

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

FRIENDS OF FRENCH PRAIRIE,)
AND MARION COUNTY FARM BUREAU)
) LUBA No.: 2008-186
)
) Petitioners,)
)
) v.)
)
) MARION COUNTY,)
)
) Respondent)
)
) and)
)
) THE CITY OF DONALD and)
) SUTHERLAND DEVELOPMENT, LLC)
)
) Intervenors-Respondents)
)
 _____)

PETITIONERS' REPLY BRIEF

James S. Coon
Swanson, Thomas & Coon
820 Sw 2nd Avenue, Suite 200
Portland, Oregon 97204
(503) 228-5222
Attorney for Petitioners

Jane Allen Stonecipher
Marion County Legal Counsel
555 Court St. NE
P.O. Box 14500
Salem, Oregon 97309
(503) 588-5220
Attorney for Marion County

Andrew M. Cole
Andrew M. Cole, Lawyer, P.C.
1919 Willamette Falls Drive
West Linn, Oregon 97068
(503) 650-1731
Attorney for the City of Donald

Dana L. Krawczuk
Ball Janik, LLP
101 SW Main Street
Suite 1100
Portland, Oregon 97204
(503) 228-2525
Attorney for Sutherland Development
LLC

TABLE OF CONTENTS

I. First Assignment of Error 1

II. Second Assignment of Error 5

TABLE OF AUTHORITIES

Cases

Concerned Citizens of the Upper Rogue v. Jackson County,
33 Or LUBA 70 (1997) 4

Redland/Viola/Fischer’s Mill Community Planning Organization v.
Clackamas County, 27 Or LUBA 560 (1994) 2, 3

Strawberry Hill 4 Wheelers v. Benton County, 287 Or 591 (1979) 4

Statutes

ORS 197.835(11)(b) 2, 3

Oregon Administrative Rules

OAR 660-024-0010 5

OAR 660-024-0030 1

OAR 660-024-0040 1, 2, 3

OAR 660-024-0050 1

I. First Assignment of Error

Petitioners demonstrated in their opening brief that the City and County based their addition of 27 acres of farmland to the UGB on the needs of a particular industry — warehousing — rather than on the needs of the City’s population. Pet. Br. at 8-13. Indeed, the City expressly disavowed any reliance on population growth or related job growth in expanding its industrial lands:

. . . the City of Donald is not basing its need for employment land on population growth but rather on the need for specific sites to accommodate target industries . . .

R. 32. The County’s principal planner testified that the City “did not choose” to consider “population growth relative to employment growth” and “did not look at employment growth in relation to population growth.” R. 408-09. The City’s consultant conceded that the City’s population projection “did not have an impact with regard to industrial land”. R. 409. The City and County based the decision on the needs of the warehousing industry, not on the needs of the City’s people.

That approach directly contradicts Goal 14, which requires that a UGB expansion be based on “[d]emonstrated need to accommodate long range urban population, consistent with a 20-year population forecast”. It also violates OAR 660-024-0040(1), which provides that

[t]he UGB must be based on the adopted 20-year population forecast for the urban area described in OAR 660–24-0030 and must provide for needed housing, employment and other urban uses . . .

Following that rule, OAR 660-024-0050 provides that

When evaluating or amending a UGB, a local government must inventory land inside the UGB to determine whether there is adequate development capacity to accommodate 20-year needs determined in OAR 660-024-0040.

As above, that means the local government must assess 20-year needs “based on the adopted 20-year population forecast.” OAR 660-024-0040(1). The City and County declined to do this. They did not quantify the job growth needed based on population or on any other reasoning.¹ The City and County below made no job growth estimates at all, so the record fails to show how many jobs are needed. Nor did they make any statement, let alone any analysis as to how many jobs a warehouse facility might entail.

However, in its responding brief Intervenor-Respondent Sutherland Development makes an argument that is not only different but directly contradicts the City and County’s reasoning. Instead of ignoring the population data as the local decision does, Sutherland starts with current job-to-population ratios, takes the population projection data in the record and assumes that job growth over the next 20 years would be directly proportional to population growth, thus generating its own job growth number for the next 20 years. Resp. Br. at 8-9. The Board should reject Sutherland’s attempt to substitute this contradictory rationale for the local decision.

Sutherland argues that LUBA “can credit” its alternative “justification” for the local decision, citing ORS 197.835(11)(b) and *Redland/Viola/Fischer’s Mill Community Planning Organization v. Clackamas County*, 27 Or LUBA 560, 563-64 (1994). ORS 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

¹Of course the local job growth analysis need not make job growth estimates directly proportional to population growth. OAR 660-024-0040(5). However, if it is to expand the UGB for needed employment, the local government must use job growth estimates based on *something*.

evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision . . .

Sutherland has not “identif[ied] **relevant evidence** in the record which clearly supports the decision”. It has created an entirely different rationale for the local decision — a rationale explicitly rejected by the City and County below. The City and County expressly declined to make any job growth estimates based on population growth — they declared evidence of population growth **irrelevant** to their decision. Sutherland cannot support the local decision on appeal with reasoning the local government specifically declined to adopt. ORS 197.835(11)(b) allows parties on appeal to rescue local decisions from technical failures to cite record evidence “which clearly supports the decision”. It does not allow an intervenor on appeal to make up an entirely new reason, especially one that directly contradicts the reasoning below.² This Board should not substitute its judgment for that of the City and County by affirming on a ground the City and County rejected.

Nor does the *Redland* case support affirming the local decision on a basis the local governments clearly rejected. The Board in that case held that it suffices, on review of a local decision, for the respondent to provide in its LUBA briefs “arguments and citations to facts in the record adequate to demonstrate that the challenged **legislative** decision complies with applicable legal standards”. 27 Or LUBA at 564.

²Further, population projections do not “clearly support the decision”. Sutherland assumes that job growth is directly proportional to population growth. Resp. Br. at 9. Job growth may or may not be proportional to population growth. OAR 660-024-0040(5). Sutherland offers nothing to show that, in this case, it is.

First, the decision below was not a legislative decision; it was quasi-judicial. *Strawberry Hill 4 Wheelers v. Benton County*, 287 Or 591, 602-03 (1979). The UGB amendment was “primarily in response to individual landowner requests”. R. 487. The part Petitioners challenge concerns land for a single warehouse facility and is therefore “directed at a closely circumscribed factual situation or a relatively small number of persons.” The decision applies, or should have applied, preexisting criteria to concrete facts. The process was bound to result in a decision. The decision meets all three *Strawberry Hill* factors and was therefore quasi-judicial, not legislative. A UGB amendment can be quasi-judicial,³ and this one was. The rule of *Redlands* does not apply. The Board should not substitute the reasoning of appellate counsel for that of the local government.

Finally, conceding that the City and County considered neither population projections nor job growth needs nor how many jobs the desired warehouse facility might provide,⁴ Sutherland argues that, in any event, 27 acres was the minimum needed for a warehouse facility, so “Petitioners cannot demonstrate that the UGB expansion is too large”. Resp. Br. at 7. Sutherland makes the same mistake the City and County made — it *assumes* the need for at least one *warehouse facility* and reasons from there. For all this record shows, a warehouse facility might provide four times the number of jobs the City needs over the next 20 years, and some other form of employment might provide a more appropriate number. The fact that Donald, like lots of other Willamette Valley towns, sits on a rail line and a

³*Concerned Citizens of the Upper Rogue v. Jackson County*, 33 Or LUBA 70, 79-80 (1997)

⁴Resp. Br. at 11

freeway does not mean its 20-year employment needs are equivalent to the jobs a warehouse facility would provide. The question is not “How much land do we need for a warehouse?” It is “How much land do we need for the kind of industrial uses that will provide the jobs our people will need over the next 20 years”? Neither the decision below nor the substitute reasoning offered by Sutherland comes close to answering that question.

II. Second Assignment of Error

Petitioners argued in their opening brief that the City and County’s “safe harbor” population projection did not meet the requirements of the relevant statute, rule and goals that define “safe harbor” population projections. Pet. Br. at 13-17. Petitioners did this because “safe harbor” was the declared basis for the City and County’s population projections below. R. 45. Sutherland concedes that the projection below, was “not based on safe harbor” though the City and County claimed it was. *Compare* Resp. Br. at 12 (“not based on safe harbor”) *with* R.45 (relying on “safe harbor”).

Sutherland argues, as is true, that “safe harbor” is not the only way to satisfy the requirements of Goal 14 for population projections. Resp. Br. at 13, *quoting* OAR 660-024-0010(2)(safe harbor “not the only way” to comply with Goal 14). What Sutherland fails to say, however, is *what other requirement the City and County complied with* in making their population projection. Sutherland describes what the City and County did⁵ but offers nothing other than the label of “reasonable mechanism” to show that the City and County complied with any standard. Resp.

⁵Resp. Br. at 12

Br. at 13. Granted that “safe harbor” is not the only way, it is the way the City and County chose but failed to follow. If there is another way which the City and County actually did follow, Sutherland has not shown what it is.

Respondents’ attempt to offer a substitute rationale to the City and County’s “safe harbor” approach to population projections should be rejected because, even if a substitute rationale were appropriate, respondents do not offer one. They offer only that the City and County’s way was not the only way. They do not apply any other.⁶

Dated January 8, 2009.

SWANSON THOMAS & COON

James S. Coon, OSB No. 771450
820 SW 2nd Avenue, Suite 200
Portland, OR 97204
(503) 228-5222
(503) 273-9175 (facsimile)
Jcoon@stc-law.com
Attorney for Petitioners

⁶Sutherland does not argue “new matters” as to the coordination requirement for population projections, and petitioners therefore do not reply as to that part of the argument.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 8, 2009, I filed the original of this Petition for Review together with four (4) copies, with the Land Use Board of Appeals, 550 Capitol Street NE, Suite 235, Salem, Oregon 97301-2552, by first class United States mail.

I also certify that on January 8, 2009, I served a true and correct copy of this Notice of Intent to Appeal on the following by first class mail:

Jane Allen Stonecipher
Marion County Legal Counsel
555 Court St. NE
P.O. Box 14500
Salem, Oregon 97309
(503) 588-5220
Attorney for Marion County

Andrew M. Cole
Andrew M. Cole, Lawyer, P.C.
1919 Willamette Falls Drive
West Linn, Oregon 97068
(503) 650-1731
Attorney for the City of Donald

Dana L. Krawczuk
Ball Janik, LLP
101 SW Main Street
Suite 1100
Portland, Oregon 97204
(503) 228-2525
Attorney for Sutherland Development
LLC

DATED: January , 2009.

James S. Coon, OSB No. 771450
Attorney for Petitioners