

Appendix 4 Findings Workshop (Liz Fancher)

Tips on Writing Land Use Decisions
Presentation to APA Conference

April 19, 1999

Legal Concepts to Analyze By

Determine Relevant Approval Criteria First

- What do you do if criteria conflict?
 - Apply hierarchy of laws
 - State law, except Goals
 - Transportation Planning Rule
 - Comprehensive Plan
 - Zoning Regulations
 - As a general rule, you can be more restrictive than State regulations.
 - Exception: ORS 215.283 (1) Uses
You must allow these uses as uses permitted outright unless a DLCD regulation allows you to impose additional restrictions. Lane County v. LCDC & Brentmar v. Jackson County.
 - Beware of the Bermuda Triangle see Friends of Neabeack Hill v. City of Philomath, 139 Or.App. 39, 911 P.2d 350 then call your lawyer!
 - Do you apply the OAR or do you enforce your acknowledged plan and zoning regulations?
 - Have you failed to adopt provisions required by state law?
 - Have you adopted local rules to implement state regulations/laws but your implementation is obviously inadequate to fulfill requirements of state law?
 - Remember that ORS 197.829 requires that local interpretations of local regulations must comply with state law and the comprehensive plan.
- Is Comprehensive Plan policy intended to serve as an approval criterion?
- Has a general Plan policy been implemented by zoning regulations?
 - Is it wise to create requirements not found in the zoning regulations based upon general Plan policies on an ad hoc basis in each land use application?

Common Errors

Inconsistent Findings

- Sources of Problems
 - Adopting Findings Written by Others to Support Decision
 - Tip: Be sure to read all adopted findings to identify conflicts with your findings. Specifically reject all findings you do not agree with and all that do not support your theory of the case or findings.
 - Writing Long Decisions and Losing Track of What You've Said
 - Trying Too Hard to Approve or Deny an Application
 - Tip: Try writing the decision without an outcome in mind - just try to answer the questions asked by each criterion. See where you end up. If you arrive at a denial and approval is in the public interest, review the findings to see if compliance with the application criteria can be met by imposing conditions of approval.

Improper Deferral of Decision Making

- Beware of Conditions of Approval
 - LUBA will reverse any decision that allows an applicant to delay demonstrating compliance with the approval criteria until after approval if the County does not determine that it is feasible for the applicant to obtain approval.
 - Any condition that requires the County to make a subsequent discretionary decision (land use decision) about some aspect of the application should also provide notice and hearing rights to opponents and the public.

Failing to Respond to Arguments and Conflicting Evidence

- It is especially important to respond to legal arguments raised by the party or parties who LOSE.
 - Review arguments and evidence presented by parties.
 - Be sure to address all arguments and evidence that relate to the approval criteria.
 - If there is a conflict in the evidence, say which evidence you accept and why. Remember that the applicant has the burden of proof.

Shifting the Burden of Proof

- Never say that the opponents have failed to prove a point. Opponents NEVER have the burden of proving anything, in the Oregon land use system, about the approval criteria. Instead, say that there is no evidence in the record (if this is the case) or explain why you did not find certain evidence presented by the opponents persuasive (perhaps because you were persuaded by the evidence presented by the applicant or others).

Failing to Address All Relevant Approval Criteria

Failing to Recognize Ambiguity in Approval Criteria and to Interpret Criteria

- See, ARLU DeCo v. Deschutes County, 149 Or App. 259, 942 P.2d 836 (1997) for help if you make this mistake.
- LUBA may refuse to interpret vague provisions of local ordinances and remand to the County to interpret the code in the first instance.
- If you fail to interpret vague provisions, LUBA may choose to do so and you may not like it.

Improper Reliance on Clark v. Jackson County

- Interpretations of local ordinances by a hearings officer or planning staff are not entitled to deference by LUBA.
- Interpretations of state law by a local government are not subject to deference.
- Look to ORS 197.829 for the Legislature's adoption of Clark
 - Does the Clark case have any continued vitality other than what is expressly stated in ORS 197.829? This question was raised by the Supreme Court at oral argument re the ARLU DeCo case. Issue not decided as Court dismissed case because review was improvidently granted.

Conclusory Findings

- Findings should discuss and determine facts, not simply state a legal conclusion.
- It is, however, a good idea to include findings that state that the approval criteria are satisfied, in the terms used by the approval criterion. Just be sure to ADD FACTS!
- If there are no facts in the record to support your conclusion, you must deny the application, unless the failure of evidence can be corrected with conditions of approval.
- Check case law for the required method of analysis of farm and forest issues that relate to compatibility, significant impacts, etc. As a general rule, you must identify the area impacted by the use being reviewed, determine what farm and forest activities are occurring (not just commercial operations), determine what the operating characteristics of the farm and forest uses are and determining whether the proposed use will impact those protected uses.

Failing to Make Findings that Respond to the Approval Criteria

- Just because it doesn't make sense to apply the criterion, that doesn't mean that the applicant has complied with the criterion.
 - If you think a criterion should not apply, SAY SO rather than saying that an application complies because it is not possible or logical to make the applicant comply. See, ODOT Weigh Station findings.
- Be sure to read the requirement and be sure to make findings that track the requirement.

- Answer the question posed by the criteria!

Make Findings Based Upon the Law in Effect at the Time of Application

- Apply this rule unless the application was not completed within 180 days of submittal (only if no refusal to submit additional information received during 180 day period) or if the case involves the amendment of a comprehensive plan. ORS 215.428
- Don't decide the case based upon newly adopted rules or plans that are under consideration but that have not been adopted.

Failing to Make Dolan Findings

- Establish essential connection between development and exaction
- Establish that exaction is roughly proportional to impact of development
- Must make an individualized factual review; make sure you get the facts you need.

Failing to Use Dolan to Help You Be Reasonable in the Light of Unreasonable Approval Criteria

- Tip: If an exaction is required by an applicable land use ordinance you should still make an individualized factual review. If the exaction is unconstitutional, it should be reduced to constitutional levels or not imposed. Per Gensman v. City of Tigard (LUBA), such requirements do not govern review of the application.

Remember the proper relationship and role of comprehensive plan.

- Not all provisions are approval criteria.
 - Some direct the County, not the applicant to act.
 - Some state general aspirations, not specific requirements for development.
- Your land use decision MAY NOT conflict with applicable provisions of the plan. Remember Angell Brothers. Tip: Seek to interpret the plan provisions to be consistent with approval. If you can't, tell the applicant to file for a plan text amendment.

Don't Make A Decision Based on Evidence Improperly Included in Final Argument

- Sort out and reject any new evidence included in final argument (if you are writing a decision for the Board of Commissioners on appeal and the applicant has failed to introduce the improperly submitted evidence at the de novo hearing).

Don't Rely on Prior County Decisions to Supply Evidence Unless They Are a Part of the Record.

An Uncommon But Interesting Error

Don't Rely on Conditions Present on Someone Else's Property

- If you do this, be sure to require the applicant to assure that those conditions will continue to exist.
- Typically, this occurs when you rely on adjoining property to provide a separation or buffer between uses.

Don't Rely on the Occurrence of Events that are not Certain to Occur

Food for Thought

1. When no one is opposing the application, pare down your findings. Just make sure the decision includes facts to support each required conclusion and make sure that the applicant knows what he needs to do to comply with conditions of approval.
2. Don't approve applications that require extensive revisions of development plans to meet code requirements.
3. Listing approval criteria in the report makes for a long report but makes a good record for code enforcement and for future applications (both for and against the applicant). It also helps you make all required findings.
4. Don't skimp on findings in contested cases. To save time, you usually can ignore the arguments advanced by the winning side on points that are not essential to your decision. Don't ignore arguments raised by the losing side.