

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GLENEDA E. DORAN BORTON,
5 *Petitioner,*

6
7 vs.

8
9 COOS COUNTY,
10 *Respondent,*

11 and

12
13 RAYMOND CASWELL and LINDA CASWELL,
14 *Intervenors-Respondent.*

15
16 LUBA No. 2005-153

17
18 FINAL OPINION
19 AND ORDER

20
21 Appeal from Coos County.

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23
24 Gleneda E. Doran Borton, San Rafael, California, filed the petition for review and
25 argued on her own behalf.

26
27 No appearance by Coos County.

28
29 Jerry O. Lesan, Coos Bay, filed the response brief and argued on behalf of
30 intervenors-respondent. With him on the brief was Lesan and Finneran.

31
32 DAVIES, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
33 participated in the decision.

34
35 AFFIRMED

06/12/2006

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner challenges a county decision approving a conditional use permit (CUP) to site six dwellings on lots in an existing subdivision.

MOTION TO INTERVENE

Raymond Caswell and Linda Caswell (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

Intervenors own Lots 1 through 22 in an existing subdivision, Sunset City Subdivision, that was originally platted in 1907. See diagram attached at the end of this opinion. All of those lots are currently undeveloped. Intervenors seek to construct six dwellings on lots 12 through 22. The property is located within the City of Bandon’s urban growth boundary (UGB) and is zoned CD-10 (Controlled Development-10). Residential uses are permitted outright within the CD-10 zone. However, the property also falls within a Beaches and Dunes Area with Limited Development Suitability. Pursuant to the local code, any development within the limited suitability area requires administrative conditional use approval.

Prior to filing their application for a CUP, intervenors attempted to reconfigure some of the lots within the area of the subdivision that is the subject of this appeal, as a property line adjustment. The county approved the requested property line adjustment. Intervenors then sought conditional use approval to determine whether the proposed development complies with the standards applicable in the Beaches and Dunes Area with Limited Development Suitability. On December 23, 2004, the county planning director approved intervenors’ conditional use application. Several opponents submitted comments, and the decision was withdrawn and referred to the county planning commission. The planning commission granted the conditional use on March 17, 2005. That decision was appealed to

1 the board of county commissioners, which adopted findings approving the requested
2 conditional use on June 7, 2005. Petitioner appealed both the decision approving the
3 property line adjustments and the separate conditional use approval to this Board. We
4 reversed the city's approval of the property line adjustments in *Borton v. Coos County*, ___
5 Or LUBA ___ (LUBA No. 2005-170, March 15, 2006) (*Borton I* or LUBA No. 2005-170).
6 It is the county's approval of intervenor's conditional use application that is the subject of
7 this appeal.

8 **MOTION TO MAKE MORE DEFINITE AND CERTAIN**

9 Following the filing of petitioner's notices of intent to appeal in this case and in the
10 previous case, intervenors filed, in both appeals, motions to make the notices more definite
11 and certain because it was unclear who the petitioner was. Petitioner Borton subsequently
12 submitted a clarifying letter for purposes of both appeals indicating that she was the sole
13 petitioner. In LUBA No. 2005-170, we determined that the letter was satisfactory and denied
14 the motion to make more definite and certain. We deny intervenors' motion to make more
15 definite in certain in this appeal for the same reasons.

16 **MOTION TO TAKE EVIDENCE NOT IN THE RECORD**

17 Prior to our resolution of *Borton I*, petitioner filed a motion to take evidence not in
18 the record. After the final opinion in that case was issued, petitioner withdrew her motion to
19 take evidence. We therefore will not address that motion further.

20 **FIFTH ASSIGNMENT OF ERROR**

21 The petition for review in this appeal was filed before our final opinion was issued in
22 *Borton I*. Petitioner's fifth assignment of error challenges the underlying attempted
23 reconfiguration of lots within the Sunset City Subdivision, which we reversed in that
24 previous appeal. Petitioner subsequently withdrew this fifth assignment of error, and we do
25 not address it further.

1 **SIXTH ASSIGNMENT OF ERROR**

2 Areas of limited development suitability are identified by the county on a Special
3 Considerations Map. Coos County Comprehensive Plan (CCCP) Policy 5.10(2) provides the
4 applicable criteria for conditional use approval of development proposed within the limited
5 development suitability area.¹ Prior to actual development on the site, intervenors will also

¹ CCCP Policy 5.10(2) provides:

“Coos County shall permit development within areas designated as ‘Beach and Dune Areas with Limited Development Suitability’ on the Special Considerations Map only upon the establishment of findings that consider at least:

- “a. the type of use proposed and the adverse effects it might have on the site and adjacent areas;
- “b. the need for temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;
- “c. the need for methods for protecting the surrounding area from any adverse effects of the development; and
- “d. hazards to life, public and private property, and the natural environment which may be caused by the proposed use.

“Further Coos County shall cooperate with affected local, state and federal agencies to protect the groundwater from drawdown, which would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of saltwater into water supplies.

“Implementation shall occur through an Administrative Conditional Use process, which shall include submission of a site investigation report by the developer that addresses the five considerations above.

“This policy recognizes that:

- “a. The Special Considerations Map Category of ‘Beach and Dune Areas with Limited Development Suitability’ includes all dune forms except older stabilized dunes, active foredunes, conditionally stable foredunes that are subject to ocean undercutting or wave overtopping, and interdune areas (deflation plains) subject to ocean flooding.
- “b. The measures prescribed in this policy are specifically required by Statewide Planning Goal #18 for the above-referenced dune forms; and that this strategy recognizes that potential mitigation sites must be protected from pre-emptory uses.”

1 be required to obtain additional approvals, including a zoning clearance letter (ZCL).²
2 Compliance with land use regulations related to required setbacks, utility easements, septic
3 drainfield locations and off-street parking is required prior to issuance of a ZCL. Intervenors
4 are not seeking those approvals, but only a determination whether the proposed dwellings
5 comply with the standards applicable under the Beaches and Dunes with Limited
6 Development Suitability, which is found in CCCP Policy 5.10(2). The county concluded,
7 and we agree, that the sole inquiry at this stage of the proposed development is whether the
8 property is buildable according to those criteria. Other considerations will be addressed in
9 the context of other approvals.

10 In the sixth assignment of error, petitioner challenges the county's interpretation that
11 Policy 5.10(2) is limited to a review of potential adverse geologic impacts that might occur
12 as a result of the proposed development.³ She contends that limiting consideration to
13 geologic impacts is inconsistent with the express language of the CCCP and is contrary to
14 Statewide Planning Goal 18 (Beaches and Dunes), which the policy implements.⁴ She
15 asserts that the policy requires consideration of a much broader array of potential impacts
16 and health hazards.⁵

² Intervenor identifies this process as a zoning clearance letter; however, the code provides for a zoning *verification* letter. Coos County Zoning and Land Development Ordinance (CCZLDO) 3.1.200. We assume these refer to the same process.

³ The challenged findings provide:

“* * * we find that the *intent of the review criteria pursuant to the acknowledged Coos County Zoning and Land Development Ordinance is to protect the subject site, natural resources and public or private property from adverse ‘geological’ impacts that may occur as a result of development.* The substantive question is whether development can reasonably be expected to occur without creating or promoting geological instability. Density levels, development standards and specific use types are regulated by other provisions of the zoning ordinance CCZLDO, and are not relevant to the applicable criteria.” Record Volume II 6 (emphasis added).

⁴ To the extent petitioner's arguments in this assignment of error relies on the reconfiguration of lots that we reversed in *Borton I*, we ignore them.

⁵ Petitioner lists the following:

1 Intervenors agree with petitioner that Policy 5.10(2) implements Goal 18. Indeed, the
2 language of Policy 5.10(2) is taken directly from the goal itself.⁶ Compare n 1 and n 6.
3 Intervenors assert, however, that the text and context of Goal 18 do not support petitioner’s
4 expansive reading of Policy 5.10(2). Goal 18 is to (1) conserve, protect, restore, and where
5 appropriate, develop the resources and benefits of coastal beach and dune areas, and (2)
6 reduce hazards to human life and property associated with these areas. The goal requires
7 inventories to “describe the stability, movement, groundwater resource, hazards and values
8 of the beach and dune areas.” According to intervenors, this language in Goal 18 clarifies
9 that the goal is directed at evaluating the suitability of beaches and dune areas for
10 development. The introductory language of the goal modifies, explains and limits the
11 applicability of Implementation Requirement 1, which the county implemented through
12 Policy 5.10(2). Intervenors contend that the types of adverse effects or hazards referred to in
13 Policy 5.10(2), and subsections (a) and (d) in particular, must be related to such things as the
14 natural limitations of dunes, the stability and potential for movement of the dunes, and the

“fire hazards due to an inadequate water supply, * * * health problems due to back flow from low water pressure, septic system failures where municipal sewerage is required, and drainage and erosion problems if surface water is allowed to flow across roadways and through existing drainage ditches and stand in roadways used by horses and people.” Petition for Review 33.

⁶ The first implementation requirement listed in the goal provides:

“Local governments and state and federal agencies shall base decisions on plans, ordinances and land use actions in beach and dune areas, other than older stabilized dunes, on specific findings that shall include at least:

- “(a) The type of use proposed and the adverse effects it might have on the site and adjacent areas;
- “(b) Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;
- “(c) Methods for protecting the surrounding area from any adverse effects of the development; and
- “(d) Hazards to life, public and private property, and the natural environment which may be caused by the proposed use.” Goal 18, Implementation Requirement 1.

1 required findings are intended to insure that proposed development is consistent with the
2 capabilities and limitations of the dunes.

3 We agree with intervenors. The county's interpretation that Policy 5.10(2), which
4 implements Implementation Requirement 1 of Goal 18, addresses development limitations,
5 such as adverse geological or geotechnical impacts, that are specific to development in beach
6 and dune areas is consistent with the text, context and policy of Goal 18. Policy 5.10(2) does
7 not require consideration of general development issues, such as noise impacts or water
8 availability, that are unrelated to the particular geological or geotechnical development issues
9 posed by beach and dune areas. As explained earlier, consideration of such general
10 development impacts will properly be made during a future permitting process. The county's
11 interpretation of Policy 5.10(2) is reasonable and is consistent with the language of the goal
12 that it implements.

13 The county and intervenors concede that the limitation of consideration to geological
14 and geotechnical impacts requires consideration of issues involving erosion control, soil
15 stabilization and storm drainage.⁷ Petitioner argues that the county's findings concluding
16 that it is feasible to resolve any stormwater runoff problems are not supported by substantial
17 evidence in the record.⁸

⁷ Intervenors also concede that although most of the issues involving sewage disposal are not relevant to the applicable criteria, to the extent they relate directly to storm water runoff, they may be appropriate for consideration in the context of this limited development suitability determination.

⁸ As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

1 Intervenors submitted several reports from various engineers regarding stormwater
2 drainage. In response, opponents hired an engineer who submitted a letter questioning the
3 conclusions reached by those reports. Record Volume I 60-70.⁹ In response to that letter,
4 one of intervenors' experts submitted a letter addressing, among other things, the stormwater
5 drainage issue.¹⁰ Based on this evidence, the county concludes that Policy 5.10(2)(a) and (d)
6 are satisfied,¹¹ and that Policy 5.10(2)(b) and (c) are satisfied.¹² Based on the evidence

⁹ The cover letter from petitioner outlines the engineer's comments as follows:

"We attach as Appendix 1 the February 12, 2005 report by Roy Arnoldt, licensed Geotechnical Engineer, which examines the proposed development and the geotechnical issues. He points out that in addition to soil foundation capacity, '(t)otal suitability for house construction must also take into account a variety of peripheral issues which would typically include local drainage impact, and redirection of the surface water into retention/detention, and the ability to support a septic system and its reserve area.'

"Because the proposal does not contain sufficient details to evaluate its true impacts, or its true requirements per County, State and Federal regulations, Arnoldt **recommends it be rejected until sufficient information is presented.** In addition, he recommends that the storm water retention/detention facilities be engineered, all issues pertaining to the engineering design of the septic system be resolved, and a series of interim ground coverings be identified before proceeding." Record Volume I 58-59 (emphases in original; citations omitted).

¹⁰ The letter provides, in relevant part:

"Furthermore, in my professional opinion, the proposed development site is more suitable for development than approximately 70% of the sites already developed adjacent to this property. All of which have been required to go through the same suitability analysis requirements prior to development. This site is in general flatter, and has less risk than the majority of the surrounding properties as it does not have the erosion potential or seismic risk of the properties directly fronting the ocean beaches due to its setback from the beach and generally flatter slopes. The underlying soil structure is substantially similar throughout the area. * * *

"The issue about drainage is the only somewhat unique issue related to this property and not the others developed adjacent. This is primarily due to its flatter slopes and the fact [that it] is in the general drainage path of the adjoining properties. * * *

"As noted by Frank Rood, the drainage issue is not complex. The drainage system requires improvement, as development will change the intensity and location of runoff. Since current drainage systems were not improved with this development in mind, I would suggest that you stipulate as a condition of approval that a drainage analysis be performed, and improvements installed based upon the recommendations of the analysis." Record Volume I 25.

¹¹ The county findings provide, in relevant part:

1 before it, and specifically intervenors' experts' suggestion, the county imposed a condition of
2 approval requiring the preparation of a storm drainage plan.¹³

“The applicant provided evidence from George Saunders, P.E., and Geotechnical Engineer with Geo Design, Inc. The Geo Design report was based upon hand-augured borings at representative intervals across the development site, an analysis of the boring the samples and recommendations for design and construction of residential structures. The recommendation included foundation bearing capacity, estimated foundation settlement and lateral resistance design parameters. The general conclusion from the Geo Design report is that the site is geotechnically suitable for supporting the proposed structures on conventional spread footings.

“* * * * *

“**FINDING:** We find that the February 1, 2005 geotechnical report prepared by George Saunders clearly demonstrates that the subject property is suitable for the proposed residential development. We also find that substantial evidence has been submitted by Mr. Saunders supporting the conclusion that no significant adverse geotechnical impacts will occur to the site or adjacent areas as a result of the proposed residential development. We further find there will be no hazard to life, public and private property or the natural environment as a result of the proposed residential development. Therefore, based upon that evidence, we find that Review criteria (a) and (d) of said Plan Policy 5.10 have been satisfied.” Record Volume II 10.

¹² The county's findings provide, in relevant part:

“The second document from George Saunders, P.E., and Scott Mills, P.E., with Geo Design Inc., specifically addressed drainage and stabilization issues raised by opponents during the initial Planning Commission hearing. The report states that there are numerous documented engineered systems for dealing with drainage flows based on site-specific conditions and well documented methods for temporary long term soil stabilization.

“The applicant also provided evidence from Ralph Dunham, P.E. with Stuntzner Engineering and Forestry, L.L.C. Mr. Dunham specifically addresses drainage and soil stabilization issues relating to development of the subject property. In his report, Mr. Dunham states that the drainage issue is not complex, however, the development will change the intensity and location of runoff. Mr. Dunham suggests that a drainage analysis be conducted and improvements be installed based upon the recommendations of that analysis.

“With regard to soil stabilization and erosion, Mr. Dunham suggests that a condition be placed upon the development permit requiring erosion control measures be installed and maintained during development.

“**FINDING:** We find that sufficient evidence has been submitted by George Saunders, Scott Mills and Ralph Dunham demonstrating that the site is similar to other development sites with regard to the implementation of soil stabilization programs and drainage systems for the management of storm water runoff. We further find that the conditions imposed provide reasonable assurances that the soil stabilization and drainage systems will be properly implemented. Therefore, we find that Review criteria (b) and (c) of said Plan Policy 5.10 have been satisfied.” Record Volume II 10-11.

¹³ Condition 2 provides:

1 In a situation such as this one, where there are competing experts, the local
2 government is entitled to choose which expert to rely on. *See, e.g., Mitchell v. Washington*
3 *County*, 37 Or LUBA 452, 458, *aff'd* 166 Or App 363, 4 P2d 774 (2000) (LUBA will affirm
4 a hearings officer's choice between conflicting expert testimony where a reasonable person
5 could conclude, based on the testimony of applicant's expert, that a proposed intersection
6 provides a sight distance exceeding that required by the code, notwithstanding the contrary
7 testimony of opponents' engineer). In concluding that it was feasible to resolve stormwater
8 drainage issues, the county relied on the expert testimony of intervenors' engineers.
9 Although it did not specifically explain its choice in the findings, to the extent opponents'
10 expert disagreed with intervenors' experts, the county obviously chose to believe the
11 testimony presented on behalf of intervenors. That was a choice that it was entitled to make,
12 and this Board may not second-guess that legitimate choice. The county's conclusion is
13 supported by substantial evidence.

14 Finally, petitioner argues that the county improperly delegated the required
15 evaluation for drainage plans. She cites to *Sunningdale-Case Heights Assoc. v. Washington*
16 *County*, 34 Or LUBA 549 (1998). As intervenors correctly point out, that case involved a
17 code section that specifically required submission of a drainage plan. In this case, the
18 CCZLDO does not include a similar requirement. Here, intervenors' experts testified that
19 the drainage issue is not complex and concluded that a plan could be developed to resolve
20 any drainage issues. The county, relying on that expert testimony, determined that it was

“A storm drainage plan will be prepared by a Professional Engineer that assures no adverse impacts will occur to adjacent lands from storm water runoff associated with development occurring on the subject property. The drainage plan will adequately address runoff onto and from the subject property, across public roadway right-of-ways and beyond the point of potential impacts to adjacent land. The developer will be responsible for implementing and maintaining the plan. However, to satisfy concerns relating to this development, a storm drainage plan that adequately addresses runoff onto and from the subject property, across public roadway right-of-ways and beyond the point potential impacts to adjacent land will be designed and monitored by a Professional Engineer.” Record Volume II 12.

1 feasible to address drainage issues and imposed a condition of approval requiring submittal
2 of a drainage plan and professional oversight. We agree with intervenors that that is all that
3 was required. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (if a local
4 government can adopt findings that demonstrate it is feasible to comply with an approval
5 criterion, it is appropriate to impose conditions of approval to assure compliance with that
6 criterion).

7 Petitioner’s sixth assignment of error is denied.

8 **FOURTH ASSIGNMENT OF ERROR**

9 Petitioner contends that the county erred in failing to address the potential risks
10 associated with approving development in a tsunami evacuation zone.¹⁴ The parties appear
11 to agree that the subject property falls within a tsunami evacuation zone as mapped by the
12 Department of Geology and Mineral Industries (DOGAMI). The significance of that map, at
13 least according to petitioner, appears to be that it identifies the subject property as a “known
14 hazard area.” Petitioner cites to CCZLDO 3.3.100(4)(B), which she apparently believes
15 requires conditional use approval where residential dwellings are proposed within a “known
16 hazard area.” As far as we can tell, she relies on CCZLDO 3.3.100(4)(B) to support her
17 contention that the county was required to address the tsunami risks associated with
18 development in such an area.

19 CCZLDO 3.3.100 generally prohibits locating buildings or structures on a lot, parcel
20 or tract that does not conform with the requirements of the district in which it is located.
21 Subsection (4)(B) provides an exception to the minimum lot standards for siting residential
22 dwellings in certain subdivisions approved prior to the adoption of the zoning code. It

¹⁴ In response to petitioner’s argument below that it was required to address tsunami hazards, the county found:

“Coos County has not amended the plan to include identified tsunami areas or policies/procedures addressing tsunami areas. The issues raised have no bearing on the applicable criteria.” Record Volume II 10.

1 provides that residential dwellings proposed in such subdivisions within the UGB are
2 permitted outright, unless the lot on which the dwelling will be sited is located within a
3 “known hazard area, pursuant to the Comprehensive Plan,” in which case conditional use
4 approval is required.

5 Petitioner’s reliance on CCZLDO 3.3.100(4)(B) is misplaced for several reasons.
6 First, the provision relates to the siting of dwellings within particular existing subdivisions
7 within the UGB. Even assuming the subject property is within a “known hazard area,” the
8 cited provision merely provides that a residential dwelling might not be permitted outright on
9 the subject property. Whatever conditional use approval might be required prior to obtaining
10 a building permit to construct a dwelling on the subject property is not required as part of the
11 subject application. Once again, the applicable review criteria for the conditional use
12 approval challenged in this appeal is limited to Policy 5.10(2).

13 Further, petitioner fails to demonstrate that the subject property falls within a “known
14 hazard area, pursuant to the Comprehensive Plan.” The mere fact that DOGAMI published a
15 map of tsunami evacuation zones in which the subject property is included falls far short of
16 demonstrating that the subject property is within a known hazard area as identified in the
17 comprehensive plan.¹⁵

18 Petitioner also cites to CCCP Policy 5.11.¹⁶ Initially, we note that Policy 5.10(2) and
19 Policy 5.11 implement different statewide planning goals. Policy 5.10 implements Goal 18.
20 Policy 5.11 implements Goal 7 (Areas Subject to Natural Hazards). Goal 7 restricts or

¹⁵ As intervenors note, the DOGAMI publication itself provides that it is not intended to be used for site specific planning.

¹⁶ Policy 5.11 provides, in relevant part:

“Coos County shall regulate development in known areas potentially subject to natural disasters and hazards, so as to minimize possible risks to life and property. Coos County considers natural disasters and hazards to include stream and ocean flooding, wind hazards, wind erosion and deposition, critical streambank erosion, mass movement (earthflow and slump topography), earthquakes and weak foundation soils.”

1 discourages development in areas subject to natural disasters and hazards. Goal 7 was
2 amended recently to identify tsunamis as a natural hazard covered by the goal. Prior to this
3 goal amendment, Goal 7 apparently did not specifically mention tsunamis.

4 While it is possible to read Policy 5.10(2) and Policy 5.11 as overlapping with regard
5 to tsunami hazards, *i.e.*, that Policy 5.11 applies in the context of this limited development
6 suitability determination, we believe that the interpretation adopted by the county and
7 advanced by intervenors at oral argument is more consistent with the language of the policies
8 and goals. *See* n 3 (“the intent of the review criteria * * * is to protect the subject site,
9 natural resources and public or private property from adverse ‘geological’ impacts that may
10 occur *as a result of development.*” (Emphasis added). Intervenors assert that Policy 5.10(2)
11 addresses the stabilization of dunes or beach areas and requires consideration of impacts
12 *caused by the proposed development* on those areas and nearby areas and development. It
13 does not address the risks *to* proposed development *caused by* natural hazards such as
14 tsunamis. For example, Policy 5.10(2)(d) requires findings addressing “hazards to life,
15 public and private property, and the natural environment *which may be caused by the*
16 *proposed use.*” (Emphasis added). Policy 5.10(2)(c) requires findings addressing “the need
17 for methods for protecting the surrounding areas from any adverse effects *of the*
18 *development.*” (Emphasis added). Policy 5.11 and Goal 7, on the other hand, are aimed at
19 reducing risks to people and property that are caused by natural hazards.¹⁷

20 We therefore agree with intervenors that petitioner fails to demonstrate how the
21 county’s conclusion that Policy 5.11 does not apply in this circumstance is in error. The
22 applicable criteria for this relatively circumscribed review are found in Policy 5.10(2).

¹⁷ To the extent Policy 5.10 relates to hazards caused by ocean flooding or tsunamis, those provisions are found in Policy 5.10(3), which implements Implementation Requirement 2 of Goal 18, not in Policy 5.10(2). Policy 5.10(3) relates to areas identified on the Special Considerations Map as “Beach and Dune Areas Unsuitable for Development,” and does not apply to the county’s *limited* suitability determination challenged in this appeal.

1 While the county may be required to adopt findings addressing Policy 5.11 and tsunami
2 hazards in the context of a different, future proceeding, it is not required to do so in the
3 context of the limited suitability determination that is before us.¹⁸

4 Petitioner’s fourth assignment of error is denied.

5 **FIRST ASSIGNMENT OF ERROR**

6 The county and the City of Bandon (city) have entered into an Urban Growth Area
7 Management Agreement (UGAMA) that requires the county to give the city notice of
8 discretionary land use proceedings that involve property within the UGB. The city may
9 submit comments on those matters, and the county is required to consider the city’s
10 comments. Pursuant to the UGAMA, the city may appeal a county decision by which it is
11 aggrieved.

12 During the planning commission hearing on the CUP application, the city submitted a
13 letter expressing concern about the high density of the proposed development, water
14 availability, lot widths, septic and access. The planning commission ultimately approved
15 intervenors’ application. The city did not appeal the planning commission’s decision to the
16 county board of commissioners. However, neighbors did. In response to opponents’
17 argument before the board of commissioners that the county failed to comply with the
18 “coordination” requirements of the UGAMA, the challenged findings provide:

19 “[N]otice was sent * * * to the City of Bandon pursuant to the City/County
20 joint management agreement.

21 “* * * * *

22 “At the time this application was filed, the subject property was located within
23 and under the jurisdiction of Coos County and is subject to County codes and
24 standards. Coos County has jurisdiction over development outside of the city
25 limits of the City of Bandon. We find that the City of Bandon was provided
26 notice and had opportunity to participate in the decision process. Therefore

¹⁸ To the extent petitioner argues that Goal 7 applies directly, as a consequence of DLCDC’s recent goal amendment, any such argument is insufficiently developed for review.

1 the requirements of the Joint Management Agreement have been satisfied.”
2 Record Volume II 7-8.

3 Petitioner argues that the county erred in determining that mailed notice to the city
4 was adequate to satisfy the UGAMA’s coordination requirement. She also argues that the
5 county erred in failing to respond to issues raised by the city, in violation of ORS 197.015(5),
6 ORS 197.763(1), and CCCP Policy 5.1.¹⁹ Petitioner’s arguments can be lumped into two

¹⁹ Petitioner cites to the definition of “comprehensive plan” appearing in ORS 197.015(5)(2003), currently ORS 197.015(6)(2005):

“‘Comprehensive plan’ means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. ‘Comprehensive’ means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. ‘General nature’ means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is ‘coordinated’ when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. ‘Land’ includes water, both surface and subsurface, and the air.”

ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

Policy 5.1 is the county comprehensive plan’s citizen involvement policy. Petitioner cites to one of the citizen involvement plan implementation strategies, which provides, in relevant part:

“1. Citizen Involvement

“The purpose of this component is to provide for widespread citizen involvement in Coos County.

“Goal #1 states the following components shall be incorporated in the ‘Citizen Involvement Program’ to:

“a. provide for widespread citizen involvement;

“b. assure effective two-way communication with citizens;

“* * * * *

1 categories: (1) arguments that the county failed to “coordinate” and (2) arguments that the
2 county violated the citizen involvement component of the CCCP.

3 **A. Coordination**

4 **1. Goal 2**

5 Statewide Planning Goal 2 (Land Use Planning) requires that comprehensive plans be
6 coordinated. Indeed, the very definition of “comprehensive plan” incorporates the
7 coordination requirement. *See* n 19. Although petitioner does not specifically argue that the
8 county violated Goal 2 by failing to coordinate with the city, she does cite to case law
9 interpreting the Goal 2 coordination requirement. *E.g., Turner Community Association v.*
10 *Marion County*, 37 Or LUBA 324 (1999).

11 As intervenors correctly point out, the Goal 2 coordination requirement applies to
12 local governments in the process of adopting or amending their comprehensive plans or land
13 use regulations. It does not apply directly where, as here, a local government approves an
14 administrative conditional use. It is only the UGAMA that imposes a coordination
15 requirement in the context of processing such administrative approvals.²⁰ We turn now to
16 that agreement.

17 **2. UGAMA**

18 As explained above, the UGAMA requires that “each jurisdiction shall consider the
19 comments of the other in proceedings outlined in this section.” The UGAMA is a contract
20 between the city and the county. We understand intervenors to argue that it is only the
21 parties to the agreement that may assign error to the county’s alleged failure to coordinate.
22 For example, the city could have appealed the county’s decision and assigned error based on
23 the county’s alleged failure to coordinate. A citizen, however, may appeal based on

“e. assure that citizens will receive a response from policy-makers[.]”

²⁰ Although the UGAMA does not refer to the requirement to consider comments as a “coordination” requirement, for ease of reference, we will refer to it as such.

1 substantive issues related to the applicable approval criteria, but may not raise the
2 coordination issue. A citizen, according to intervenors, does not have standing to raise the
3 coordination issue where the sole authority for the coordination requirement is a contract
4 between local governments. We need not decide this issue here because even if petitioner
5 has standing to raise the UGAMA coordination issue, as discussed below, the requirement
6 was satisfied in this case.

7 During the proceedings before the planning commission, the city submitted a letter
8 raising five issues. First, the city urges the county to reconsider the property line adjustments
9 that we reversed in *Borton I*. As we have already noted, that issue is moot. Second, the city
10 states that “the provision of City water service is not assured” and questions how the
11 development would be affected without such services. Third, the city inquires whether the
12 proposed development will be served by a community septic system and, if so, whether the
13 Department of Environmental Quality has reviewed the plans. Fourth, the city notes that the
14 provision of adequate access via fully developed streets and adequacy of storm drainage are
15 not part of the proposal, and that they are requirements for city water service. Finally, the
16 city argues that the planning commission cannot find compliance with Policy 5.10(2)(a) – (d)
17 because the geotechnical report submitted by intervenors does not address “the proposed area
18 of development, the level and intensity of development, or the requirements for building on
19 these specific sites.” Record Volume I 180-81.

20 Petitioner argues that the county failed to respond to comments by the city and thus
21 violated the coordination requirement set forth in the UGAMA.²¹ Intervenor’s response
22 includes a discussion of the requirement set forth in *Turner Community Association v.*
23 *Marion County* that a concern expressed by an affected local government must be

²¹ To the extent petitioner believes that case law interpreting the Goal 2 coordination requirement is instructive in interpreting the UGAMA coordination requirement, we agree with her.

1 sufficiently developed to require a specific response for the local government.²² They
2 contend that the city’s comments do no more than “suggest an issue.” *See ONRC v. City of*
3 *Seaside*, 29 Or LUBA 39, 57-58 (1995) (statements that merely suggest an issue and are not
4 sufficiently developed do not require a specific response from the local government).
5 However, we need not determine whether the city’s comments were adequate to warrant a
6 response from the county in this instance because, even assuming they were, they are not
7 “legitimate concerns” for purposes of the limited development suitability determination.

8 Petitioner’s argument focuses on the county’s findings quoted above that conclude
9 that the UGAMA is complied with because the city was provided notice and an opportunity
10 to participate. However, the challenged decision specifically responds to the issues of water
11 availability for purposes of fire safety, street development, storm drainage and subsurface
12 sewage disposal by indicating that the approval criteria are limited to the criteria set forth in
13 Policy 5.10(2), and that those issues are not relevant in the context of this limited
14 development suitability determination.²³ A local government is required to respond to
15 “legitimate concerns” that are expressed by affected governmental agencies. *Waugh v. Coos*
16 *County*, 26 Or LUBA 300, 314-15 (1993). In order to require a response by the local
17 government, however, those “legitimate concerns” must present issues that are relevant to the
18 matter that is before the local government.

²² Petitioner cites to ORS 197.763(1) in support of her argument that the city’s comments were specific enough to afford the county an opportunity to respond to them. As intervenors point out, ORS 197.763(1) simply requires that in order to raise an issue before this Board, a petitioner must have raised the issue during the local proceedings with sufficient specificity to afford the local government and other parties an adequate opportunity to respond. While the requirement expressed in *Turner Community Association* is similar and based on similar policy considerations, we do not agree that ORS 197.763(1) is relevant here.

²³ The final issue listed in the city’s January 26, 2005 letter, intervenors concede, is relevant to the applicable approval criteria. However, intervenors submitted engineering reports addressing that issue after the date of the city’s letter. Further, petitioner does not mention this concern and makes no specific argument that the county failed to respond.

1 **B. Citizen Involvement**

2 Petitioner’s reliance on CCCP Policy 5.1 is misplaced. Policy 5.1 implements
3 Statewide Planning Goal 1 (Citizen Involvement). *See* n 19. Petitioner’s first assignment of
4 error and underlying argument relates to the county’s failure to consider comments of the
5 city. As intervenors correctly point out, the city is not a citizen, and Policy 5.1 is therefore
6 irrelevant to the first assignment of error.

7 Petitioner’s first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioner argues that the county erred in concluding that CCCP Policy 5.18(2) is not
10 an applicable approval criterion, and in failing to respond to issues raised by the State
11 Deputy Fire Marshal.

12 **A. Compliance with Policy 5.18(2)**

13 CCCP Policy 5.18(2) provides:

14 “Coos County shall provide opportunities to its citizens for a rural residential
15 living experience, where the minimum rural public services necessary to
16 support such development are defined as police (sheriff) protection, public
17 education (but not necessarily a rural facility), and fire protection (either
18 through membership in a rural fire protection district or through appropriate
19 on-site fire precaution measures for each dwelling).”

20 In response to petitioner’s assertion below that the county inadequately responded to the fire
21 protection issue in general, and Policy 5.18(2) in particular, the county found:

22 “*We find that Plan Policy 5.18 addresses public facilities and services. The*
23 *subject review criteria are found at Policy 5.10(2). Plan Policy 5.18 is not*
24 *relevant to the applicable criteria.” Record Volume II 8.*

25 Petitioner contends that the county was required to demonstrate in the context of the
26 challenged CUP whether there was adequate water for fire protection. Intervenors argue that
27 the county was correct in determining that the plan policy does not apply because Policy
28 5.10(2) provides the only applicable approval criteria. Second, intervenors contend that the
29 subject property is within the UGB. The policy applies only to opportunities for *rural* living

1 experiences. “Rural” is defined in the county code as outside city limits or urban growth
2 boundaries. CCZLDO 2.1.200. Accordingly, the policy does not apply here for those
3 reasons as well. Intervenors also argue that even if the policy did apply, it is complied with
4 because the subject property falls within the Bandon Rural Fire Protection District. We
5 agree with intervenors on all three counts.

6 **B. Coordination**

7 Petitioner also argues that the county failed to adequately consider comments
8 submitted by the state fire marshal. The state fire marshal expressed concern with whether
9 there was sufficient water available to handle fire risks associated with the proposed density
10 of residential development. As discussed in more detail above under our discussion of
11 petitioner’s first assignment of error, the county correctly determined that it was not required
12 to address the adequacy of water for fire protection in the context of the limited suitability
13 determination. Accordingly, it did not violate any duty it had to coordinate by failing to
14 address such issues raised by the state fire marshal, issues that it determined were not
15 relevant to the limited suitability determination. *Turner Community Association, 37 Or*
16 *LUBA at 353-54* (a local government is only required to respond to “legitimate concerns”
17 that are expressed by affected governmental agencies).

18 **C. Minimum Lot Size**

19 Petitioner argues that the configuration of the lots created as a result of the property
20 line adjustments in 2004 created six lots that fail to comply with the minimum lot size
21 standards. In the CD-10 zone, the minimum lot size for properties that do not have both
22 public water and public sewer is one acre. It appears that petitioner’s argument here is
23 related to the density of the development and the inability of the water supply to handle that
24 density of development.

1 First, petitioner’s argument regarding the minimum lot size is premised on the
2 configuration of lots that we reversed in *Borton I*. Further, as intervenors point out, and as
3 the county found, minimum lot size is not relevant in the limited suitability determination.

4 Petitioner’s second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Petitioner asserts that the subject property is located within the urban growth
7 boundary and is therefore “urbanizable land.” She argues that the challenged decision
8 violates CCCP Policy 5.22(2), which requires that conversions of urbanizable land to urban
9 uses require particular findings that were not included in the challenged decision. CCCP
10 Policy 5.22(2) provides:

11 “* * * Discretionary rezone dealing with the conversion of urbanizable land to
12 urban uses shall be supported by findings that the action is consistent with the:
13 1) orderly, economic provision of public facilities and services; 2) availability
14 of sufficient land for the various uses to ensure choices in the market place; 3)
15 encouragement of development within urban areas before conversion of
16 urbanizable areas; and 4) other applicable goals and implementation strategies
17 within this plan.”

18 The county concluded that Policy 5.22 “is not relevant to the approval criteria.” Intervenor
19 agree with the county and argue:

20 “Plan Policy 5.22(2) is by its terms limited to actions involving rezones, and
21 is not an approval criteria for granting an administrative conditional use in the
22 Beaches and Dunes Limited Suitability area.” Intervenor-Respondents’ Brief
23 25.

24 We agree.

25 Petitioner also argues that the county erred in failing to require compliance with
26 development standards set forth in CCZLDO 3.3.500(1), which provides:

27 “Within Urban Growth Boundary: No lot area, yard, offstreet parking and
28 loading area or other open space which is required by this Ordinance for one
29 use shall be used as the required lot area, yard or other open space for another
30 use, such as utility easements, access easements, road and street right-of-ways
31 or septic drainfields.”

1 Intervenor's argue, and we agree, that petitioner fails to demonstrate how this provision
2 relates to the applicable approval criteria; *i.e.*, Policy 5.10(2).

3 Petitioner also cites to CCZLDO 7.1.550 and Tables 7.1 and 7.3. In response to
4 petitioner's arguments below, the county found:

5 "Section 7.1.550 addresses access management provisions [where land
6 divisions occur]. The subject property is zoned Controlled Development 10
7 (CD-10) and the subject review criteria are found at Policy 5.10(2). Section *
8 * * 7.1 (is) not relevant to the applicable criteria. * * *

9 "We find that Table 7.3 addresses road standards. The subject review criteria
10 are found at Policy 5.10(2). Table 7.3 is not relevant to the applicable
11 criteria." Record Volume II 7-9.²⁴

12 Once again, the provisions petitioner cites will be relevant in some future review, but are not
13 relevant to the challenged limited development suitability determination.

14 Petitioner's third assignment of error is denied.

15 The county's decision is affirmed.

16

²⁴ Table 7.3 provides the minimum road and street development standards applicable within the UGB. The standards in that table apply only to new roads created in conjunction with a partition, subdivision or planned unit development. CCZLDO 7.3.100.

DIAGRAM

