

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

08/06/18 #120-09 LUBA

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4                   STEVE VANSICKLE, JOHN WHITE,  
5                                   and BART BALLARD,  
6   *Petitioners,*

7  
8   vs.

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10                                   KLAMATH COUNTY,  
11   *Respondent.*

12  
13                                   LUBA Nos. 2018-014 and 2018-036

14  
15   FINAL OPINION  
16   AND ORDER

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18                   Appeal from Klamath County.

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20                   Tim Fitchett, Portland, filed the petition for review and argued on behalf  
21 of petitioners. With him on the brief was Staterra Law.

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23                   No appearance by Klamath County.

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25                   RYAN, Board Chair; ZAMUDIO, Board Member, participated in the  
26 decision.

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28                   BASSHAM, Board Member, did not participate in the decision.

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30                                   REMANDED                                   08/06/2018

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

**NATURE OF THE DECISION**

Petitioners appeal a decision by the board of county commissioners approving an application to change the comprehensive plan and zone map designation of a five-acre parcel from Forestry/Range to General Commercial Use.

**FACTS**

In June 2017, the owner of a five-acre parcel designated Forestry and zoned Forestry/Range applied to change the plan and zoning designation to General Commercial. The property is located approximately two miles south of Sprague River, an unincorporated community. An existing convenience store is located on the property, and the application proposed to redesignate and rezone the property and to add a gas station and a laundromat on the property. After a hearing on the application, the planning commission denied the proposal. The board of county commissioners voted to approve the proposal, and this appeal followed.<sup>1</sup>

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<sup>1</sup> In LUBA No. 2018-014, petitioners appeal a Final Order adopted by the board of county commissioners on January 25, 2018. That final order was amended by the board of county commissioners in a February 21, 2018 Final Order (Amended Final Order). Record 14. Petitioners filed an Amended Notice of Intent to Appeal that Amended Final Order.

In LUBA No. 2018-036, petitioners appeal Ordinance 44.128 (Ordinance), an ordinance that was adopted by the board of county commissioners on

1 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

2 Petitioners’ first, second, and third assignments of error challenge the  
3 adequacy of the county’s findings to support its conclusion that the application  
4 satisfies the applicable criteria in Klamath County Land Development Code  
5 (LDC) Articles 47 and 48. Petitioners’ second and third assignments of error  
6 allege that the county’s decisions are not supported by substantial evidence in  
7 the record.

8 **A. Inadequate Findings**

9 In their first assignment of error, and in portions of their second and third  
10 assignments of error, petitioners argue that the challenged decisions approving  
11 the comprehensive plan and zone map amendment are not supported by  
12 adequate findings. Adequate findings are required to support quasi-judicial  
13 land use decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or  
14 3, 20–21, 569 P2d 1063 (1977). Generally, findings must: (1) identify the  
15 relevant approval standards, (2) set out the facts which are believed and relied  
16 upon, and (3) explain how those facts lead to the decision on compliance with  
17 the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556  
18 (1992).

19 According to petitioners, the board of county commissioners may have  
20 adopted a September 26, 2017 Revised Staff Report as findings in support of

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January 25, 2018 that approves the requested changes to the comprehensive  
plan and zoning map.

1 its decision to approve the application, and that Revised Staff Report adopted  
2 the applicant's burden of proof statement. Record 134-53. Petitioners argue  
3 that the Revised Staff Report and the applicant's burden of proof statement do  
4 not contain adequate findings to explain the basis for the board of county  
5 commissioners' decision approving the plan and zone map amendment.

6 At the outset, we question whether the board of county commissioners  
7 adopted the Revised Staff Report as findings. We can find nothing in the  
8 Amended Final Order or Ordinance that adopts the Revised Staff Report as the  
9 board of county commissioners' findings.<sup>2</sup> However, even assuming for  
10 purposes of this opinion that the decisions adopted the Revised Staff Report as

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<sup>2</sup> Both the Ordinance and the Amended Final Order include the following recitals:

“WHEREAS, based on testimony entered and consideration of the whole record and the proposed findings of fact in the revised application submittal and Revised Staff Report, the Klamath County Planning Commission concluded the application was not in conformance with State Law, Klamath County Land Development Code and Comprehensive Plan, and forwarded a recommendation of Denial \* \* \* to the Board of County Commissioners; and

“WHEREAS based on testimony entered and after consideration of the whole record; the Klamath County Board of Commissioners acting within their authority, did not agree with the Planning Commission's recommendation, and unanimously APPROVED the request \* \* \* with the following Condition of Approval[.]”  
Record 6, 13.

1 findings, we agree with petitioners that the findings in the Revised Staff Report  
2 are inadequate.

3 The findings in the Revised Staff Report address LDC 47.030 and LDC  
4 48.030 but no other applicable approval criteria.<sup>3</sup> The findings in the Revised

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<sup>3</sup> LDC 47.030 provides:

- “A. A request for a change of zone designation may only be approved if it meets all applicable review criteria.
- “B. A request for a change of zone designation shall be reviewed against the following criteria:
  - “1. The proposed change of zone designation is in conformance with the Comprehensive Plan and does not afford special privileges to an individual property owner not available to the general public or outside the overall public interest for the change;
  - “2. The property affected by the change of zone designation is adequate in size and shape to facilitate any uses allowed in conjunction with such zoning;
  - “3. The property affected by the proposed change of zone designation is properly related to streets and roads and to other public facilities and infrastructure to adequately serve the types of uses allowed in conjunction with such zoning and the proposed change is in compliance with the Transportation Planning Rule (TPR) OAR 660-012-0060 (to demonstrate compliance with the TPR the applicant shall submit a Traffic Impact Study pursuant to Section 71.200);
  - “4. The proposed change of zone designation will have no significant adverse effect on the appropriate use and development of adjacent properties; and

1 Staff Report addressing LDC 48.030 do not address LDC 48.030(B)(1) or (2) at  
2 all, and address LDC 48.030(B)(3) in two sentences, concluding that “OAR  
3 660-018 \* \* \* speaks primarily to procedures, which have been followed in

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“5. The proposed change is supported by specific studies or other factual information, which documents the need for the change.”

LDC 48.030 provides:

- “A. A request for a change of Comprehensive Plan designation may only be approved if it meets all applicable review criteria;
- “B. A request for a change of Comprehensive Plan designation shall be reviewed against the following criteria:
  - “1. The proposed change is supported by specific studies or other factual information, which documents the public need for the change;
  - “2. The proposed change complies with policies of the Comprehensive Plan and policies and standards of the Urban Area Transportation System Plan; and
  - “3. The proposed change complies with the Oregon State wide Planning Goals and Administrative Rules, including compliance with the TPR (OAR 660-012-0060). To document compliance with the TPR the applicant shall submit a Traffic Impact Study pursuant to Section 71.200. Exceptions to the Statewide Planning Goals, shall be based upon Statewide Planning Goal 2, Part II (Exceptions) as interpreted by Oregon Administrative Rules (OAR Chapter 660, Division 4).”

1 processing this application[.]” and that “[t]he Transportation Planning Rule  
2 (OAR 660-012[-060]) would also apply, however, the proposed use is not  
3 anticipated to generate a sufficiently greater amount of potential traffic to  
4 trigger a traffic study, so [that] the application can be found to meet this  
5 criterion.” Record 135.

6 The findings in the Revised Staff Report addressing LDC 47.030 are  
7 contained in a single sentence:

8 “The zone change criteria are very similar to the Comprehensive  
9 Plan criteria and the applicant has addressed these in the  
10 Comprehensive Plan Application with Burden of Proof Statement  
11 (Exhibit 1) which concludes that the application meets the  
12 criteria.” Record 136.

13 None of the findings in the Revised Staff Report set out the facts relied on or  
14 explain how those facts lead to the conclusion that the applicable criteria are  
15 satisfied.

16 The Revised Staff Report lists six exhibits, including “Exhibit 1  
17 Revised,” which is described as “Application for CLUP/ZC Amendment,” and  
18 “Exhibit 2 Revised,” which is described as “Revised Burden of Proof.” Record  
19 137–53. The Burden of Proof Statement that is attached to the Revised Staff  
20 Report as Exhibit 2 does a slightly better job of addressing the criteria in LDC  
21 47.030 and LDC 48.030. It also appears to address goals and policies from the  
22 Klamath County Comprehensive Plan (KCCP), and some Statewide Planning  
23 Goals. However, the Revised Staff Report does not contain any language that  
24 attempts to incorporate the Burden of Proof Statement as findings or additional

1 findings in support of the decision. Accordingly, any proposed findings  
2 included in the burden of proof statement do not serve as findings in support of  
3 the decision. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402, 409 (2011)  
4 (where the language in the decision is inadequate to adopt a separate document  
5 as findings, the findings are not adopted and may not be relied on to support  
6 the decision). The burden of proof statement may have evidentiary value, but it  
7 does not serve as findings in support of the challenged decision.

8 **B. Substantial Evidence**

9 In portions of their second and third assignments of error, petitioners  
10 additionally allege that the county's decisions are not supported by substantial  
11 evidence in the record, and point to evidence in the record that petitioners  
12 maintain supports a conclusion that LDC 47.030 and LDC 48.030 cannot be  
13 met.

14 The county has not appeared in these proceedings, and the county's  
15 findings are inadequate for review because they do not identify the facts the  
16 county relied on or explain how those facts lead it to conclude that the approval  
17 criteria are satisfied. Accordingly, we are not able to ascertain the evidence that  
18 the county may have relied on to support its conclusion or determine whether  
19 that evidence supports the county's decision. On remand, the county should  
20 adopt findings that identify the relevant approval standards, set out the facts  
21 which are believed and relied upon, and explain how those facts lead to the  
22 decision on compliance with the approval standards.

1 The first, second and third assignments of error are sustained.

2 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

3 In their fourth assignment of error, petitioners argue that the county's  
4 decisions fail to include findings addressing Goal 3 of the KCCP, OAR 660-  
5 033-0030 and OAR 660-033-0045, and Statewide Planning Goal 3  
6 (Agricultural Lands). In their fifth assignment of error, petitioners argue that  
7 the county's decisions fail to include findings addressing Goal 4 of the KCCP.<sup>4</sup>

8 As explained above, we assume for purposes of this opinion that the  
9 board of county commissioners adopted the Revised Staff Report as findings.  
10 The Revised Staff Report contains no findings addressing Goals 3 or 4 of the  
11 KCCP, OAR 660-033-0030 and OAR 660-033-0045, or Goal 3. Accordingly,  
12 remand is required in order for the county to address those criteria in the first  
13 instance or explain why the county concludes they do not apply to the  
14 application.

15 The fourth and fifth assignments of error are sustained.

16 **SIXTH AND EIGHTH ASSIGNMENTS OF ERROR**

17 According to petitioners, the subject property is located within the  
18 Significant Resource Overlay map as Antelope High Density Winter Range.  
19 Record 218. In their sixth and eighth assignments of error, petitioners argue

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<sup>4</sup> In both assignments of error, petitioners additionally argue that in order to approve the proposal, the county was required to approve an exception pursuant to OAR 660-004-0020. We address those arguments in our resolution of the seventh assignment of error.

1 that the county’s decisions fail to address Goal 5, Policy 12 of the KCCP, OAR  
2 660, Divisions 16 and 23, and in particular OAR 660-023-0250(3)(b). In the  
3 eighth assignment of error, petitioners argue that LDC Article 57 applies to the  
4 application and the county was required but failed to adopt any findings  
5 addressing LDC Article 57.

6 The Revised Staff Report does not address any of the criteria identified  
7 in petitioners’ sixth and eighth assignments of error. Accordingly, remand is  
8 required in order for the county to address those criteria or explain why the  
9 county concludes they do not apply to the application.

10 The sixth and eighth assignments of error are sustained.

11 **SEVENTH ASSIGNMENT OF ERROR**

12 In their seventh assignment of error, petitioners argue that the county  
13 failed to apply the administrative rules governing exceptions at OAR 660-004-  
14 0020. As we understand this argument, it arises from a statement by the  
15 applicant in the burden of proof statement that refers to “[t]he property for  
16 which the zone change exception is requested[,]” and from the notice to the  
17 Department of Land Conservation and Development that indicates that “[a]n  
18 exception to a statewide planning goal is proposed – goal(s) subject to  
19 exception: 4.” Record 51, 217. If the applicant is seeking an exception to  
20 Statewide Planning Goal 4 (Forest Lands), then we agree with petitioners that  
21 the county’s decision includes no findings addressing the criteria that apply to  
22 exceptions. On remand, the county should clarify whether the application seeks

1 an exception to Goal 4 and if it does, apply the applicable administrative rules  
2 governing exceptions and determine that they are met before it approves an  
3 exception.

4 The seventh assignment of error is sustained.

5 The county's decision is remanded.