a conclusion that approval of [petitioner's] requested UR-2 rezone will conform with the CCCP: The City and County included the subject property in the City's

> acknowledged UGB, determined that the property is urbanizable, suitable, available, and necessary for urban level development, and the County established urban zoning districts to allow for interim urban zoning and development of the property. Therefore rezoning the subject property to UR-2 conforms with the CCCP as a matter of law." Petition for Review 19.

While there is certainly substantial evidence in the record the county *could* have relied upon to conclude that the zone change application conforms with the CCCP, we cannot say that as a matter of law that that is the only conclusion the county could have reached.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner challenges the county's findings that the zone change application does not comply with ZLDO 5.1.400(1)(b).

A. Whether the Findings Are Adequate

ZLDO 5.1.400(1)(b) requires that the proposed zone change "will not seriously interfere with permitted uses on other nearby parcels." Petitioner argues that the county's findings that the zone change application does not demonstrate that it will not seriously interfere with permitted uses on other nearby parcels are inadequate and not supported by substantial evidence. The county's findings regarding ZLDO 5.1.400(1)(b) state:

> "The purpose of the rezone was to ultimately develop 38 lots if UR-2 zoning was approved * * *
>
> "The existing access is via a 50' wide easement that leaves Shelley Lane and goes through adjacent tax lot 100 owned by Bowers. Tax lot 100 consists of 2.460 acres and is developed with a single family dwelling. Assessment maps show an easement along the southern boundary of tax lot 100.
>
> "The City of Coquille is concerned that the proposed concentration of homes built on this type of terrain needs proper consideration including access and on-site fire flow. The proposed lots would be served by private roads within the subdivision. The main access would be through the private easement through tax lot 100. The City notes that adequate access as well as the ability of the Coquille/Rural Fire department to gain access and fight fire is an important consideration.

> "The applicant did not adequately address how the rezoning will not seriously interfere with permitted uses on other nearby parcels." Record 6.

The only concerns mentioned in the findings relate to access and fire safety. Regardless of whether these concerns are valid, they have no obvious bearing on whether the proposal will result in serious interference with permitted uses on nearby parcels. If the county believes such concerns could result in serious interference with permitted uses on nearby parcels, the basis for that belief must be better explained in the county's findings. The county's findings regarding ZLDO 5.1.400(1)(b) are inadequate.

This subassignment of error is sustained.

B. Substantial Evidence in the Whole Record

As in the first assignment of error, petitioner again searches the record for potential evidence in support of the county's denial. Until the county has adopted adequate findings, it is not possible to know what evidence might be relevant in determining whether those findings are supported by substantial evidence. *Wolfgram*, 52 Or LUBA 548. Petitioner's substantial evidence challenge is premature.

We do not reach this subassignment of error.

C. Whether Application Conforms With CCCP As a Matter of Law

As in the first assignment of error, petitioner argues that he has satisfied his burden as a matter of law that the proposed zone change will not seriously interfere with permitted uses on nearby parcels. Although petitioner makes a persuasive argument for why the proposal satisfies this approval criterion, we cannot say that, as a matter of law, that is the only conclusion the county could have reached.

This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

In addition to requesting a zone change to UR-2, petitioner requested in the alternative that the property be excluded from the UGB and zoned RR-2. The county's findings denying the alternative proposed zone change state:

> "* * * the alternative request for removing the property from the UGB and rezoning it to * * * RR-2 would be inconsistent with the CCCP because the property was part of the justification for establishing the City of Coquille's UGB." Record 5.

Petitioner argues:

> "It is axiomatic that every provision in the CCCP was, or should have been, justified when included in or added to the CCCP. To conclude that a CCCP provision cannot be amended because it was originally justified is nonsensical and obviously contrary to local and state law." Petition for Review 25.

The City of Coquille presumably included the subject property in its UGB to satisfy its anticipated future need for housing. Taking the subject property out of the UGB would affect the city's supply of land for future housing. Petitioner offers no explanation for how the subject property can be removed from the UGB and still leave the city with an adequate supply of land for needed housing. Therefore, the county's finding that removing the subject property from the UGB would be inconsistent with the CCCP is adequate to deny the alternative zone change request.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error is somewhat difficult to follow. Petitioner apparently believes the county committed a procedural error that prejudiced his substantial rights by denying the proposed zone change for a lack of adequate information even though the county did not notify petitioner that the application was incomplete, pursuant to ORS 215.427(2), which provides:

> "If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in

> writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of:
>
> "(a) All of the missing information;
>
> "(b) Some of the missing information and written notice from the applicant that no other information will be provided; or
>
> "(c) Written notice from the applicant that none of the missing information will be provided."

The county staff report concluded that the proposed zone change did not satisfy the applicable approval criteria. Petitioner argued before both the planning commission and the board of county commissioners that the staff report failed to specify *how* the application failed to satisfy the approval criteria. Petitioner now argues that because the challenged board of county commissioners' decision also finds that the approval criteria are not satisfied, but does not specify what evidence petitioner should have submitted to satisfy the approval criteria, the county in essence determined that the application was incomplete after it had previously determined that the application was complete.

Petitioner misunderstands the purpose and legal effect of ORS 215.427(2). The statute merely provides that a local government may request additional information before proceeding with a permit or rezoning application if it believes such information is necessary. The statute does not mean that once a local government indicates the application is complete that necessarily means the application includes substantial evidence that all applicable criteria are satisfied. When the local government indicates the application is complete, that merely means that the local government has determined that it has sufficient information to render a decision, not that the application necessarily will be or must be approved. The portion of the staff report quoted by petitioner reflects this understanding:

> "The application met the submittal requirements for a complete application. The adequacy of the applicant's submitted findings and justifications is not determined until staff reviews and issues the staff report." Record 25.

Although we agree with petitioner that the county's decision is not supported by adequate findings, that does not necessarily mean that a county finding that petitioner failed to carry his evidentiary burden concerning one or more approval criteria necessarily would violate ORS 215.427(2). Petitioner's argument to the contrary under the fourth assignments of error is based on a misunderstanding of the purpose and legal effect of ORS 215.427(2).

The fourth assignment of error is denied.

The county's decision is remanded.